

CELEBRITY NEWSGATHERING AND PRIVACY: THE TRANSFORMATION OF BREACH OF CONFIDENCE IN ENGLISH LAW

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I. INTRODUCTION

Traditional English common law does not recognize invasion of privacy as a separate tort. Although it is accepted that various torts such as trespass, nuisance, defamation, and the equitable duty to maintain confidences might have the incidental effect of providing such redress in particular cases of privacy invasion, the American approach of articulating a general principle of tort law providing direct redress for privacy invasions has had little appeal. In the modern era, the traditional resistance to this particular modification of tort law has been criticized from at least two sources. First, in contemporary society, the list of privacy invasive practices and phenomena that reduce the realm of privacy within which individuals conduct their private lives continues to grow. Any list of modern developments of this kind would nonexclusively include the continuing development of modern surveillance technologies, the internet and other data sharing technologies, modern marketing practices, the increasingly fine-grained intimate personal information produced by medical health technologies, the security measures resulting from 9/11, and the War on Terror. For celebrities, the increasingly aggressive newsgathering activities of the tabloid press and their associates in the paparazzi photo trade constitute what may be an increasing menace. Privacy advocates' refrain for the last several decades to the effect that privacy is now threatened as never before has a continuing ring of truth to it. Those who have been injured by such practices in England, as in America, have frequently turned to the courts for redress. It would be surprising if English courts did not

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feel some pressure to find new means for redressing injuries of this kind.

In England, an additional source of pressure emanates from European sources. The European Convention on Human Rights,¹ to which the United Kingdom is a party, provides as follows in Article 8:

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

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

Although the effect of Article 8 of the Convention in requiring the United Kingdom to protect privacy is a matter of some subtlety and complexity, it is nonetheless widely accepted that with the enactment of the Human Rights Act of 1998,³ to which the Convention is appended, the Convention provisions, including Article 8, impose at least a duty on the courts to apply or interpret existing private law causes of action in a manner consistent with the Convention rights. Thus, for example, in the recent cases re-interpreting the elements of the traditional claim for breach of confidence, English courts have drawn some support from the conceded need to interpret breach of confidence doctrine in a manner consistent with Article 8 of the Convention. Indeed, at least one appellate court judge has suggested that the obligation imposed by the Human Rights Act on every public authority, including the courts, to act consistently with the Convention provides a powerful reason for recognizing the existence of the tort of the invasion of privacy.⁴ As we shall see, however, this is not a view that has prevailed.

In recent years, a series of leading cases have returned to consider these questions. The implications of these decisions for the current shape of English law relating to civil redress for privacy invasion are the subject of this article. Surprisingly, perhaps, English courts have remained steadfast in their refusal to recognize invasion of privacy as a tort and in doing so have quite explicitly declined to rely on American

1. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

2. *Id.*

3. Human Rights Act, 1988, c. 42 (U.K.).

4. *Douglas v. Hello! Ltd.*, [2001] Q.B. 967, 996-998 (Sedley, L.J) [hereinafter DOUGLAS (No. 1)].

experience in this area. Rather, English courts have preferred to resist innovation of this kind and leave the difficult question of privacy law reform to Parliament. On a number of recent occasions, Parliament has reacted by enacting legislation designed to solve the particular problem left unsolved by the courts. At the same time, however, in the last few years, English courts have subjected the traditional doctrine of breach of confidence to a radical transformation and have recognized what is essentially, though not in name, a tort consisting of the unlawful publication of sensitive personal information. The principal application of this doctrine to date has been in the context of aggressive news gathering activities of the tabloid press targeted at the personal lives of celebrities. After providing an account of these developments, this article will briefly consider the adequacy of reformulated breach of confidence doctrine as an instrument of redress in such circumstances.

II. THE MODERN REJECTION OF THE PRIVACY TORT

Modern judicial treatment of the English judicial approach to the privacy tort can be traced to the decision of Megarry V.-C. in *Malone v. Commissioner of Police of the Metropolis*.⁵ The plaintiff was an antique dealer who had been prosecuted for a number of offences of possession of stolen property. At the initial trial, which ended inconclusively, the prosecution indicated that it was relying on certain information obtained by the police from wiretapping the plaintiff's telephone line. Facing a second trial, the plaintiff brought an action seeking to enjoin the further use of the material on a variety of grounds including allegations that the wiretap was "unlawful and constituted an invasion of his right to privacy." Although the police wiretap had been made on the basis of a warrant issued by the Secretary of State, such warrants had no statutory authority, and the plaintiff, accordingly, argued that in the absence of such authority the wiretap was unlawful. The tort claim was advanced on the basis that English law should recognize either a general tort of invasion of privacy or a more particularized right of privacy concerning wiretap surveillance of telephone communications. More particularly, the claimant attempted to draw support from Article 8 of the Convention as a basis for recognizing the existence of the civil redress for invasion of privacy on tortious grounds. On the present facts, the only hope for a successful claim in tort was the recognition of invasion of privacy as a tort. The physical means by which wiretapping was accomplished in

5. *Malone v. Comm'r of Police of the Metropolis*, [1979] Ch. 344.

England at that time was that the police would obtain a warrant from the Secretary of State and forward the warrant to the Post Office from which location a recording was then made of conversations on the telephone line being tapped. The wiretap did not occur on the premises of the plaintiff and thus could not constitute the tort of trespass.

The plaintiff's arguments failed across the board. *Megarry V.-C.* held that the police were entitled to engage in telephone wiretap surveillance, even in the absence of statutory authority, provided that the means by which it was accomplished did not itself contravene the law. As no trespass had occurred, the wiretap was perfectly lawful. With respect to the privacy tort, *Megarry V.-C.* held that English law recognized neither a general privacy tort nor a particular invasion of privacy relating to the interception of telephone communications. Interestingly, *Megarry V.-C.* conceded that the fact that such a right had not yet been recognized did not necessarily preclude recognition of the right. As he observed:

I am not unduly troubled by the absence of English authority: there has to be a first time for everything, and if the principles of English law, and not least analogies from the existing rules, together with the requirements of justice and common sense, pointed firmly to such a right existing, then I think the court should not be deterred from recognizing the right.⁶

Recognition of even a limited right to privacy in the context of telephone communications did not constitute, however, in *Megarry V.-C.*'s view, the mere recognition of a new "right." Recognition of such a tort, in his view, amounted to a creation by judicial "legislation" of a new field of law. He further noted:

On the other hand, it is no function of the courts to legislate in a new field. The extension of the existing laws and principles is one thing, the creation of an altogether new right is another. At times judges must, and do, legislate; but, as Holmes J. once said, they do so only interstitially, and with molecular rather than molar motions[.] . . . Anything beyond that must be left for legislation. No new right in the law, fully-fledged with all the appropriate safeguards can spring from the head of the judge deciding a particular case: only Parliament can create such a right.⁷

The task of designing such a tort and demanding what exceptions to the tort would exist was, in *Megarry V.-C.*'s view, beyond the

6. *Id.* at 372 (citing *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917)).

7. *Id.*

capacity or appropriate bounds of judicial innovation.⁸

Nor was the European Convention of any assistance. The Convention was a treaty and therefore not justiciable in the Courts of England. The Convention did not have the effect of conferring direct rights of civil redress on the plaintiff that could be enforced in an English court. The plaintiff's further suggestion that the Convention might assist in determining the nature of English law on a point of difficulty such as the existence of a privacy tort also foundered on the shoal of judicial incapacity. As the jurisprudence under the Convention indicated, in *Megarry V.C.*'s view, the difficulties created by unregulated wiretap surveillance could be remedied only by a complex legislative response restricting the use of this form of surveillance to suitably limited circumstances and providing some independent means for authorizing its use in those cases. The latter task, in particular, was well beyond the capacity of the courts. Giving effect to the argument that the Convention should inform judicial interpretation of the common law would thus carry a judge "beyond any possible function of the Convention as influencing English law that has ever been suggested; and it would be most undesirable."⁹

In light of later developments, it is also of passing interest that *Megarry V.-C.* rejected the plaintiff's further suggestion that the action for breach of confidence could be extended to cover the present facts. In *Megarry V.-C.*'s view, the duty of confidence rests on the existence of a confidential relationship. Thus, "a person who utters confidential information must accept the risk of any unknown overhearing that is inherent in the circumstances of communication."¹⁰ As illustrations, those who exchange confidences on a bus or train, over a garden wall, or within earshot of an unseen fellow employee assume the risk of some third party acquiring confidential information in such circumstances. *Megarry V.-C.* observed:

I do not see why someone who has overheard some secret in such a way should be exposed to legal proceedings if he uses or divulges what he has heard. No doubt an honourable man would give some warning when he realises that what he is hearing is not intended for his ears; but I have to concern myself with the law, and not with moral standards. There are, of course, many moral precepts which are not legally

8. *See id.*

9. *Id.* at 380.

10. *Id.* at 376.

enforceable.¹¹

The possibility of reformulating the duty of breach of confidence in such a way as to incorporate some aspects of privacy protection is not an idea that appears to have interested *Megarry V.-C.* on this occasion.

The pattern of judicial rejection of the privacy tort followed by Parliamentary intervention to fill the gap in the law made apparent by the particular decision is illustrated in the *Malone* case. Shortly after the decision in *Malone*, Parliament addressed the problem by enacting the Interception of Communications Act in 1985.¹² Similarly, in *R. v. Khan (Sultan)*,¹³ the courts' failure to recognize that a right to privacy had been infringed by deployment of a listening device affixed to a house was followed by the enactment of amendments to the Police Act of 1997 to provide a statutory basis for surveillance of this kind.

A somewhat more aggressive approach was taken by the English Court of Appeal in a case involving telephone harassment. In *Khorasandjian v. Bush*,¹⁴ the plaintiff, a girl of eighteen, sought an injunction against a disappointed suitor, five years her senior, who engaged in various forms of harassment. The harassment consisted, in part, of telephone harassment of the plaintiff and various members of her family. At trial, the defendant was enjoined from "harassing, pestering or communicating with" the plaintiff through the making of unwanted phone calls.¹⁵ The defendant appealed on the ground that the alleged misconduct of "harassing, pestering or communicating" with the plaintiff did not constitute any tort known to the law and, more particularly, represented an attempt to introduce a tort of invasion of privacy. The Court of Appeal held, however, that the defendant's telephone harassment constituted the tort of nuisance in the sense of an actual interference with the ordinary and reasonable use and enjoyment of property, even though the plaintiff was not the legal owner of the property in question. Drawing some support from a Canadian authority granting such relief to an owner of property, the court held that similar protection could be afforded to the non-owner plaintiff in the circumstances of this case.¹⁶ Dillon L.J., for a majority of the court, reasoned as follows:

11. *Id.*

12. Interception of Communications Act, 1985, c. 56 (U.K.).

13. *R v. Khan (Sultan)*, [1997] (H.L.) (appeal taken from Eng.).

14. *Khorasandjian v. Bush*, [1993] Q.B. 727, 731 (C.A.) (appeal taken from Eng.).

15. *Id.*

16. *Id.* at 734 (citing *Motherwell v. Motherwell*, [1976] 1 A.R. 47).

To my mind, it is ridiculous if in this present age the law is that the making of deliberately harassing and pestering telephone calls to a person is only actionable in the civil courts if the recipient of the calls happens to have the freehold or a leasehold proprietary interest in the premises in which he or she has received the calls.¹⁷

Although this decision might be thought to constitute a small but significant step forward in the recognition of privacy interests, the House of Lords held, in a subsequent nuisance decision, that the tort of private nuisance could be maintained only by a plaintiff having an ownership interest in the affected property and that the *Khorasandjian* case, on this ground, was incorrectly decided.¹⁸ Again, Parliament intervened in 1997 with the Protection from Harassment Act.¹⁹

The prospect of recognizing the existence of a tort of invasion of privacy surfaced for consideration by the House of Lords in the recent decision in *Wainwright v. Home Office*, a case involving an unlawful strip-search by prison officials conducted upon relatives of a prisoner.²⁰ Prison officials were suspicious that the prisoner in question was dealing in drugs and were concerned with determining how he might be obtaining his supply. Accordingly, when the plaintiffs, the mother and the brother of the prisoner, paid a visit to the prison, they were subjected to a strip-search to which the plaintiffs had reluctantly agreed. Although the prison officers were considered to have acted in good faith, the searches failed to comply with the applicable administrative rules in various respects and, with respect to the son, the search included an investigation and touching of his private parts. The plaintiffs alleged that they found the experience quite distressing. In the case of the brother, a psychiatrist testified that the brother had suffered post-traumatic stress disorder. As the strip-searches had not been conducted in accord with the applicable rules, they were not protected by statutory authority. Accordingly, it was material to consider whether the conduct of the searches constituted tortious wrongdoing. Although the defendant Crown did not contest that the touching of the defendant constituted a battery, for which damages could be appropriately awarded, the defendant contested the proposition that the conduct of the searches was otherwise tortious. Counsel for the plaintiffs advanced the broader claim on two grounds. First, it was urged that in order to comply with its

17. *Id.*

18. *Hunter v. Canary Wharf Ltd.* [1997] A.C. 655 (H.L.) (appeal taken from Eng.).

19. Protection from Harassment Act, 1997, c. 40 (Eng.).

20. *Wainwright v. Home Office*, [2003] UKHL 53, [2004] 2 A.C. 406 (appeal taken from Eng.) (U.K.).

Convention obligations, the House of Lords should declare that the common law embraces and, in theory at least, always has embraced a tort of invasion of privacy under which the searches of both plaintiffs were tortious. On this basis the plaintiffs were entitled to damages for the mental distress suffered by the mother and, in the son's case, the psychiatric injury caused by the search. Alternatively, the plaintiff proposed that if so bold a step could not be taken, relief could be grounded on a modest extension of the tort of intentional infliction of mental harm.²¹

In rejecting, once again, the proposition that English law should consider the tort of invasion of privacy, the House of Lords specifically alluded to the American experience in this area. In the leading opinion, Lord Hoffmann referred to privacy as "the right to be left alone," defined in the famous article by Warren and Brandeis, and noted the authors' thesis that identifying the common element of privacy invasion would enable the courts to pronounce the existence of a general principle, "which protected a person's appearance, sayings, acts and personal relations from being exposed in public."²² Lord Hoffmann further observed that American courts had been receptive to this suggestion and developed an extensive American jurisprudence of the privacy tort. Lord Hoffmann additionally noted Prosser's four part taxonomy of the privacy tort: (i) intrusion upon the plaintiff's physical solitude or seclusion (including unlawful searches, telephone tapping, long distance photography and telephone harassment); (ii) public disclosure of private facts; (iii) publicity putting the plaintiff in a false light; and (iv) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.²³ One who favored recognition of the privacy tort in English law might have found Prosser's analysis illuminating and helpful in the sense that it demonstrates that the tort, properly viewed, is not so vague and amorphous as to suffer from incurable uncertainty. For Lord Hoffmann, however, American experience was such as to demonstrate the invalidity of the American approach. He reasoned as follows:

The need in the United States to break down the concept of 'invasion of privacy' into a number of loosely-linked torts must cast doubt upon the value of any high-level generalization which can perform a useful

21. *Id.* at 424-26 (discussing *Wilkinson v. Downton*, [1897] 2 Q.B. 57).

22. *Id.* at 419 (Lord Hoffmann) (citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890)).

23. *Id.* (noting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 804-14 (4th ed. 1971)).

function in enabling one to deduce the rule to be applied in a concrete case. English law has so far been unwilling, perhaps unable, to formulate any such high-level principle . . . what the courts have so far refused to do is to formulate a general principle of “invasion of privacy” (I use the quotation marks to signal my doubt about what in such a context the expression would mean) from which the conditions of liability in the particular case can be deduced.²⁴

For this view, Lord Hoffmann drew support from the analysis offered by Megarry V.-C. in the *Malone* case and provided an account of the modern history, recounted in part above, of English judicial decisions rejecting the existence of the privacy tort and the subsequent enactment of legislation by Parliament to fill in gaps in the common law.²⁵ For Lord Hoffmann, this seemed a satisfactory approach. In his view and notwithstanding the American experience in this area, recognition of a broad privacy tort was simply inconsistent with the common law method. Manifesting some similarities to the reasoning of Megarry V.-C. in *Malone*, Lord Hoffmann opined that a principle in favor of privacy protection was incapable of being formulated in the form of a “rule.” As he stated,

There seems to me a great difference between identifying privacy as a value which underlies the existence of a rule of law (and may point the direction in which the law should develop) and privacy as a principle of law in itself. The English common law is familiar with the notion of underlying values – principles only in the broadest sense – which directed its development. A famous example is [a decision of the House of Lords] in which freedom of speech was the underlying value which supported the decision to lay down the specific rule that a local authority could not sue for libel. But no one has suggested that freedom of speech is in itself a legal principle which is capable of sufficient definition to enable one to deduce specific rules to be applied in concrete cases. That is not the way the common law works.²⁶

Nor, in his view, could support for the recognition of such a tort be drawn either from the Convention or from the 1998 legislation requiring “public authorities” to act compatibly with Convention rights.²⁷ The latter legislation, by creating a statutory right of redress in cases where public authorities act inconsistently with the Convention, weakened the

24. *Id.*

25. *Id.* at 419-22 (citing *Malone v. Comm’r of Police of the Metropolis*, [1979] Ch. 344, 372-81).

26. *Id.* at 423.

27. Human Rights Act, 1998, c. 42, s. 6 (U.K.).

argument for recognizing a general tort of invasion of privacy since it would pre-empt the controversial question of whether such remedies should be extended into the private sector.

In *Wainwright*, then, the House of Lords endorsed, with apparent enthusiasm, the recent history of judicial rejection of the privacy tort. The court accepted the proposition that civil redress of privacy invasion, to the extent that it falls outside existing common law torts and statutory initiatives, is a matter best left for the legislature. Indeed, in *Wainwright*, the somewhat extreme claim is made that the recognition of a privacy tort is simply inconsistent with the common law method. Against this background, one would have little reason to anticipate or predict that the existing law of breach of confidence might soon be dramatically transformed with a view to extending hitherto unprecedented protection of privacy interests through evolution of the common law.

III. CELEBRITY NEWSGATHERING AND PRIVACY

On November 18, 2000, the American Film Stars Michael Douglas and Catherine Zeta-Jones wed in New York. The wedding was held in the Plaza Hotel and was presumably followed by a lavish reception, to which nearly 350 guests had been invited. The engagement of the couple had been announced earlier that year and was the subject of some interest in the popular press. Douglas and Zeta-Jones were approached by two British tabloids, *Hello!* and *OK!*, rival publications in the tabloid market, for the exclusive right to publish photographs of the wedding reception. After a period of negotiations, the couple entered into an agreement with *OK!* a week or so before the wedding. Under the agreement, *OK!* agreed to pay £500,000 each to Mr. Douglas and Ms. Zeta-Jones in return for the exclusive right to publish the wedding photographs for a period of nine months. The couple retained the right to control the selection of photographs to be published and undertook to “use their best endeavours” to ensure that no other media organization was permitted access to the celebration and that no photographs would be taken by guests or other persons present at the event other than the photographers retained by the couple. Pursuant to this obligation, the arrangements made by the couple for the celebration included a clear statement on the invitation that no photographs were to be taken at the event, security arrangements for the hotel and, the day before the event, issuance of security cards designed to restrict access to the reception to

invited guests.²⁸

Notwithstanding these arrangements, an unauthorized photo-journalist was able to insinuate himself into the reception where he surreptitiously took a number of photographs of the event, including pictures of Douglas and Zeta-Jones. Subsequently, the photographer in question sold these photographs to *OK!*'s rival, *Hello!* Magazine, for £125,000. *Hello!* then commenced the preparation of its next issue, which would include the unauthorized photographs and "scoop" *OK!*. Prior to publication, *OK!* learned that the unauthorized photographs were being peddled on the market and, in due course, became aware that they had been purchased by *Hello!*. Allegedly shocked by these revelations, Douglas and Zeta-Jones joined with *OK!* in launching proceedings in London seeking to enjoin *Hello!* from the publication of the photographs. At the same time, *OK!* advanced the date for its own publication of the photographs and elicited cooperation from Douglas and Zeta-Jones in achieving this objective. Although an interim injunction was granted at the first instance, the injunction was lifted by the Court of Appeal on the basis, principally, that, assuming that a valid cause of action against *Hello!* would arise in these circumstances, the interests of the plaintiffs would be adequately protected by an award of damages at trial. In the event, the wedding issue of *OK!* magazine went on sale the very same day as the issue of *Hello!* containing the unauthorized photographs. In due course, the matter proceeded to trial and a verdict in favor of the plaintiffs was recently affirmed by the English Court of Appeal.²⁹

On February 1, 2001, the internationally successfully fashion model Naomi Campbell was the subject of unwanted and unattractive publicity in the London newspaper, the *Daily Mirror*. Ms. Campbell had, on previous occasions, publicly declared that she, unlike others in her industry, did not suffer from drug or alcohol addiction. The story in the *Mirror* painted a different picture under the front page headline "Naomi: I am a Drug Addict,"³⁰ with the story indicating that Ms. Campbell was attending Narcotics Anonymous meetings in a courageous attempt to defeat her addiction to alcohol and drugs. The article went on to describe the duration and frequency of her attendance at such meetings and the manner in which she was treated by fellow attendees. The story was accompanied by a picture of the "supermodel" and "catwalk queen"

28. DOUGLAS (NO. 1), *supra* note 4, at 975-76.

29. Douglas v. Hello! Limited, [2006] Q.B. 125 [hereinafter DOUGLAS (NO. 3)].

30. Campbell v. M.G.N. Ltd., [2004] UKHL 22, [2004] 2 A.C. 457, 462.

casually dressed and said to be emerging from a “grueling two-hour session” at Narcotics Anonymous.³¹ Although the faces of alleged friends were pixilated, the famous Ms. Campbell was plainly visible. The article could be portrayed as a somewhat sympathetic account of Ms. Campbell’s courageous battle with her addictions. At the same time, however, the article did not refrain from drawing attention to her prior public falsehoods on this topic. On the same day as this coverage appeared in the *Mirror*, Ms. Campbell commenced an action for damages against the defendant publisher of the *Mirror*. A modest award of damages (£3,500) in her favor at trial was overturned by the Court of Appeal. The Court of Appeal’s decision was, however, reversed by the House of Lords in what has become the leading English decision on privacy protection issues in the context of celebrity newsgathering.³²

Against the background of the modern rejection of the privacy tort by English courts, one might have assumed that the prospects for success in the claims brought by Douglas, Zeta-Jones, and Campbell, at least to the extent that they rested on alleged invasions of privacy interests, would be insubstantial. If the unauthorized strip-search of Mrs. Wainwright,³³ the persistent telephone harassment of Ms. Khorasandjian,³⁴ and the unregulated use of wiretap surveillance by law enforcement authorities did not warrant civil redress,³⁵ how likely was it that English courts would find a basis for protecting the interests of Douglas and Zeta-Jones in preserving control over the use of photographs of their wedding reception or the interest of Campbell in preserving secrecy concerning a medical condition about which she had lied to the public? The claims of Douglas and Zeta-Jones may appear particularly fragile. Non-celebrities can only imagine the level of distress sustained by the couple when confronted by the alleged invasion of privacy that would result from the publication of unauthorized photographs of their wedding. The trial judge, however, was satisfied that such distress had occurred, and the modest award of £3,750 each to the plaintiffs with respect to that distress was not successfully challenged on appeal. More easily imagined, however, is the concern that the

31. *Id.*

32. *Id.* at 458-59.

33. *Wainwright v. Home Office*, [2003] UKHL 53, [2004] 2 A.C. 406 (appeal taken from Eng.) (U.K.).

34. *Khorasandjian v. Bush*, [1993] Q.B. 727 (C.A.) (appeal taken from Eng.).

35. *Malone v. Comm’r of Police of the Metropolis*, [1979] Ch. 344. While it is true that the use of such surveillance by the police was regulated on a non-statutory basis by the issuance of warrants by the Secretary of State, the existence of an informal regulatory scheme of this kind was not central to the court’s decision to deny civil redress.

couple may well have experienced to preserve the commercial value of the wedding photographs which had been handsomely paid for by *OK!*. At the same time, however, the fact that Douglas and Zeta-Jones had sold the right, albeit an exclusive one, to publish their wedding photographs to *OK!* might be thought to undermine any suggestion that the publication of unauthorized photographs by *Hello!* constituted an invasion of their privacy. Although the claim of Ms. Campbell to be able to preserve confidentiality with respect to her addiction presents a substantially more sympathetic case, her prior public falsehoods on the subject might be thought to significantly undermine her claim to remain immune from press coverage on this subject. Indeed, the right of the press to publish information inconsistent with her prior statements was not seriously challenged in the *Campbell* litigation. The plaintiffs in each case, however, enjoyed success, though not on the basis of a newly recognized privacy tort. Rather, success was achieved on the basis of a substantially reformed doctrine of breach of confidence which would appear, other than in name, to afford protection for what would be considered, in American law, to constitute invasions of privacy interests.

IV. THE TRANSFORMATION OF BREACH OF CONFIDENCE

The traditional doctrine of breach of confidence affords protection against the abuse or misuse of information which is given to another in confidence.³⁶ The duty to maintain a confidence may arise out of a fiduciary or contractual relationship, but the duty may arise in other circumstances as well. Thus, for example, the disclosure of confidential information in the course of the negotiations towards a contract may give rise to such a duty. The classic modern statement of the doctrine is that of Megarry J. in *Coco v. A.N. Clark (Engineers) Ltd.*³⁷ The three elements that give rise to the duty were described by Megarry J. in the following terms:

First, the information itself, . . . must “have the necessary quality of confidence about it.” Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorized use of that information to the detriment of the party communicating it.³⁸

36. See generally, PETER D. MADDAUGH & JOHN D. MCCAMUS, *THE LAW OF RESTITUTION* 28, 891 (2d ed. 2004); R. GOFF & GARETH JONES, *THE LAW OF RESTITUTION* 749 (6th ed. 2002); FRANCIS GURRY, *BREACH OF CONFIDENCE* (1925).

37. *Coco v. A.N. Clark (Engineers) Ltd.*, [1968] F.S.R. 415 (Ch.).

38. *Id.* at 419.

If the person to whom the information has been confided abuses or misuses the information, a broad range of remedies is available to the person who confided the information, including an injunction and/or an accounting of profits secured through use of the information or damages.³⁹ The principal obstacle to the deployment of breach of confidence analysis in the context of celebrity newsgathering is the first requirement concerning the existence of the confidential relationship. The traditional breach of confidence duty protects confidential relationships rather than confidential or private information *per se*. The essence of the wrong lies in the misuse of information disclosed in the context of a confidential relationship where the person to whom the information has been confided either understands or ought to understand the existence of the duty to maintain the confidence. Moreover, in the typical case, far from a confidential disclosure of information by the celebrity, the information has typically been gathered by the journalist, through assiduous research or, indeed, aggressive invasions of the privacy of the celebrity. In the typical case of celebrity newsgathering, then, the journalist may have no relationship whatsoever with the celebrity in question. It would be highly artificial to characterize the situation as one in which the celebrity disclosed information in circumstances where the journalist would reasonably expect that the information was confidential and that the confidence should be maintained. It is thus only by reducing or, indeed, eliminating the requirement of a pre-existing confidential relationship that breach of confidence can become a satisfactory instrument for protecting the use or misuse of personal information simply on the basis that the information is of a highly sensitive and confidential nature. The difficulty with eliminating the requirement of confidential relationship, however, is that the traditional nature of the duty of confidence is substantially transformed and becomes indistinguishable from what might more properly be referred to as a duty to avoid invasion of the privacy of the celebrity target.

The seeds of a dramatic transformation of breach of confidence of this kind were sown by Lord Goff in *Attorney-General v. Guardian Newspapers Ltd.*, a case involving the publication of the indiscreet memoirs of a secret service agent written by the agent in breach of a duty of confidence.⁴⁰ Lord Goff noted that the duty of confidence normally arises in the context of an existing confidential relationship

39. See *supra* note 36.

40. *Attorney General v. Guardian Newspapers Ltd.*, [1990] 1 A.C. 109 (H.L.).

where the information is disclosed by a “confider” to a “confidant.” Lord Goff went on to observe, however, in a radically pregnant *dictum*, that the duty applies more broadly to include circumstances where confidential information is, in some sense, accidentally disclosed. He observed as follows:

But it is well settled that a duty of confidence may arise in equity independently of such cases; and I have expressed the circumstances in which the duty arises in broad terms, not merely to embrace those cases where a third party receives information from a person who is under a duty of confidence in respect of it, knowing that it has been disclosed by that person to him in breach of his duty of confidence, but also to include certain situations, beloved of law teachers – where an obviously confidential doctrine is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in a public place, and is then picked up by a passer-by.⁴¹

Although Lord Goff offered no authority for this proposition, other than lecture hall speculation, the door was thus opened to a rather more comprehensive deployment of the doctrine of breach of confidence in the context of improper use of confidential or private information accidentally acquired in the absence of a pre-existing relationship with the subject of the information. The duty to refrain from subsequent use of the misplaced diary must arise, if at all, from the obviously private and sensitive nature of the information contained therein.

Although the significance of Lord Goff’s hypothesis for the possible expansion of the duty of confidence appears not to have been appreciated for a period of time,⁴² the possibility was explored at considerable length in the proceedings concerning the interlocutory injunction in *Douglas v. Hello! Ltd (No. 1)*.⁴³ As Sedley, L.J. noted, application of the traditional doctrine of breach of confidence to the Douglas/Zeta-Jones wedding was problematic because “it is possible that the photographer was an intruder with whom no relationship of trust had been established.”⁴⁴ If, on the other hand, the misuse of information that had been perpetrated by a guest or employee with whom the couple had a relationship of confidence, the traditional doctrine would apply. Both Sedley and Keene, LL.J. contended that breach of confidence no

41. *Id.* at 281.

42. *But see* Hellewell v. Chief Constable of Derbyshire, [1995] 4 All E.R. 473 at p. 476 *per* Laws J.

43. DOUGLAS (No. 1), *supra* note 4.

44. *Id.* at 998.

longer required the establishment of a pre-existing relationship of confidence. Sedley, L.J., in particular, argued that this recent development of the law of breach of confidence was rendered desirable by the “increasingly invasive social environment in contemporary society.”⁴⁵ Further, Sedley, L.J. drew support from the Human Rights Act of 1998 that requires the courts to give appropriate effect to the right to privacy set out in Article 8 of the European Convention.⁴⁶ Indeed, for Sedley, L.J., the time had arrived for the recognition of an explicit privacy right. He reasoned as follows:

What a concept of privacy does . . . 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 subjected 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 recognize privacy itself as a legal principle drawn from the fundamental value of personal autonomy.⁴⁷

Similarly, Keene, L.J. suggested that:

[w]hether the resulting liability is described as being for breach of confidence or breach of a right to privacy may be a little more than deciding which label is to be attached to the cause of action, but there would seem to be merit in recognizing 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.⁴⁸

To the extent that these comments offer support for the direct recognition of a privacy tort, however, they have not survived the subsequent decision of the House of Lords in *Wainwright v. Home Office*,⁴⁹ in which the possibility of recognizing a new tort of privacy invasion was plainly rejected. Notwithstanding the court’s embrace of Lord Goff’s expansion of breach of confidence, the interlocutory injunction was lifted on the ground that damages at trial would, in any event, provide an adequate remedy for any alleged infringement of the plaintiffs’ interests.

45. *Id.* at 997.

46. *Id.*; *see supra*, note 1.

47. DOUGLAS NO. 1, *supra* note 4, at 1001.

48. *Id.* at 1012.

49. *Wainwright v. Home Office*, [2003] UKHL 53, [2004] 2 A.C. 406 (appeal taken from Eng.) (U.K.).

The notion that the action for breach of confidence might be extended to circumstances where no pre-existing relationship of confidence existed, however, has enjoyed much greater success. Indeed, in the immediate aftermath of this decision of the Court of Appeal, another judge enjoined the disclosure of information by a newspaper concerning the location of two youths who had been convicted of the murder of a two year old child upon their release from a period of imprisonment.⁵⁰ The proposed new version of the duty of confidence provided the means for redress for Naomi Campbell in her suit against the publishers of the *Daily Mirror*.⁵¹ The claim in *Campbell v. M.G.N. Ltd.* was framed in terms of breach of confidence rather than invasion of privacy.⁵² The House of Lords, although divided with respect to the result in this case, was unanimous in holding that an extended version of the duty of confidence was now applicable to fact situations of this kind. Lord Hoffmann summarized recent developments in the following terms:

In recent years . . . there have been two developments of the law of confidence, typical of the capacity of the common law to adapt itself to the needs of contemporary life. One has been an acknowledgement of the artificiality of distinguishing between confidential information obtained through the violation of a confidential relationship and similar information obtained in some other way. The second has been the acceptance, under the influence of human rights instruments such as Article 8 of the European Convention, of the privacy of personal information as something worthy of protection in its own right.⁵³

A majority of the panel was convinced that the expanded duty of confidence was applicable to some but not all of the information concerning Ms. Campbell that had been published by the Mirror. It was not seriously contested by the plaintiff that Ms. Campbell's prior false statements concerning her lack of addiction precluded her from contesting the publication of the information that she suffered a drug addiction and that she was receiving treatment for it. The majority of the court, however, was of the view that the details concerning the nature of the treatment at Narcotics Anonymous, the details of the duration and frequency of her attendance, and the pictorial portrayal of her leaving a

50. *Venables v. News Group Newspapers Ltd.*, [2001] Fam. 430. In *A v. B*, [2003] Q.B. 195, however, an attempt to enjoin publicity concerning the adulterous affairs of a celebrity footballer failed. See also *Theakston v. M.G.N. Ltd.*, [2002] E.M.L.R. 22.

51. *Campbell v. M.G.N., Ltd.*, [2004] UKHL 22, [2004] 2 A.C. 457.

52. *Id.*

53. *Id.* at 472.

meeting with other addicts crossed the line of information protected by the expanded version of the breach of confidence doctrine. In reaching this conclusion, the majority drew support from a consideration that the private nature of Narcotics Anonymous meetings was essential. Addicts would be encouraged to attend such meetings if they believed that they could do so anonymously. Accordingly, the therapy was placed at risk if the details of attendance at such meetings were made public. The House of Lords was divided, however, on the significance to be attached to another fundamental value secured by Article 10 of the European Convention, the article enshrining protection of the freedom of the press. For the majority, the right to privacy lying at the heart of the action of the breach of confidence had to be balanced against the right of the media to impart information to the public. In striking that balance, it was appropriate to consider whether the benefits that would be achieved by publication were proportionate to the harm that might be done by interfering with the privacy right. Applying that test, the majority agreed with the trial judge that the infringement of Ms. Campbell's privacy interests should weigh more heavily than the press's interest in being able to publish information concerning the nature of her addiction treatment.

V. PRIVACY AND BREACH OF CONFIDENCE: A SQUARE PEG IN A ROUND HOLE?

The reformulation of the duty to maintain confidences into what is essentially a privacy tort by another name may be thought to demonstrate the resilience of the English common law and its capacity for fruitful modification or development. In the very shadow of the recent decision of the House of Lords in *Wainwright* and its rejection of the validity of the privacy tort, the emergence of breach of confidence as a potentially vigorous form of civil redress for privacy invasion offers interesting and compelling evidence of the suppleness of the common law. It may be seriously questioned, however, whether transformation of the duty to maintain confidences is a satisfactory means for achieving the objective of providing civil redress for newsgathering practices that are unacceptably invasive of personal privacy. Thus transformed, it may be that breach of confidence no longer directly accomplishes the objectives of the traditional breach of confidence claim. Moreover, an overly intense connection with traditional breach of confidence analysis may impair understanding and development of the new privacy claim.

One may begin by noting that even in its traditional form, breach of

confidence was one of a number of causes of action that, in particular circumstances, could have the effect of protecting privacy interests. Although the typical breach of confidence case involves the transfer of confidential commercial information in the context of contractual negotiations, it is also well established that breach of confidence analysis can apply to personal information of a private nature. Thus, in the leading case of *Prince Albert v. Strange*, Prince Albert successfully enjoined a domestic servant from publishing a catalogue of etchings that he and Queen Victoria had made.⁵⁴ Although the case is a leading illustration of the application of the traditional duty of confidence, it is evident that the effect of the holding was, and was intended to be, the protection of the privacy of the royal family. In the more usual context of the disclosure of confidential commercial information in the context of contractual negotiations, there are obviously no similar privacy interests at issue. This important fact points toward a fundamental distinction between traditional breach of confidence and the protection of privacy interests.

The fundamental rationale of confidence doctrine is not the protection of privacy but, rather, the protection of relationships of confidence. Although the elaboration of that rationale might take various forms, it is not likely to be contentious to suggest that the reason for protecting such relationships is to facilitate the disclosure of information in confidence and to give effect to the reasonable expectations of the confider and the confidant in such circumstances. Further, the duty to maintain confidences preserves the commercial value of the information disclosed. The rationale of privacy based tort duties, on the other hand, is to preserve the confidentiality of personal information with a view to enhancing the ability of individuals to avoid unwarranted intrusions into their private lives and to maintain control over the disclosure of personal information of an intimate nature. Loss of such control threatens the moral autonomy of individuals and undermines the quality of their private lives. From a privacy perspective, then, it is not essential that the personal information has been initially disclosed in the context of a confidential relationship. The acquisition of the personal information, through the use of a telephoto lens or other means of electronic surveillance, is equally offensive to the privacy value. Moreover, the type of information protected by the two different rationales for redress is importantly different. The protection of privacy rationale is targeted at the improper disclosure of personal information,

54. *Prince Albert v. Strange*, (1849) 2 De G. & Sm. 652, 64 E.R. 293.

especially information of an intimate nature, disclosure of which could cause embarrassment or harm to the individual in question. In the breach of confidence cases, the confidential information protected is rarely of this kind, although the protected information must be “confidential” in the sense that it is not “something which is public property and public knowledge.”⁵⁵ In the typical case, the information at issue has commercial value that may be improperly exploited by the confidant.

These fundamental differences between the breach of confidence and privacy protection rationales suggest that the abandonment of the relationship of confidence requirement of the traditional breach of confidence doctrine would seriously undermine the ability of the doctrine to give effect to its underlining objectives. It seems rather likely, then, that in factual situations traditionally considered to give rise to a duty of confidence, courts will continue to apply the traditional breach of confidence doctrine, including the requirement that the information that has been disclosed in circumstances “importing an obligation of confidence.”⁵⁶ On this basis, we should assume that English law now embraces two forms of breach of confidence doctrine, the second relating to issues of privacy protection rather than breach of the duty of confidence. In attempting to ascertain whether this new and second form of breach of confidence in English law truly is aimed at the protection of privacy interests, it will be of interest to attempt to determine whether the rationale for the relief offered in cases like *Douglas* and *Campbell* is rooted in privacy protection rather than breach of confidence and whether the nature of the information protected is consistent with a privacy protection rather than a breach of confidence rationale.

The opinions of the House of Lords in the *Campbell* case and the leading opinion of Lord Phillips in the more recent decision of the Court of Appeal in the appeal from the trial of the issue in *Douglas v. Hello! Ltd. (No. 2)* strongly suggest that a privacy protection rationale underlies the relief accorded in these cases under the banner of breach of confidence. In *Campbell*, Lord Hoffmann observed that human rights law had identified private information “as something worth protecting as an aspect of human autonomy and dignity.”⁵⁷ He further noted the following:

55. *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.* [1963] 3 All E.R. 413 (NOTE), (1948), 65 R.P.C. 203 (C.A.) 203, 215 (Lord Greene M.R.).

56. *See supra* note 36.

57. *Campbell*, 2 A.C. at 472.

The new approach [to breach of confidence] takes a different view of the underlying value which the law protects. 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 the dissemination of information about one’s private life and the right to the esteem and respect of other people.⁵⁸

Moreover, the reasoning of the court supporting the majority view that publication of the information concerning Ms. Campbell’s addiction treatment was strongly rooted in personal autonomy rather than breach of confidence terms. Disclosure of the information was harmful to Ms. Campbell and others similarly positioned because it might discourage them from seeking addiction treatment of this kind. Disclosure thus has a harmful effect on the personal autonomy of individuals in need of drug rehabilitation. Further the disclosure was said to be one which would be “distressing and highly offensive.”⁵⁹

Another view of the rationale for relief on the facts of the *Campbell* case was possible. The information acquired by the *Mirror* must surely have come from one of Ms. Campbell’s fellow patients or from a member of the staff at the clinic. It is well established law that one who receives confidential information innocently but nonetheless becomes aware that the information was originally given in confidence can be restrained from breaching the confidence.⁶⁰ It is of some significance, then, that the rationale articulated by the House of Lords for granting relief in *Campbell* rests on privacy rather than on traditional breach of confidence rationales.

Further, in *Campbell*, the House of Lords plainly shifted the focus of concern from confidential information of the kind protected by the traditional breach of confidence doctrine to personal information of a private nature. Thus, in *Campbell*, Lord Nicholls observed:

The continuing use of the phrase “duty of confidence” and the description of the information as “confidential” is not altogether comfortable. Information about an individual’s private life would not, in ordinary usage, be called “confidential.” The more natural description today is that such information is private.⁶¹

In order to determine whether such information is private in the

58. *Id.* (referring to Sedley, LJ’s observations in *DOUGLAS* (NO.1)).

59. *Id.* at 484 (Hope, L.).

60. *Fraser v. Evans*, [1969] 1 Q.B. 349, 361 (C.A.) (Lord Denning M.R.).

61. *Campbell*, 2 A.C. at 465.

requisite sense, a rule aimed at privacy protection (but not at breach of confidence) must develop a means for distinguishing sensitive personal information from that which can be publicized without harm. In *Campbell*, the House of Lords also developed such a test. Borrowing indirectly from American law,⁶² Lord Hope was of the view that the information must be of a kind that would make its disclosure “highly offensive to a reasonable person of ordinary sensibilities.”⁶³ Lord Hope added the gloss that Ms. Campbell’s privacy interest was to be determined by considering whether a reasonable person in need of medical treatment would consider the disclosure to be objectionable in the requisite sense.

Similarly, in *Douglas v. Hello!*,⁶⁴ Lord Phillips emphasized the privacy protection rationale of the relief being afforded and the private rather than confidential nature of the information being disclosed.⁶⁵ Application of the new version of breach of confidence to the facts of *Douglas v. Hello!* may, however, appear problematic. The Court of Appeal concluded that the photographs of the wedding “plainly portrayed aspects of the Douglases’ private life”⁶⁶ and that the publication of the unauthorized pictures would lead them to “reasonably feel distress.”⁶⁷ Further, the fact the Douglases had contracted to publish authorized photographs of the wedding in another tabloid did not constitute a defense to the claim. On this point, however, the court appeared to revert more to the traditional breach of confidence analysis. The Court of Appeal articulated the following principle, which distinctly had a breach of confidence rather than privacy protection rationale:

Where an individual (“the owner”) has at his disposal information which he has created or which is private or personal and to which he can properly deny access to third parties, and he reasonably intends to profit commercially by using or publishing that information, then a third party who is, or ought to be, aware of these matters and who has knowingly obtained the information without authority, will be in breach of duty if he uses or publishes the information to the detriment of the owner.⁶⁸

62. RESTATEMENT (SECOND) OF TORTS § 652(D) (1997); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

63. *Campbell*, 2 A.C. at 483.

64. *DOUGLAS* (No. 3), *supra* note 29.

65. *Id.* at 152-53.

66. *Id.* at 159.

67. *Id.* at 162.

68. *Id.* at 165.

The Court of Appeal upheld an award of damages to Douglas and Zeta-Jones on this basis. The unauthorized photographer and the defendant publisher both must have been aware of the arrangements undertaken by the plaintiffs to secure the confidentiality of the information. Publication of the unauthorized photographs constituted a breach of confidence. It nonetheless remains difficult to sustain the argument that disclosure of the unauthorized photographs constitutes the publication of personal information of a kind likely to cause distress in the context of a celebrity wedding.

These modern British authorities, then, reflect a somewhat uneasy tension between a modern privacy-based tort analysis and traditional breach of confidence reasoning. Given the fundamental dissimilarities between breach of confidence and privacy protection analysis, it may be that the path to clearer analysis of celebrity newsgathering cases in English law lies in the direction of a clearer shift from breach of confidence analysis to privacy protection analysis than has yet occurred in the recent cases.

VI. CONCLUSION

This article has traced the history of English common law doctrine in recent decades concerning civil redress for injuries resulting from the invasion of privacy. This history represents a curious amalgam of resistance to change and a capacity for radical reform. The former tendency was most obviously evident in the reaffirmation by the House of Lords of the traditional English position that invasion of privacy, *per se*, does not constitute a tort. The capacity to radically reform a traditional doctrine of English common law is manifest in the expansion of the duty of confidence in such fashion as to provide civil redress for a particular type of privacy invasion. In effect, English law has achieved indirectly, through expansion of the breach of confidence doctrine, what could not be accomplished directly through recognition of invasion of privacy as a tort. Although the reform of well-established common law doctrine through indirect means is a familiar form of common law evolution, the resulting doctrine provides yet another illustration of the wisdom contained in Llewellyn's memorable aphorism, "Covert tools are never reliable tools."⁶⁹ A number of difficulties will need to be addressed.

First, the relationship between the old and traditional doctrine of

69. Karl Llewellyn, Book Review, 52 HARV. L. REV. 700, 703 (1939).

breach of confidence and the new reformulated version remains unclear. As we have seen, the reasoning in cases such as *Douglas*⁷⁰ and *Campbell*⁷¹ strongly suggests that the new breach of confidence doctrine is not simply a revised version of traditional breach of confidence but rather a new and separate doctrine which will apply principally to cases, to which the traditional doctrine is inapplicable. Nonetheless, the traditional doctrine remains standing and presumably will continue to apply to the kinds of cases to which it has traditionally applied. Thus, where, for example, commercially valuable information is disclosed in the course of contractual negotiations, counsel will look to the traditional law of breach of confidence in order to determine whether the information was “imparted in circumstances importing an obligation of confidence.”⁷² In such cases, the doctrine will be deployed in order to achieve the traditional objectives of giving effect to the reasonable expectations of the confider and confidant in such circumstances and preserving the commercial value of the confidential information disclosed to the confidant.

The new doctrine of breach of confidence, freed from any requirement to establish that information has been confided in circumstances importing an obligation of confidence, appears to be designed to apply in circumstances where the publication of sensitive personal information threatens to undermine the moral autonomy of the individual in question or is highly offensive to the moral sensibilities of a reasonable person in a similar situation. On its facts, *Campbell* is a classic illustration of this problem. The disclosure of, broadly speaking, private medical information undermines the freedom of the person needing assistance to seek appropriate medical advice and treatment. The disclosure of the sensitive medical information is also highly offensive to a reasonable person’s sense of dignity. If it is correct to conclude that the new breach of confidence is a very different type of claim from the old breach of confidence, it seems very likely that referring to the two types of claims by the same label and treating one as simply a modification of the other is likely to be a source of continuing confusion of the two doctrines. In theory at least, the confusion could run in either direction. Thus, it is possible that a modern court applying the traditional doctrine will not insist on a strict finding that the traditional three elements of the traditional cause of action for breach of

70. DOUGLAS (NO. 3), *supra* note 29.

71. *Campbell v. M.G.N., Ltd.*, [2004] UKHL 22, [2004] A.C. 457.

72. *Coco v. A.N. Clark (Engineers) Ltd.*, [1968] F.S.R. 415, 419 (Ch.).

confidence are present in a particular fact situation. This would undermine the capacity of the traditional doctrine to accomplish its objectives. In the context of the new breach of confidence, courts may be inclined to restrict relief to situations that have some similarity to the traditional breach of confidence claim. Thus, in *Douglas*, a passing reference was made by the court to the fact that both the unauthorized photographer and the defendant publisher must have been aware of the security arrangements concerning the wedding of Douglas and Zeta-Jones and, accordingly, the private nature of the event. In *Campbell*, it was said, the defendant publisher must have been aware that the information received from its informants would have been obtained in circumstances where Campbell would have expected that her participation would be treated as a confidential matter by all concerned. Although such circumstances bring these cases somewhat closer to the traditional breach of confidence paradigm, any such requirement would appear to be inconsistent with a modern claim designed to provide redress for invasions of privacy in the form of publication of sensitive and potentially embarrassing personal information. In retrospect, it appears that the complete rejection by the House of Lords in *Wainwright* of American experience was an unfortunate turn of events. A much more preferable course might have been to simply refuse recognition of the particular kind of privacy claim being advanced in *Wainwright* – invasive searches – and save to another day the question of whether other forms of privacy invasion, such as publication of personal information of a private nature, should be considered to be tortious. That day may yet come, of course. In the interim, celebrities who, concerned by the highly intrusive practices of contemporary newsgathering agencies, seek redress under English law will be forced to “shoehorn”⁷³ their claims into the second generation action for breach of confidence.

73. DOUGLAS (NO. 3), *supra* note 29, at 149.