



# The Right Honourable Lord Phillips of Worth Matravers

## Right to Privacy: The Impact of the Human Rights Act 1998



**Nicolas Addison Phillips**  
(b. 21 January 1938)

**N**icolas Addison Phillips was educated at King's College, Cambridge and called to the Bar in 1962, where he specialised in admiralty and commercial work. He became a Queen's Counsel in 1978 and a Recorder four years later.

In 1987 he was appointed as a Judge of the High Court, Queen's Bench Division, and presided over several lengthy and complex trials including the Barlow Clowes and Maxwell prosecutions. In his handling of such complex cases, he has won praises from lawyers for his fairness, attention to detail and patience. In 1995, before the Maxwell trial came to an end, he was promoted as a Lord Justice of Appeal of the Court of Appeal.

Lord Phillips is well-known for his role in presiding over the inquiry into the causes of the BSE crisis from 1998–2000. He was also one of the seven Law Lords, after his appointment to the House of



Lords in 1999, who heard the appeal in the extradition proceedings of the former Chilean dictator, Augusto Pinochet.

In 2000, Lord Phillips was elevated to Master of the Rolls, the second most senior judicial office in England and Wales after the Lord Chief Justice. He is also the Head of Civil Justice and is responsible for taking forward reforms to make litigation cheaper, speedier and simpler.

Lord Phillips is a popular judge among lawyers, and is known as a moderniser and information technology buff who pioneered the use of computer technology in the courtroom.

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## Right to Privacy: The Impact of the Human Rights Act 1998

Lord Phillips of Worth Matravers  
*Master of the Rolls, Court of Appeal*

Your Royal Highnesses, Vice-Chancellor, Minister, your Excellencies, fellow judges, distinguished guests, ladies and gentlemen. There are a number of possible milestones of distinction for one who is pursuing a career as a member of the English Bench. Foremost among these is to be invited to deliver the Sultan Azlan Shah lecture. As I stand here I am humbled at the thought of the eminence of those who have preceded me, including, in 1991, my brother-in-law, Lord Mustill.<sup>1</sup> It is, indeed, a great honour to be invited to give this lecture.

Your Royal Highness, compared to your illustrious judicial career, I am conscious that mine is still almost in its infancy. I was last in Malaysia, appearing as counsel, in 1980, when Your Royal Highness was Chief Justice of Malaya. Kuala Lumpur has changed a little since that time, but what has not changed is the delight that I and my wife have in being back here.

When I chose the subject of this lecture I had no idea quite how topical it would prove to be. Over the last month the British Royal Family have been subjected to quite extraordinary and distasteful intrusions into their private lives. Intensely personal letters written by the Duke of Edinburgh to Lady Diana have been published in the press. Scurrilous

*Text of the Seventeenth Sultan Azlan Shah Law Lecture delivered on 16 December 2003 in the presence of His Royal Highness Sultan Azlan Shah.*

<sup>1</sup> See chapter 6, *Negligence in the World of Finance*, above.

and absurd allegations against the Prince of Wales from a totally unreliable source have been published in the foreign press, though not in the United Kingdom. A journalist has gained access in the guise of a footman to Buckingham Palace and Windsor Castle and published in the *Daily Mirror*,<sup>2</sup> with photographs, details of the Royal Family's private apartments and innocuous but personal details about their private lives, such as the programmes that the Queen likes to watch on television.

These incidents have been typical of the intrusive disregard for privacy that is shown by much of the media today. This is by no means a new phenomenon, but I believe that it has become more intense.

Let me take you back over 150 years to the early part of the reign of Queen Victoria. She and her beloved Prince Albert had taken up sketching. Prince Albert decided that it would be nice to have some etchings made of these sketches and so he entrusted them to an etcher. The etcher, a gentleman named Strange duly made the etchings, but then decided that, for his own profit, he would publish a catalogue of these. When Prince Albert learned of this project, he commenced legal proceedings, claiming an injunction restraining the etcher from the proposed undertaking. That he was successful is, perhaps, no occasion for surprise. What is, perhaps, a little startling to the modern judge, schooled in showing impartiality to all litigants, be they prince or pauper, is the language used by the Vice-Chancellor, Sir Knight Bruce, when delivering his judgment:<sup>3</sup>

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<sup>2</sup> 20 November 2003.

<sup>3</sup> *Prince Albert v Strange* (1849) 1 Mac & G 25; (1849) 64 ER 293; (1849) 18 LJ Ch 120.

I think, therefore, not only that the defendant here is unlawfully invading the plaintiff's rights, but also that the invasion is of such a kind and affects such property as to entitle the plaintiff to the preventive remedy of an injunction; and if not the more, yet, certainly, not the less,

because it is an intrusion—an unbecoming and unseemly intrusion—an intrusion not alone in breach of convention rules, but offensive to that inbred sense of propriety natural to every man—if intrusion, indeed, fitly describes a sordid spying into the privacy of domestic life—into the home (a word hitherto sacred among us), the home of a family whose life and conduct form an acknowledged title, though not their only unquestionable title, to the most marked respect in this country.

The interest of this case lies not so much in its facts as in the basis on which the court granted Prince Albert the remedy of an injunction. It is possible to analyse the judgment as founded on the conventional causes of action of breach of confidence and breach of trust, but the Vice-Chancellor also used the language of breach of privacy. The etcher had the temerity to appeal and he was, not surprisingly, unsuccessful. On the appeal,<sup>4</sup> however, the Lord Chancellor, Lord Cottenham, remarked “privacy is the right invaded”.

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What I propose to do this evening is to explore the extent to which the law of different countries, and particularly the common law countries, recognises a right to privacy. Not only does this have topicality in England. Two months ago there was an important international conference here in Kuala Lumpur to discuss Privacy, Data Protection & Corporate Governance in the Internet Economy and, as we shall see, the potential for electronic storage and dissemination of information has acted as a spur both in Malaysia and elsewhere to the protection of private information. For the moment, however, I intend to remain in the 19th century and to take you to the United States, where we find the foundation of much current thought on the law of privacy.

## United States

In 1877 there graduated, first in his year, from the Harvard Law School a young man who was to become one of America's great jurists—Louis Brandeis. Second was his great friend, Samuel Warren. He also prospered as a lawyer and married one of Boston's social elite. In due course, he retired from the law to take over the family paper business, and shortly after that he gave his daughter away at a magnificent society wedding. The press were not invited, but contrived to obtain personal details of the event which they lost no time in publishing, for the delectation of their readers.

This unpleasant experience caused Mr Warren to join with his old classmate Mr Brandeis, who had no doubt been one of the wedding guests, to write an article in the *Harvard Law Review*.<sup>5</sup> Their article began with the following protest:

The press is overstepping in every direction the obvious bounds of propriety and decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers.

Later they wrote:

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" ... since the latest advances in photographic art have rendered it possible to take pictures surreptitiously, the doctrines of contract and of trust are inadequate to support the required protection, and the law of tort must be resorted to.

Warren and Brandeis recommended that the judges should take it upon themselves to develop the common law so as to provide the

<sup>5</sup> "The Right to Privacy", (1890) 4 Harvard Law Review 193.

necessary protection against the intrusion of the camera. They had no compunction in making this suggestion. They remarked:

That part of the law of every country which was made by judges has been far better made than that part which consists of statutes enacted by the legislature.

Your Highness, I suspect that you and I might both share that sentiment.

Warren and Brandeis went on to advance some propositions, which are echoed in the jurisprudence down to this day. They

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observed that the right of privacy cannot prohibit publication of a matter which is of public or general interest. Those who seek or achieve eminence must accept that, within their limits, their doings are of legitimate public interest but, having said that, there are “some things that

all men alike are entitled to keep from popular curiosity, whether in public life or not”.

The views of Warren and Brandeis proved influential in the development of a common law right of privacy in the United States. At first, however, the States were not united. Some upheld a right of privacy; others would not accept any inroad into the freedom of the press. By 1960, however, writing in the *California Law Review*<sup>6</sup> Dean Prosser identified that there had become established no less than four different varieties of the tort of invasion of privacy. The variety with which I am concerned this evening he described as “public disclosure of private facts about the plaintiff”. In the *Second Restatement* published in 1977 this variety of invasion of privacy was described as committed by:

<sup>6</sup> “Privacy”, (1960) Calf LR 338.

*Editor's note:* See also Ellen Alderman and Caroline Kennedy, *The Right to Privacy*, 1997.

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy if the matter publicized is of a kind that—

- (a) would be highly offensive to a reasonable person; and
- (b) is not of legitimate concern to the public.

You will note the preservation of the right, recognised by Warren and Brandeis, to publish matters of legitimate public interest. Wherever the right of privacy is raised it tends to run head-on into the right of freedom of speech, and it is fair to say that in the United States that right tends to take pride of place. Privacy often founders on the rock of the First Amendment and the rule against prior restraint.

Whether it will do so in the case of those who recently took covert photographs of Michael Jackson in his private jet remains to be seen.

Warren and Brandeis thought that the English courts had led the way in *Prince Albert v Strange*<sup>7</sup> in introducing a common law tort of invasion of privacy. If so, as I shall show, we proceeded to lose our way.

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### **European Convention on Human Rights**

But before looking at the common law jurisdictions I would like to touch briefly on how two of England's civil law neighbours have approached protection of privacy and, in that context, to refer to the European Convention on Human Rights, which is now influencing the development of English law.

The Convention, agreed in 1951, but only incorporated into English law by the Human Rights Act 1998, has two relevant provisions. Article 8 provides that:

<sup>7</sup> See note 3, above.



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

Article 8 goes on to provide that a public authority shall not interfere with this right, except for certain specified purposes, which include “the protection of the rights and freedoms of others”. Those rights and freedoms include those conferred by Article 10, which provides, “Everyone has the right to freedom of expression”, which includes the freedom to “receive and impart information”. But this right also is qualified by the right to impose restrictions on freedom of expression where necessary “for the protection of the reputation or rights of others or for the prevention of the disclosure of information received in confidence”. So the Convention requires a Member State to strike a balance between freedom of expression and the right to privacy.

### Germany

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right to the free development of his personality”. The jurisprudence seems largely to have developed in the context of journalistic interest, one might almost say obsession, with the activities of Princess Caroline of Monaco. The

German Constitution also protects freedom of expression and the courts have drawn a distinction between photographs taken of her in public, which have been permitted, and photographs taken on a private occasion, secretly or by stealth, which have entitled her to an injunction and damages.

Last month the European Court of Human Rights at Strasbourg heard argument by Princess Caroline that she should also be protected from intrusive activity when she is carrying out private activities, such as playing tennis or swimming, in a public place.<sup>8</sup> As I understand it, she would probably have received such protection in France.

### France

In France the balance leans quite heavily in favour of the right to privacy, at least where the taking and publishing of photographs is concerned. Article 9 of the Code Civil protects “intimate private life” and French law has long paid particular respect to *le droit de l’image*—the right to one’s own image. The press cannot take and publish photographs taken on a private occasion. This extends, it seems, to protect the image of one’s property. I understand that the owner of an attractive chateau was recently awarded damages in respect of the unauthorised use of a photograph of his home to advertise mineral water.

Lord Bernstein of Leigh must have wished that English law was as protective. In 1975 he was incensed to be offered for sale a photograph of his own farm at Leigh, taken from an aircraft which had flown low over his farm. He brought an action<sup>9</sup> against the photographers in the course of which his counsel conceded that English law imposed no restriction on photographing the property of another. Lord Bernstein sued for trespass into his airspace, but lost because Griffiths J held that the right of a landowner to airspace extends no higher than is necessary to enable him to carry out normal activities on his land.

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<sup>8</sup> AFP Report, 6 November 2003.

<sup>9</sup> *Bernstein v Skyviews Ltd* [1978] 1 QB 479.

I am now going to leave civil law and turn to the countries of the Commonwealth that share the common law tradition, starting with Canada.

### Canada

The law of Canada has been influenced by French law, and this seems particularly true of the Canadian law of privacy. Canada has its own Charter of Human Rights and Freedoms, known as the Quebec Charter. Article 5 confers a right to respect for family life, which has to be balanced against the right of freedom of expression conferred by Article 3. The two came into conflict when an arts magazine published a charming photo of a 17-year-old girl sitting in the sun on the steps of a public building. The magazine did not ask her permission either to take the photograph or to publish it, and she sued them for breach of her right to privacy.<sup>10</sup>

The Supreme Court found in her favour, holding that there had been a “violation of her privacy and her right to her image”. The right of the magazine to freedom of expression did not prevail in circumstances where the magazine could so easily have asked the young lady whether or not she agreed to having her photograph taken and published. Canada’s right to privacy is embodied in its Charter. In other Commonwealth countries the judges have been left to fashion protection of privacy by extending the common law.

### Australia

At the end of 2001, the High Court of Australia gave judgments in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*,<sup>11</sup> which ran to 242 pages and contained 638 citations. This was an appeal against the grant of an interlocutory injunction by the Supreme Court of Tasmania. Lenah Game Meats was, as its name suggests, a company which killed, processed and sold game, including the Tasmanian brush-tail possum. Trespassers installed hidden cameras in its abattoir and filmed the way in which the possums were

<sup>10</sup> *Aubrey v Les Editions Vice Versa Inc* [1998] 1 SCR 591.

<sup>11</sup> (2001) 208 CLR 199.

slaughtered. The film was passed to the defendants, who were not party to the manner in which it had been obtained and who proposed to broadcast it. Lenah Meats did not view this with enthusiasm. It was not suggested that there was anything unlawful about their operation, but as Gleeson CJ remarked:<sup>12</sup>

... 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 material issue with which the Supreme Court had to grapple was whether Lenah Meats had an arguable claim in tort for breach of privacy.

The High Court held that they had not but—and here lies the interest of the case—only because Lenah Meats was a corporation and not an individual. All members of the court were favourably disposed to the development in Australia of a tort of invasion of privacy to protect individuals. Gleeson CJ expressed the view that:

*It looks as though Australia may be set to follow the American jurisprudence in developing a tort of invasion of privacy.*

... the law should be more astute than in the past to identify and protect interests of a kind which fall within the concept of privacy.<sup>13</sup>

He suggested that:

The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.<sup>14</sup>

You will note that this test is borrowed from the American tort to which I referred earlier and thus it looks as though Australia may be set to follow the American jurisprudence in developing a tort of invasion of privacy. How about New Zealand?

<sup>12</sup> Ibid at 221.

<sup>13</sup> Ibid at 225.

<sup>14</sup> Ibid at 226.

## New Zealand

In 1993, New Zealand passed the Privacy Act. This is essentially concerned with data protection. The common law has not, however, stood still. In a remarkable case tried by the High Court in 1992, Gallen J declared himself satisfied that a tort of invasion of privacy had become established in New Zealand. The case was *Bradley v Wingut Films Ltd.*<sup>15</sup>

The defendants had made a film of a type known as a “splatter film” because so much blood and gore is splattered about in the course of it. One scene was shot in a graveyard. Standing proudly in that graveyard, and clearly visible in the film, was a marble tombstone above a grave in which a number of the plaintiff’s close relatives were buried and in which, in the fullness of time, he expected to be buried himself. He was very upset and sought an injunction against the showing of the film relying, inter alia, on invasion of privacy. Gallen J, on reviewing the authorities, identified three strong statements in the High Court in favour of the existence of such a tort and acceptance in the Court of Appeal that the concept was at least arguable. He held that the three elements of the tort were:

- (i) that there must be a public disclosure;
- (ii) that disclosure should be of private facts; and
- (iii) that the matter disclosed should be highly offensive and objectionable to a reasonable person of ordinary sensibilities—here again the court was plainly adopting the American jurisprudence.

The judge held that, on the facts, only the first element was made out. As to the second, he remarked that there could scarcely be anything less private than a tombstone in a public cemetery. As to the third he found that it was not the depiction of the tombstone that the plaintiff found offensive, but the activities going on in the vicinity of the tombstone which were too indelicate to describe in a public lecture.

<sup>15</sup>  
[1993] 1 NZLR 415.

More recently in *H v D*<sup>16</sup> Nicholson J granted an injunction restraining publication of information which he held would be a breach of privacy. The information was that the plaintiff had received treatment at a psychiatric hospital. The judge followed Gallen J in identifying the three factors that had to be established, but held that these had to be balanced against any legitimate public interest in having the information disclosed.

So we now have both Australia and New Zealand moving in the direction of a common law tort of privacy.

### Hong Kong

Hong Kong has yet to develop a law to protect the privacy of individuals, although there have been moves in this direction.

In 1996 the Chinese Weekly magazine called *Oriental Sunday* published a photograph of a pop star called Faye Wong. Unlike most pop stars she shunned publicity and this photograph was taken surreptitiously without consent while she was in the baggage claim area in the airport at Beijing. The photograph was said to confirm the rumour that she was pregnant. A Chinese daily newspaper, *Apple Daily*, reproduced this photograph. *Oriental Sunday* sued *Apple Daily* in Hong Kong for breach of copyright and recovered judgment.

In dealing with the issue of damages in the Court of Appeal<sup>17</sup> Godfrey JA commented on the irony that *Oriental Sunday* was recovering damages for reproducing the photograph of Miss Faye without permission, whereas she had no remedy against the *Oriental Sunday* for doing precisely the same. He commented:<sup>18</sup>

Public sentiment has turned, or seems to be turning, against those who are guilty of invasion of the privacy of public figures by taking their photographs on private occasions without their consent and then selling those photographs for large sums which reflect the cupidity of the publishers and the prurience of their readers. The time may come when,

<sup>16</sup> [2000] 2 NZLR 591.

*Editor's note:* See also the reserved judgment of Randerson J in the New Zealand High Court decision in *Hosking v Runting & Ors*, 30 May 2003.

<sup>17</sup> *Oriental Press Group Ltd & Anor v Apple Daily Ltd* [1997] 2 HKC 515 at 529-530.

<sup>18</sup> *Ibid.*

if the legislature does not step in first, the court may have to intervene in this field.

In 1999 the Law Reform Commission of Hong Kong published two consultation papers. One recommended the establishment of an independent Press Council to protect the privacy of the individual. The other recommended the creation of a statutory tort of invasion of privacy. So far as I am aware no steps have been taken in either direction.

What Hong Kong has done is to enact the Personal Data (Privacy) Ordinance of 1996. This regulates the collection, retention and use of personal data and establishes a Privacy Commissioner, whose powers include the imposition of penalties for breaches of the Ordinance. One of the requirements of the Ordinance is that

data should only be collected in a manner that is both lawful and fair. For a while it seemed that this Ordinance might extend to protecting the individual from intrusive photography.

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In 1997 *Eastweek Magazine*, a glossy with wide circulation in Hong Kong, published a fashion article, illustrated by photographs taken of passers-by in the street. One young lady, photographed without her knowledge or consent

with a telephoto lens, was singled out as demonstrating the use of inappropriate accessories, including the comment that her biggest failure was her handbag—had she perhaps taken her mother's by accident? She complained to the Privacy Commissioner, who upheld her complaint on the basis that taking her photograph in such circumstances amounted to collecting data in a manner that was unfair. The magazine challenged this finding by judicial review—unsuccessfully at first instance, but successfully before the Court of Appeal.<sup>19</sup>

<sup>19</sup> *Eastweek Publisher Ltd v Privacy Commissioner for Personal Data* [2000] 175 HKCU 1.

The court held that the Ordinance only applied to the collection of data relating to an identified person and could not apply to taking a photograph of an anonymous passer-by. This was not much comfort to the unfortunate lady in question, whose friends had had no difficulty in identifying her from her photograph and who was so embarrassed by their teasing that she had had to consign the clothes and accessories that she was wearing to the dustbin, although they were brand new. As Ribeiro JA remarked:<sup>20</sup>

She obviously deserves the court's sympathy. Minding her own business and exercising her right as a citizen, without in any way inviting media or public attention, she unwittingly found herself, or more accurately her choice of attire, the object of sarcasm and derision in a widely-circulated magazine.

It seems to me that a strong case can be made out for legal protection against such intrusion upon someone's private life. It is not yet, it seems, to be found in Hong Kong.

### Singapore

My researches into the position in Singapore led me to an article by Ravi Chandran in the *Singapore Journal of Legal Studies* for July 2000. This ended with the conclusion that although there was no right of privacy in Singapore privacy could be indirectly enforced, at least in the employment context, by an action for breach of confidence. I found one example of this in the Singapore High Court.<sup>21</sup>

The issues arose as so often at the interlocutory stage and is a classic example of the proposition that “hell hath no fury like a woman scorned”. The fury in question was the defendant. She had been the secretary of the plaintiff, who was married, and they had had an affair, which had come to an end. She was replaced in his affections by another lady, whom the plaintiff took off on holiday to Phuket and showered with expensive gifts. The defendant wrote to

<sup>20</sup>  
Ibid at 25.

<sup>21</sup>  
*X Pte Ltd & Anor v CDE*  
[1992] 2 SLR 996.



the plaintiff enclosing a draft of a letter which she proposed to send to thousands of people, including his family, his superiors, all the staff of the company, business contacts, clubs and his embassy. The letter was written in intemperate and virulent language.

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The judge, Judith Prakash JC, held that the plaintiff had an arguable case for restraining publication about his relationship with his new lady friend, on the ground that this was confidential information which the defendant had obtained by underhand means, such as looking through his personal papers, so that publication would be a breach of confidence. The same was not true in respect of the prior relationship between the plaintiff and the defendant. No relationship of confidentiality existed between sexual partners who were unmarried.

In support of this proposition the judge relied upon the fact that the Duke of Wellington, when threatened with publication of the fact of his relationship with the celebrated courtesan, Harriet Wilson, said “publish and be damned” rather than attempting the vain task of obtaining an injunction.<sup>22</sup>

I question whether this is the best authority for the proposition that there is no relationship of confidentiality between unmarried partners.

It appears, however, that breach of confidence is the principal basis upon which the court may protect privacy in Singapore.

## Malaysia

As I understand it, this is also the position in Malaysia. I am aware of the intention of the Government next year to introduce legislation with the aim of protecting personal data, but I suspect that this will

<sup>22</sup>  
Ibid at 1010.

have similar ambit to the data protection legislation that has been introduced in other jurisdictions, including the United Kingdom, in which case it is likely to have only limited impact on the protection of personal privacy.

### England

It is time to return to my own jurisdiction and to see how we have been addressing the task of protecting personal privacy.

The approach of Parliament has been to leave the task to regulatory bodies and to the courts. Thus the Broadcasting Act 1996 established the Broadcasting Standards Commission and gave a right to complain to the Commission for “unwarranted infringement of privacy in, or in connection with, the obtaining of information” by the BBC. An issue arose as to whether this protection extended to secret filming of the business activities of Dixons, a chain of stores which sell hi-fi equipment. Interestingly, in contrast to the approach of the High Court of Australia in *Lenah Game Meats*,<sup>23</sup> the Court of Appeal held that a company could complain of infringement of privacy under the terms of the statute.<sup>24</sup> Both the Broadcasting Standards Committee and the Press Complaints Committee, the other important body in this context, have published codes of conduct. The code of the latter has not proved an adequate restraint on the worst excesses of the press. Nor has the common law proved adequate to fill the gap.

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<sup>23</sup> (2001) 208 CLR 199.

<sup>24</sup> *R v Broadcasting Standards Commission, ex parte British Broadcasting Corporation* [2001] QB 885; [2000] 3 All ER 989, CA.

<sup>25</sup> (No 2) [1979] 2 All ER 620, Ch D.

In 1978, in *Malone v Metropolitan Police Commissioner*<sup>25</sup> the plaintiff sought to rely upon Article 8 of the Human Rights Convention in seeking an injunction restraining the police from tapping his telephone. We had not then incorporated the Convention into our domestic law, but he argued that the State’s duties under the

Convention ought to guide the development of our common law. Sir Robert Megarry VC dismissed this claim. He said:<sup>26</sup>

It seems to me that, where Parliament has abstained from legislating on a point that is plainly suitable for legislation, it is indeed difficult for the court to lay down new rules of common law or equity that will carry out the Crown's treaty obligations, or to discover for the first time that such rules have always existed.

The nadir of the seeming impotence of our common law was reached in 1990 in the case of *Kaye v Robertson*.<sup>27</sup> Mr Gordon Kaye, a popular television star, was lying in Charing Cross Hospital in a private room recovering from serious brain injuries sustained in a road accident. A photographer from the *Sunday Sport* gained unauthorised access to his room and took a series of flashlight photographs, including photographs of the scarring of his head. He made no objection, for he was in no condition to do so.

Potter J granted an interlocutory injunction against publishing these photos, but the Court of Appeal reluctantly discharged it, holding that there was no arguable cause of action. Bingham LJ remarked:<sup>28</sup>

If ever a person has a right to be let alone by strangers with no public interest to pursue, it must surely be when he lies in hospital recovering from brain surgery and in no more than partial command of his faculties. It is this invasion of his privacy which underlies the plaintiff's complaint. Yet it alone, however gross, does not entitle him to relief in English law.

The common law is, however, too robust to ignore injustice as extreme as that experienced by the unhappy Mr Kaye. A straw in the wind was this statement by Laws J in *Hellewell v Chief Constable of Derbyshire*:<sup>29</sup>

If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his

<sup>26</sup>  
Ibid at 648.

<sup>27</sup>  
[1991] FSR 62.

<sup>28</sup>  
Ibid at 70.

<sup>29</sup>  
[1995] 1 WLR 804 at 807.

subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found or stolen a diary in which the act was recounted and proceeded to publish it. In such a case, the law would protect what might reasonably be called *a right of privacy*, although the name accorded to the cause of action would be breach of confidence.

This suggestion that the law of confidentiality could be used to protect against intrusive photography was imaginative. It certainly does not seem to have occurred to anyone in the case of *Kaye*. The established authorities had held a duty of confidence to arise where one person conveyed information to another in confidence. “Confidential” did not naturally describe an unauthorised photograph. None the less, as we shall see, Laws LJ’s observation has proved prophetic.

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During the course of the debates on the Human Rights Bill the Lord Chancellor Lord Irvine suggested:<sup>30</sup>

... the judges are pen-poised, regardless of incorporation of the Convention, to develop a right to privacy to be protected by the common law. This is not me saying so; they have said so. It must be emphasised that the judges are free to develop the common law in their own independent judicial sphere. What I say positively is that it will be a better law if the judges develop it after incorporation because they will have regard to Articles 8 and 10, giving Article 10 its due high value ... The experience of continental countries shows that their cautious development of privacy law has been based on domestic law, case by case, although they have also had regard to the Convention.

30  
HL Debates, Volume  
583, column 784 (24  
November 1997).

The Human Rights Act came into force in October 2000. It imposes on public authorities, which include the courts, the duty to respect Convention rights.

In 1998 the Commission at Strasbourg considered an application against the UK Government by Earl and Countess

*Here were indications that the Government was leaving it to the judges to use the tool of the Human Rights Act to build a law of privacy on the foundations of the law of confidentiality.*

Spencer.<sup>31</sup> This related to a series of articles in the tabloid press the nature of which can be deduced from the headline in the *News of the World*—“Di’s sister-in-law in booze and bulimia clinic”. The articles were illustrated by photographs of Countess Spencer in the grounds of a private clinic, taken with a telephoto lens. The applicants contended that the United Kingdom had infringed their Article 8 rights by failing to prevent such publications.

The Government succeeded in getting the applications ruled inadmissible on the ground that the law of confidence offered the applicants a satisfactory domestic remedy, which they had failed to exhaust. So here were indications that the Government was leaving it to the judges to use the tool of the Human Rights Act to build a law of privacy on the foundations of the law of confidentiality.

There was a problem with that exercise. The Human Rights Convention imposes duties on public authorities, not on private individuals or corporations. How could the courts use it to restrain, for instance, over intrusive journalism?

The answer that some gave was that the courts are themselves public authorities. Their duty to comply with the Convention requires them to make sure that the law that is applied between individuals respects Convention rights. This doctrine gives the Convention what is known as “horizontal effect”, and Professor Wade was one who

<sup>31</sup> *Spencer v UK* (1998) 25 EHRR CD 105.

espoused it. Others, notably Buxton LJ, writing extra judicially in the *Law Quarterly Review*,<sup>32</sup> expressed the view that the Convention gave the courts no power to alter established law.

In the month after the Act came into force, the Court of Appeal had and seized the opportunity to consider some of these matters. I speak, of course, of the interlocutory application for an injunction in the *Hello* case.<sup>33</sup>

The case received wide press coverage—let me just remind you of the facts. Michael Douglas and Catherine Zeta-Jones, a lady who is well known in Kuala Lumpur, had sold the exclusive rights to photograph their wedding to a magazine called *OK. Hello*, a rival publication published photographs of the wedding taken surreptitiously without permission. Douglas and Zeta-Jones brought an action in which they claimed damages for breach of confidence and breach of privacy.

The court refused the injunction on the ground that, if the facts disclosed a cause of action, damages would be an adequate remedy. That conclusion rendered it unnecessary to explore the question of whether the facts did disclose a cause of action, but nonetheless in the week between the hearing and judgment each member of the court produced his own analysis of the law in terms which were to be quoted by common law courts around the world. They were careful, of course, not to express final conclusions on the issues raised.

*The court's duty to comply with the Human Rights Convention requires them to make sure that the law that is applied between individuals respects Convention rights. This doctrine gives the Convention what is known as "horizontal effect".*

<sup>32</sup>  
(2000) 116 LQR 48.

<sup>33</sup>  
*Douglas v Hello Ltd*  
[2001] 2 All ER 289, CA.

Brooke LJ, after adverting to both the possibility and the problems of using the Convention as a basis for extending the law,

remarked<sup>34</sup> that he had the luxury of identifying difficult issues but was not obliged to solve them.

Keene LJ referred to Laws LJ's approach in *Hellewell*<sup>35</sup> and commented:<sup>36</sup>

That approach must now be informed by the jurisprudence of the Convention in respect of Article 8. Whether the resulting liability is described as being for breach of confidence or for breach of a right to privacy may be little more than deciding what label is to be attached to the cause of action, but there would seem to be merit in recognising that the original concept of breach of confidence has in this particular category of cases now developed into something different from the commercial and employment relationships with which confidentiality is mainly concerned.

The most radical approach was, perhaps not surprisingly, that of Sedley LJ. He said:<sup>37</sup>

What a concept of privacy does, however, is accord recognition to the fact that the law has to protect not only those people whose trust has been abused but those who simply find themselves subject to an unwanted intrusion into their personal lives. The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy.

The case proceeded to trial, before Lindsay J, in the early part of this year. I will turn to consider that judgement a little later.

The next piece in the jig-saw is the decision of the President of the Family Court, Dame Elizabeth Butler-Sloss in *Venables and Thompson v News Group Newspapers*.<sup>38</sup> The claimants were the Bulger killers. Released from prison under new identities they sought permanent injunctions against all the world restraining solicitation or

<sup>34</sup>  
Ibid at 313.

<sup>35</sup>  
[1995] 1 WLR 804.

<sup>36</sup>  
[2001] 2 All ER 289 at 330.

<sup>37</sup>  
Ibid at 320.

<sup>38</sup>  
[2001] 1 All ER 908, Fam D.

publication of information that would lead to the disclosure of those identities. They were successful.

Dame Elizabeth held that the Convention did not give rise to free standing causes of action, but required the court to act consistently with the Convention, when applying existing causes of action. On this basis, the tort of breach of confidence extended to entitling the claimants to the relief that they sought. If their identities were disclosed their lives would be at risk, so their right to privacy was much more important than the right of the press to freedom of expression.

The President subsequently granted similar relief to protect the identity of another child murderer—Mary Bell—and her daughter.<sup>39</sup>

These two decisions were daring in that they broke new ground in two respects. They identified a private law right under the law of confidence that was available against all the world. And the relief, in private law proceedings, of an injunction expressly directed against all the world was also without precedent. It had been invented by a Family Court judge, Balcombe J, to protect a ward of court—in fact none other than Mary Bell, when a child. But he emphasised that, had he not been exercising the wardship jurisdiction of the court, he would not have had jurisdiction to make the order.

*The Convention did not give rise to free standing causes of action, but required the court to act consistently with the Convention, when applying existing causes of action.*

On 17 December the year before last, a well-known presenter of “Top of the Pops”, a single man, had the misfortune to visit a brothel. I say “misfortune” not having regard to the activities that he there indulged in with the assistance of one and in the presence of a number of prostitutes, but because one of the prostitutes took photographs of the activities in question and the photographs and the story were sold to *The Sunday People*. The paper contacted him to seek his

<sup>39</sup>  
X (a woman formerly known as Mary Bell) v O’Brien [2003] EWHC 1101 (QB), 21 May 2003.



comments and he applied for an interlocutory injunction restraining publication.<sup>40</sup>

Ouseley J approached the task of applying section 12 of the Human Rights Act with some finesse. He held that there was no relationship of confidence between the claimant and the prostitutes. He further held that as the claimant was someone whom young people might treat as a role model, it was in the public interest that the fact that he had visited a brothel should be made public. Thus, even if the fact of his visit had been private for the purposes of Article 8, this would not prevail over the defendants' right of freedom of expression under Article 10. The fact of the visit could be published.

As to the details of what went on in the brothel, he held that there was no public interest in the publication of those. Nonetheless the claimant was unlikely to establish at trial that any right of privacy that he enjoyed should take precedence over the Article 10 right of the prostitute herself and the *Sunday People* to publish this information. There should be no injunction as to these details.

The photographs fell into a different category. The claimant had not agreed to being photographed. There was no public interest in the publication of the photographs.

The courts had consistently recognised that photography could be particularly intrusive. To restrain publication involved no particular extension of the law of confidentiality. An interlocutory injunction against publishing the photos was granted.

Two days before Ouseley J handed down his judgement, the Court of Appeal reserved judgement in an appeal which raised some similar issues.

In *A v B*<sup>41</sup> a professional footballer had obtained an interlocutory injunction restraining both a newspaper and a young

40  
*Theakson v MGM Ltd*  
[2002] EWHC 137.

41  
[2003] QB 195; [2002] 3  
WLR 542; [2002] 2 All  
ER 545, CA.

lady from publishing details of the footballer's sexual relations with the latter. The Court of Appeal set aside the injunction on the basis that it was most unlikely that a permanent injunction would be granted at trial. Giving the judgment of the court, Lord Woolf CJ said this:<sup>42</sup>

The applications for interim injunctions have now to be considered in the context of Articles 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ...

These articles have provided new parameters within which the court will decide, in an action for breach of confidence, whether a person is entitled to have his privacy protected by the court or whether the restriction of freedom of expression which such protection involves cannot be justified.

*Whether or not the publication is in the public interest, any interference with publication must be justified.*

The court's approach to the issues which the applications raise has been modified because, under section 6 of the 1998 Act, the court, as a public authority is required not to act "in a way which is incompatible with a Convention right". The court is able to achieve this by absorbing the rights which Articles 8 and 10 protect into the long-established action for breach of confidence. This involves giving a new strength and breadth to the action so that it accommodates the requirements of those articles.

Lord Woolf then went on to lay down 15 guidelines which, alas optimistically, he suggested would spare the courts from being deluged with authorities on this topic in the future. Of particular interest are the following propositions:

1. Whether or not the publication is in the public interest, any interference with publication must be justified.
2. A duty of confidence will arise whenever the party subject to the duty is in a situation where he either knows or ought to

<sup>42</sup>  
Ibid at para [4].

know that the other person can reasonably expect his privacy to be respected.

3. Where an individual is a public figure he is entitled to have his privacy respected in appropriate circumstances. He said:<sup>43</sup>

A public figure is entitled to a private life. The individual, however, should recognise that because of his public position he must expect and accept that his actions will be more closely scrutinised by the media. Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media. Conduct which in the case of a private individual would not be the appropriate subject of comment can be the proper subject of comment in the case of a public figure.

The public figure may hold a position where higher standards of conduct can be rightly expected by the public. The public figure may be a role model whose conduct could well be emulated by others. He may set the fashion. The higher the profile of the individual concerned the more likely that this will be the position. Whether you have courted publicity or not you may be a legitimate subject of public attention. If you have courted public attention then you have less grounds to object to the intrusion which follows.

In any of these situations it would be overstating the position to say that there is a public interest in the information being published. It would be more accurate to say that the public have an understandable and so a legitimate interest in being told the information. If this is the situation then it can be appropriately taken into account by a court when deciding on which side of the line a case falls.

In *Campbell v Mirror Group Newspapers Ltd*,<sup>44</sup> the only case to which I shall refer in which I have been involved, we suggested that last comment had been misunderstood:<sup>45</sup>

When Lord Woolf CJ spoke of the public having “an understandable and so a legitimate interest in being told” information, even including trivial facts, about a public figure, he was not speaking of private facts which a fair-minded person would consider it offensive to disclose.

<sup>43</sup>  
Ibid at para [11].

<sup>44</sup>  
[2003] QB 633; [2003] 1  
All ER 224, CA.

<sup>45</sup>  
Ibid at para [40].

We added:<sup>46</sup>

For our part we would observe that 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.

In that case Naomi Campbell sued in respect of the publication in the *Mirror* of an article which disclosed that she was a drug addict and that she was receiving therapy with Narcotics Anonymous. The article was illustrated by photographs showing her in a public street in Chelsea, having just left the meeting. They had been taken surreptitiously with the aid of a telephoto lens.

Miss Campbell sued for breach of confidence and expressly renounced any contention that she could rely on a separate tort of invasion of privacy. She also conceded that the *Mirror* had been entitled to publish the fact that she was a drug addict and was receiving treatment. This was because she had publicly stated in the past that she did not touch drugs. She accepted that the press were entitled to correct misleading public statements. What she did not accept was that the press could disclose the nature of the treatment that she was receiving for her addiction, nor publish the photographs taken of her.

*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.*

In these circumstances we did not need to consider whether there was a separate tort of invasion of privacy. Applying principles of the law of breach of confidence, we concluded that, once it had been conceded that it was legitimate to publish the fact that Miss Campbell was receiving treatment for drug addiction, it was legitimate to publish the additional information, that this was with Narcotics Anonymous.

<sup>46</sup>  
Ibid at para [41].

The photographs were taken in a public place and we said they were a legitimate, if not an essential part, of the journalistic package designed to demonstrate that Miss Campbell had been deceiving the public when she said that she did not take drugs. Our judgment has been criticised by some as being over-conservative.

I now come to the judgment of Lindsay J in the *Douglas v Hello* case.<sup>47</sup> There was almost as much media interest in that judgment as there was in the wedding itself. In the event, some commentators may have been disappointed. Lindsay J declined to invoke a new law of privacy but found that the claimants had been successful in proving an action based on a breach of the existing law of confidence.

Much had been made by some section of the press that an event, albeit a wedding, that was to be attended by some 360 people—a number of whom were world famous celebrities—could not be said to be a private affair. The defendants argued that the exclusive contract reached with *OK!* was more about money than an attempt to prevent media intrusion. Having heard the evidence, Lindsay J disagreed. The judge found:<sup>48</sup>

On the evidence I hold that the notion of 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 is a notion that can reasonably be believed in as a potentially workable strategy to achieve such ends and was honestly believed in by Miss Zeta-Jones, Mr Douglas and their advisers.

Noting the steps that had been taken to keep out unwanted intruders and that the security bill alone had been \$66,006, Lindsay J concluded that:<sup>49</sup>

To the extent that privacy consists of the inclusion only of the invited and the exclusion of all others, the wedding was as private as was possible consistent with it being a socially pleasant event.

47  
(*No 3*) [2003] 3 All ER 996, Ch D.

48  
Ibid at para [52].

49  
Ibid at para [66].

Applying the law to the facts of the case, Lindsay J concluded that the photographic representation of the wedding was a valuable trade asset. This asset had the necessary quality of confidence about it. He went on to hold that, even if he were wrong about the commercial confidence, the Douglases would have had an actionable claim for breach of personal confidence.

Whilst the judge was happy to find that detriment had been suffered through a breach of confidence, he was equally clear that he would not be drawn on a free standing law of privacy. He said this:<sup>50</sup>

So broad is the subject of privacy and such are the ramifications of any free-standing law in that area that the subject is better left to Parliament which can, of course, consult interest far more widely than can be taken into account in the course of ordinary inter partes litigation. A judge should therefore be chary of doing that which is better done by Parliament. That Parliament has failed so far to grasp the nettle does not prove that it will not have to be grasped in the future.

All this while there was proceeding through the courts a case involving a different kind of invasion of privacy. Mrs Wainwright and her son Alan went to visit her other son, Patrick, who was detained in Armley Prison, in Leeds. Each was subjected to a highly embarrassing strip search. They brought proceedings which included a common law claim for invasion of privacy. This claim succeeded at first instance, but was rejected by the Court of Appeal.<sup>51</sup>

In a decision delivered this summer, the House of Lords<sup>52</sup> agreed with the Court of Appeal and firmly rejected the attempt to establish a common law tort of invasion of privacy. Lord Hoffmann, who gave the leading speech, considered that the right to privacy was too broad a concept to be treated as a principle of law. He observed that “having to take off your clothes in front of a couple of prison officers is not to everyone’s taste” but held that the distress caused to

*The right to privacy was too broad a concept to be treated as a principle of law.*

<sup>50</sup> Ibid at para [229](iii).

<sup>51</sup> *Home Office v Wainwright* [2001] EWCA Civ 2081.

<sup>52</sup> *Wainwright & Anor v Home Office* [2003] UKHL 53, delivered 16 October 2003.

the claimants did not involve any breach of legal duty. He said that whether the law of breach of confidence could be extended so as to afford a remedy in a case such as *Kaye v Robertson*<sup>53</sup> was a question which would have to await another day.

Your Highness, ladies and gentlemen, when that day comes I very much hope that I shall be presiding in the Court of Appeal. ☞

53

See note 27, above.







Professor JAG Griffith FBA

Judicial Decision Making  
in Public Law

Professor John Griffith was born in 1918 and educated at Tauton School and at the London School of Economics and Political Science (LSE). In 1948 he became a lecturer at LSE. In 1959, he became the Professor of English Law, and in 1970 until his retirement in 1984, he was the Professor of Public Law. He was subsequently appointed as Emeritus Professor of Public Law at LSE. In 1977 he was made a Fellow of the British Academy. He is also a member of the European Group of Public Law.

He is well known for his writing on law, Parliament, politics and government. His classical work (with Michael Ryle), *Griffith and Ryle on Parliament: Functions, Practice and Procedures*, first published in 1989, and now in its second edition (2003), provides a definitive account of the workings of the House of Commons and the House of Lords. The second edition provides an in-depth empirical analysis of the workings of the House of Commons



under the Blair administration, focusing on the many changes which have taken place since 1977, including the new initiatives and procedures aimed at promoting modernisation.

He is the author of a number of leading works, notably, *Principles of Administrative Law* (with H Street); *Central Departments and Local Authorities*; *Government and Law* (with TC Hartley); *Parliamentary Scrutiny of Government Bills, Public Rights and Private Interest and Parliament* (with Michael Ryle); *Government and Law: An Introduction to the Working of the Constitution in Britain*; and *Judicial Politics Since 1920: A Chronicle*. He was the editor of *Public Law* from 1956 to 1981.

Perhaps, he is most well known for his book, *The Politics of the Judiciary*, first published in 1977, and now in its fifth edition (1997). Professor Griffith's controversial thesis is that the judiciary cannot act neutrally but must act politically. When first published, the book was described by *The Guardian* as an "instant classic", and *The Times* as "a stimulating and provocative study".

In 1986, Professor Griffith was appointed the Chancellor of the University of Manchester, a post he held until 1993.

At the time when he delivered the pre-inaugural Sultan Azlan Shah Law Lecture on *Judicial Decision Making in Public Law* in 1985, he was an external examiner at the Faculty of Law, University of Malaya (see also [1985] 1 MLJ *clxv*).



## The Right Honourable Lord Irvine of Lairg

Commerce, Common Law  
and the Commonwealth:  
New Dimensions in Malaysia & UK Law



**Alexander Andrew Mackay Irvine**  
(*b.* 23 June 1940)

**L**ord Irvine of Lairg was invited to become Lord High Chancellor of Great Britain by Prime Minister Tony Blair on 2 May 1997.

He was born Alexander Andrew Mackay Irvine in Inverness in Scotland on 23 June 1940. Lord Irvine, also known as Derry Irvine, was educated at Inverness Academy and at Hutchesons' boys' grammar school in Glasgow before going to Glasgow University (where he joined the Labour Party). He then went on to Christ's College, Cambridge, where he graduated with first class Honours with distinction in law, and LLB with first class Honours. He was a scholar of his college, and won the university prize in jurisprudence. He is an Honorary Fellow of Christ's College and has an honorary LLD from Glasgow University.

He lectured in law at the London School of Economics from 1965–1969 and was called to the Bar



by the Inner Temple in 1967. He became a Queen's Counsel in 1978 and was head of chambers at 11 King's Bench Walk Chambers from 1981. Among his pupil barristers were Tony Blair and Cherie Booth. He served as a recorder from 1985–1988 and was appointed a Deputy High Court Judge in 1987. He ceased practice on becoming Lord Chancellor on 2 May 1997.

After being appointed Lord Chancellor, he held the following offices: President of the Magistrates' Association; Joint President of the Industry and Parliament Trust; Joint President of the British-American Parliamentary Group; Joint President of the Inter-Parliamentary Union; and Joint President of the Commonwealth Parliamentary Association.

He was also a Church Commissioner; an Honorary Fellow of the Society for Advanced Legal Studies; a Trustee of the Hunterian Collection; Chairman of the Glasgow University 2001 Committee; and a Vice-Patron of the World Federation of Mental Health.

In addition to his traditional role as Lord Chancellor of supervising the legal system, he gained responsibility for a wide range of constitutional issues including human rights and freedom of information.

Lord Irvine retired as Lord Chancellor on 12 June 2003. It was then announced by Prime Minister Tony Blair that the post of Lord Chancellor which has been in existence for over 1,300 years would soon be abolished. He was replaced by Lord Falconer, who will serve in the interim until the post is abolished. As a result of these changes, Lord Irvine was forced to re-prioritise his schedule, making him unavailable to deliver his lecture in 2003.