

**THE LAW REFORM COMMISSION
OF HONG KONG**

SUB-COMMITTEE ON PRIVACY

**CONSULTATION PAPER ON
CIVIL LIABILITY FOR INVASION OF PRIVACY**

This consultation paper can be found on the Internet at:
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Mr Godfrey K F Kan, Senior Government Counsel, was principally responsible for the writing of this consultation paper.

This Consultation Paper has been prepared by the Privacy sub-committee of the Law Reform Commission. It does not represent the final views of either the sub-committee or the Law Reform Commission, and is circulated for comment and criticism only.

The sub-committee would be grateful for comments on this Consultation Paper by 30th November 1999. All correspondence should be addressed to:

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Anyone who responds to this Consultation Paper will be acknowledged by name in the subsequent report. If an acknowledgement is not desired, please indicate so in your response.

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Preface

1. On 11 October 1989, under powers granted by the Governor-in-Council on 15 January 1980, the Attorney General and the Chief Justice referred to the Law Reform Commission for consideration the subject of “privacy”. The Commission’s terms of reference are as follows:

“To examine existing Hong Kong laws affecting privacy and to report on whether legislative or other measures are required to provide protection against, and to provide remedies in respect of, undue interference with the privacy of the individual with particular reference to the following matters:

- (a) the acquisition, collection, recording and storage of information and opinions pertaining to individuals by any persons or bodies, including Government departments, public bodies, persons or corporations;*
- (b) the disclosure or communication of the information or opinions referred to in paragraph (a) to any person or body including any Government department, public body, person or corporation in or out of Hong Kong;*
- (c) intrusion (by electronic or other means) into private premises; and*
- (d) the interception of communications, whether oral or recorded;*

but excluding inquiries on matters falling within the Terms of Reference of the Law Reform Commission on either Arrest or Breach of Confidence.”

2. The Law Reform Commission appointed a sub-committee to examine the current state of law and to make recommendations. The members of the sub-committee are:

The Hon Mr Justice Mortimer, GBS (Chairman)	Vice-President, Court of Appeal
Dr John Bacon-Shone	Director, Social Sciences Research Centre, The University of Hong Kong
Mr Don Brech	Principal Consultant, Records Management International Limited
Mrs Patricia Chu, JP	Deputy Director of Social Welfare (Services), Social Welfare Department
Mr A F M Conway	Chairman,

Great River Corporation Limited

Mr Edwin Lau	Assistant General Manager Head of Personal Banking, HSBC
Mr James O'Neil	Deputy Solicitor General (Constitutional), Department of Justice
Mr Peter So Lai-yin	Former General Manager, Hong Kong Note Printing Limited
Prof Raymond Wacks	Professor of Law and Legal Theory, The University of Hong Kong
Mr Wong Kwok-wah	Chinese Language Editor, Asia 2000 Limited

3. The secretary to the sub-committee is Mr Godfrey K F Kan, Senior Government Counsel.

4. The collection, recording, storage and disclosure of personal data have been addressed in the Law Reform Commission report on *Reform of the Law Relating to the Protection of Personal Data* published in August 1994. Thereafter, the sub-committee published a consultation paper on the regulation of surveillance and the interception of communications. The Commission report on the regulation of interception of communications was issued in December 1996.¹ It recommends that unauthorized interception of telecommunications or mail be a crime. As regards surveillance, the sub-committee has decided that the civil aspects of invasion of privacy should be looked into before it finalises its recommendations on the regulation of surveillance. This paper deals with civil liability for invasion of privacy. It covers the civil aspects of surveillance as well as other means of intrusions. The criminal aspects of surveillance will be dealt with in the Commission report on Criminal Sanctions for Unlawful Surveillance to be issued later.

5. Since the passing of the Personal Data (Privacy) Ordinance and the establishment of the Office of the Privacy Commissioner for Personal Data, the general public has become more concerned about privacy issues. The 1996-97 Annual Report of the Privacy Commissioner reported that the levels of complaints and enquiries have been significantly above expectations. His office received about 170 enquiries and 4 complaints per week in 1997.² The Commissioner noted that violations of personal data privacy can have far-reaching adverse consequences for an individual economically and psychologically.³ An opinion survey on public attitudes to and preparedness for the Personal Data (Privacy) Ordinance revealed that as a social policy issue, privacy was given an average rating in terms of importance of about 7.6 out of 10. This was lower than unemployment but roughly on par with environmental hygiene, noise pollution and health services.⁴

¹ The Law Reform Commission of Hong Kong, *Privacy: Regulating the Interception of Communications* (1996).

² Office of the Privacy Commissioner for Personal Data, Hong Kong, *1997 Year-End Review*.

³ Office of the Privacy Commissioner for Personal Data, Hong Kong, *Annual Report 1996-97*, p 3.

⁴ Office of the Privacy Commissioner for Personal Data & The University of Hong Kong Social Sciences Research Centre, *1998 Opinion Survey - Personal Data (Privacy) Ordinance: Attitudes and Implementation - Key Findings* (1998), p 3.

6. In the year 1995-96, the Hong Kong Journalists Association received many complaints and enquiries related to ethical issues. Half of the written complaints received involved the obtaining of journalistic materials by means which were not straight forward. These complaints involved “human interest” stories. The complainants were unhappy with the use of “undercover” reporting techniques by journalists when they approached their targets.⁵ The Association noted that the sharp increase in ethics complaints involving the use of means which are not straight forward is a “worrying trend”. The decline in the standard of coverage is also a matter of concern.

7. Instruments of electronic and data surveillance which are highly sophisticated and easy to use are easily accessible to the public at a low price. They may be used by employers, private detectives, reporters and those who have fallen victim to “voyeurism”. In order to increase circulation, some sections of the press put more emphasis on exposé journalism and fill their gossip columns with salacious details about people’s private lives. The plight of the university student who had been subjected to surreptitious surveillance for 6 months while staying at a university hostel has also illustrated that there is a pressing need to strengthen protection of individual privacy by law.

8. This document is published as a consultation paper together with the Consultation Paper on *The Regulation of Media Intrusion*.⁶ All the conclusions and recommendations in this paper are those of the sub-committee. The Commission will reach its own conclusions and recommendations after it has considered the responses to this paper.

⁵ *Hong Kong Journalists Association 28th Anniversary* (1996), pp 28-29.

⁶ The *Media Intrusion* Paper will examine whether it is necessary to regulate media intrusion by measures other than those in the civil and criminal law.

Chapter 1 - The right of privacy

International Covenant on Civil and Political Rights

1.1 A useful starting point for a discussion of civil liability for invasion of privacy is Article 17 of the International Covenant on Civil and Political Rights (“ICCPR”). Article 17 provides:

- “1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.”

1.2 The ICCPR imposes on the Hong Kong Special Administrative Region Government a positive duty to protect the right of privacy. The Government is under an obligation to adopt legislative and other measures to give effect to the prohibition against interference with the right to privacy as well as to the protection of this right.¹ In the opinion of the Human Rights Committee set up under the Covenant, the Government should protect every person against all arbitrary or unlawful interferences whether they emanate from Government authorities or from natural or legal persons. The “protection of the law” in paragraph 2 of the Article calls for measures in the area of private and administrative law as well as prohibitive norms under criminal law.²

United Nations report on privacy

1.3 Subsequent to the adoption of the ICCPR, the Secretary-General of the United Nations published in 1976 a report which included several specific points “for possible inclusion in draft international standards concerning respect for the privacy of the individual in the light of modern recording and other devices”.³ The recommendations of the report which are relevant to this consultation paper are stated below:

- “1. States shall adopt legislation, or bring up to date existing legislation, so as to provide protection for the privacy of the individual against invasions by modern technological devices; ...

¹ UN Human Rights Committee, General Comment 16/32 of 23 March 1988, para 1.

² M Nowak, *UN Covenant on Civil and Political Rights; CCPR Commentary* (Strasbourg: Engel, 1993), 289 - 290.

³ UN Document E/CN.4/1116. The recommendations of the report are reproduced in J Michael, *Privacy and Human Rights* (Dartmouth, 1994), 21 - 23.

3. States shall, in particular, take the following minimum steps:
[(a) to (d) omitted]
 - (e) In addition to any possible criminal liability, civil liability should attach to either the use of an auditory or visual device in relation to a person, under circumstances which would entitle him to assume that he could not be seen or heard by unauthorized persons, or the unauthorized disclosure of information so gained;
 - (f) Civil remedies shall allow a person to apply for the cessation of acts thus violating his privacy and, where the act has been completed, to recover damages, including damages for non-pecuniary injury;”

The Hong Kong Bill of Rights Ordinance

1.4 Article 17 of the ICCPR is replicated as Article 14 of the Hong Kong Bill of Rights.⁴ However, section 7 of the Hong Kong Bill of Rights Ordinance provides that the Ordinance binds only (a) the Government and all public authorities, and (b) any person acting on behalf of the Government or a public authority. The Bill of Rights therefore has no direct effect on inter-citizen relationship and the scope of the right to privacy under Article 14 of the Bill of Rights is much narrower than that under Article 17 of the ICCPR. Nonetheless, since section 6 of the Ordinance provides that a court in an action for breach of the Ordinance “may grant such remedy or relief, or make such order, in respect of such a breach, violation or threatened violation as it has power to grant or make in those proceedings”, it is arguable that an individual has a cause of action for breach of the right to privacy guaranteed under the Hong Kong Bill of Rights so long as it is the Government or a public authority which has committed or threatened to commit a breach. Such a construction would lead us to the conclusion that the Hong Kong Bill of Rights Ordinance has created a general right of privacy protecting private individuals from invasions of privacy by the Government and public authorities, as opposed to invasions by private persons.

The Basic Law of the Hong Kong Special Administrative Region

1.5 The provisions of the ICCPR have acquired a constitutional status in Hong Kong by virtue of Article 39 of the Basic Law of the Hong Kong Special Administrative Region.⁵ Article 39 provides:

“The provisions of the International Covenant on Civil and Political Rights ... as applied to Hong Kong shall remain in force and shall be

⁴ The Hong Kong Bill of Rights Ordinance (Cap 383), Part II.

⁵ Y Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong University Press, 1997), 419 - 420. The repeal of sections 2(3), 3 and 4 of the Hong Kong Bill of Rights Ordinance (Cap 383) by the Decision of the Standing Committee of the National People's Congress on the Treatment of the Laws Previously in Force in Hong Kong (adopted on 23 Feb 1997) does not have much effect on the operation of Cap 383. See Y Ghai, above, 493 - 494.

implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.”

1.6 The Article imposes an obligation on the Hong Kong Special Administrative Region to implement the provisions of the ICCPR through its laws. This would necessitate the enactment of laws to give effect to the right to privacy guaranteed under the International Covenant. Since China has undertaken the responsibility to report on the measures Hong Kong has adopted to give effect to the rights recognised in the Covenant, the implementation of the Covenant will continue to be subject to international scrutiny. Failure to implement Article 17 through the laws of Hong Kong would not only be contrary to the Basic Law of the Hong Kong Special Administrative Region, but would also be criticised by the United Nations Human Rights Committee when it considers the report submitted by China.

1.7 Another Article in the Basic Law which may be of relevance to the protection of privacy is Article 28. It provides, inter alia, that: “Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited.” Article 29 supplements Article 28 by extending the protection against arbitrary or unlawful search from search of the body to search of or intrusion into the “home and other premises” of a resident. Such provisions are reminiscent of the Fourth Amendment to the Constitution of the United States of America which provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”.

1.8 The function of the Fourth Amendment is to protect individual privacy and dignity against unwarranted intrusion by the state. It was originally applied to afford protection to tangible items as represented by persons, houses, papers and effects. But in recent years, the American courts have construed it as meaning that an individual has a reasonable expectation of privacy to be free from intrusion of electronic surveillance. The two-pronged test used in the courts is: (a) whether a person has exhibited an actual (subjective) expectation of privacy, and (b) whether that expectation is one that society is prepared to recognise as reasonable.⁶ Since the Fourth Amendment now protects both tangible and intangible interests, the standard has been applied to electronic surveillance and interception of communications by the state. It is open to the Hong Kong courts to adopt a liberal interpretation to construe Articles 28 and 29 of the Basic Law as providing Hong Kong residents with a right to be protected against unwarranted invasion of individual privacy by private citizens and the Government.

Definitions of “privacy”

1.9 Edward Bloustein views invasion of privacy as an affront to human dignity. He believes that an intrusion on an individual’s private life “would destroy individual dignity and integrity and emasculate individual freedom and independence”.⁷ He says:

⁶ *Katz v United States*, 389 US 347, 361 (1967), per Harlan J.

⁷ E J Bloustein, “Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser” (1964) 39 NYULR 962, 971.

“The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual.”⁸

1.10 We think that it is not sufficient to describe invasion of privacy as an affront to human dignity. Tim Frazer points out that although invasions of privacy violate human dignity, an individual’s dignity may be offended without his privacy being invaded:

“This approach to privacy, which attempts a single succinct description, does not sufficiently take account of the multifaceted nature of privacy. Though all aspects of privacy may be traced to human dignity, individuality or autonomy, so may the rationale underlying laws covering crimes of violence, sexual offences, marital breakdown, the detention of mental patients, etc. The right ‘to be let alone’ is relevant in all these contexts.”⁹

1.11 Thomas Cooley was the first person to define privacy as the “right to be let alone”.¹⁰ The phrase is simple and easy to understand. But Ruth Gavison says that such a simple definition cannot be used in a meaningful way:

“This description gives an appearance of differentiation while covering almost any conceivable complaint anyone could ever make. [Footnote: This is not true of only explicit privacy cases, however. Actions for assault, tort recovery, or challenges to business regulation can all be considered assertions of the ‘right to be let alone’.] A great many instances of ‘not letting people alone’ cannot readily be described as invasions of privacy. Requiring that people pay their taxes or go into the army, or punishing them for murder, are just a few of the obvious examples.”¹¹

1.12 According to Alan Westin, there are four basic states of individual privacy.¹²

- (a) *Solitude* - The individual is separated from the group and freed from the observation of other persons.
- (b) *Intimacy* - The individual is acting as part of a small unit that claims to exercise corporate seclusion so that it may achieve a close and frank relationship between two or more individuals.¹³

⁸ E J Bloustein, 1003.

⁹ T Frazer, “Appropriation of Personality - A New Tort?” (1983) 99 LQR 281, 296.

¹⁰ Thomas Cooley, *Laws of Torts* (2nd edn, 1888), 29.

¹¹ R Gavison, “Privacy and the Limits of Law” (1980) 89 *Yale LJ* 421, at 437.

¹² A F Westin, *Privacy and Freedom* (New York: Atheneum, 1968), 31-32.

¹³ Examples of units of intimacy are husband and wife, the family and the work clique.

- (c) *Anonymity* - This state of privacy occurs when the individual is in public places but still finds freedom from identification and surveillance. Although he knows that he is being observed on the streets, he does not expect to be personally identified and systematically observed by others.
- (d) *Reserve* - This occurs when the individual's need to limit communication about himself is protected by the willing discretion of those who have an interpersonal relationship with him. The creation of "mental distance" between individuals gives the parties a choice to withhold or disclose information.

1.13 Westin stresses that in a free society and subject to the extraordinary exceptions in the interests of society, the choice to decide when and on what terms personal information should be revealed to the general public ought to be left to the individual concerned.¹⁴ He therefore defines privacy as:

*"the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others. Viewed in terms of the relation of the individual to social participation, privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means, either in a state of solitude or small-group intimacy or, when among larger groups, in a condition of anonymity or reserve."*¹⁵

1.14 In the opinion of Ruth Gavison, there is a loss of privacy when others obtain information about an individual, pay attention to him, or gain access to him. She concludes that the concept of privacy is a complex of three elements which are independent of but related to each other.¹⁶

- (a) *Secrecy (the extent to which an individual is known)* - A person can be said to have lost privacy if he is unable to control the release or use of information about himself which is not available in the public domain. In general, the more people know about the information, the greater the loss of privacy suffered by the individual to whom the information relates.
- (b) *Anonymity (the extent to which an individual is the subject of attention)* - An individual loses privacy when he becomes the subject of attention. Attention alone will cause a loss of privacy even if no new information about him becomes known.¹⁷
- (c) *Solitude (the extent to which others have physical access to an individual)* - An individual loses privacy when another gains physical access to him; not only because physical access enables another to acquire information about an individual, but also because it diminishes the "spatial aloneness" of an individual.¹⁸

¹⁴ A F Westin, 42.

¹⁵ A F Westin, 7. Cf R Wacks, *Personal Information - Privacy and the Law* (Oxford: Clarendon Press, 1993), 14 - 15.

¹⁶ R Gavison (1980), at 428.

¹⁷ R Gavison (1980), at 432.

¹⁸ R Gavison (1980), at 433.

1.15 The focus of Gavison is therefore on access to a person. She defines privacy as: "The extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others' attention."¹⁹ This approach has been criticised on the ground that if a loss of privacy occurs whenever any information about an individual becomes known, the concept of privacy loses its intuitive meaning. Such a proposition would lead to the result that any loss of solitude by or information about an individual has to be counted as a loss of privacy.²⁰ Raymond Wacks suggests that a limiting or controlling factor is required. He points out that although focusing attention upon an individual or intruding upon his solitude is objectionable in its own right, our concern for the individual's "privacy" in these circumstances is strongest when he is engaged in activities which we would normally consider "private". He therefore suggests that the protection afforded by the law of privacy should be limited to information "which relate[s] to the individual and which it would be reasonable to expect him to regard as intimate or sensitive and therefore to want to withhold or at least to restrict its collection, use, or circulation."²¹ Philosophers who hold this view contend that access to personal information is a necessary but not sufficient condition for it being within the scope of privacy. What is further required is that the information acquired must be of an intimate and sensitive nature, such as information about the sexual proclivities of a person.

1.16 However, there can in theory, perhaps, be an invasion of privacy without any loss of intimate or sensitive information about an individual. A person who peeps into a private dining room which is not occupied by anyone may acquire no information other than the fact that the occupants of the house are not using the dining room at that time. Yet it is a clear case of privacy intrusion. Where an employer secretly opens the personal locker of his employee and discovers that it is empty, all the employer finds out about the employee is that the latter does not use the locker for storage. Nevertheless, no one would argue that the employer has intruded upon the privacy of the employee. Another example is the persistent following of another on the streets. Most people would agree that it constitutes an interference with private life even though no new information about the victim is acquired as a result. Likewise, listening to a telephone conversation which reveals no intimate or sensitive information about the parties to the conversation is a serious invasion of privacy. These examples show that a loss of intimate or sensitive information is not a necessary condition for invasion of privacy.²²

1.17 Although most philosophers contend that the essence of privacy is inaccessibility, some philosophers define privacy as the measure of control an individual has over a realm of his private life. According to this view, privacy functions by giving individuals autonomy over certain aspects of their private life. Privacy therefore consists of the individual's control over access to and information about himself.²³ An individual who exercises control by choosing to disclose certain aspects of his private life does not experience a loss of privacy on the ground that others gain access to him. On the contrary, he experiences privacy by choosing to allow himself or his personal information to go public. But if he chooses not to allow

¹⁹ R Gavison in F D Schoeman (ed), *Philosophical Dimensions of Privacy: An Anthology* (Cambridge: Cambridge University Press, 1984), 379.

²⁰ R Wacks, (1993), 15-18.

²¹ R Wacks (1993), 26.

²² The question as to whether stalking behaviour amounts to an invasion of privacy is addressed in: HKLRC, Privacy sub-committee, *Stalking - Consultation Paper* (1998), ch 1.

²³ J Rachels, "Why Privacy is Lost" (1975) 4 *Philosophy and Public Affairs* 323, 326.

others gaining access to himself or his personal data, an intrusion into his private affairs or a disclosure of his personal data would violate his right of privacy.

1.18 In an attempt to provide a workable definition for the term “privacy”, the declaration of the Nordic Conference of Jurists on the Right to Respect for Privacy elaborates on what the right to be let alone is about. Paragraphs 2 and 3 of the declaration states:

“2. The right of privacy is the right to be let alone to live one’s own life with the minimum degree of interference. In expanded form, this means:

The right of the individual to lead his own life protected against:

- (a) interference with his private, family and home life;*
- (b) interference with his physical or mental integrity or his moral and intellectual freedom;*
- (c) attacks on his honour and reputation;*
- (d) being placed in a false light;*
- (e) the disclosure of irrelevant embarrassing facts relating to his private life;*
- (f) the use of his name, identity or likeness;*
- (g) spying, prying, watching and besetting;*
- (h) interference with his correspondence;*
- (i) misuse of his private communications, written or oral;*
- (j) disclosure of information given or received by him in circumstances of professional confidence. ...*

3. For practical purposes, the above definition is intended to cover (among other matters) the following:

- (i) search of the person;*
- (ii) entry on and search of premises and other property;*
- (iii) medical examinations, psychological and physical tests;*
- (iv) untrue or irrelevant embarrassing statements about a person;*
- (v) interception of correspondence;*
- (vi) wire or telephone tapping;*
- (vii) use of electronic surveillance or other ‘bugging’ devices;*
- (viii) recording, photographing or filming;*
- (ix) importuning by the Press or by agents of other mass media;*
- (x) public disclosures of private facts;*
- (xi) disclosure of information given to, or received from, professional advisers or to public authorities bound to observe secrecy;*
- (xii) harassing a person (e.g. watching and besetting him or subjecting him to nuisance calls on the telephone).²⁴*

²⁴ Reproduced in JUSTICE, *Privacy and the Law* (London: Stevens and Sons, 1970), Appendix B.

The conference also declared that there was a need for a civil right to guard against intrusion, surreptitious recording, photographs or eavesdropping, and the use of material obtained by unlawful intrusion or which exploits a person's identity, places him in a false light or reveals embarrassing private facts.

1.19 Another attempt was made by the Council of Europe when it passed a resolution defining the right to privacy as the right to live one's own life with a minimum of interference. The resolution states that the right to privacy:

*“concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorized publication of private photographs, protection from disclosure of information given or received by the individual confidentially.”*²⁵

1.20 Instead of giving a general definition of privacy, the Younger Committee in the United Kingdom identified the principal privacy interests involved. They are:

- a) the “freedom from intrusion upon oneself, one's home, family and relationships”; and
- b) “the right to determine for oneself how and to what extent information about oneself is communicated to others.”²⁶

1.21 The Law Reform Commission of Australia adopted a similar approach. It identified three categories of privacy interests requiring legal protection, namely:²⁷

- a) the interest in controlling entry to the “personal place” (“territorial privacy”);
- b) the interest in freedom from interference with one's person and “personal space” (“privacy of the person”); and
- c) the interest of the person in controlling the information held by others about him (“information privacy”).

1.22 William Prosser adopted a descriptive approach. After examining the decisions of the American courts which recognised the existence of a right to privacy, he came to the conclusion that the law of privacy “comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff ... ‘to be let alone’.”²⁸ He described these four torts as:

- a) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;
- b) public disclosure of embarrassing private facts about the plaintiff;
- c) publicity which places the plaintiff in a false light in the public eye; and

²⁵ Resolution 428(1970) of the Consultative (Parliamentary) Assembly of the Council of Europe: Council of Europe, Cons. Ass., 21st Ordinary Session (3rd part), *Texts Adopted*, (1970).

²⁶ *Report of the Committee on Privacy* (“Younger Report”), (London: HMSO, Cmnd 5012, 1972), para 38.

²⁷ Law Reform Commission of Australia, *Privacy* (Report No 22, 1983), vol 1, 21. See also S I Benn, “The Protection and Limitation of Privacy” (1978) 52 ALJ 601 and 686.

²⁸ W L Prosser, “Privacy” (1960) 48:3 California Law Review 383 at 389.

- d) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.²⁹

1.23 More recently, the Calcutt Committee in the United Kingdom defined privacy as "the right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information."³⁰

Functions of privacy

1.24 According to Alan Westin, privacy serves the following functions for individuals and groups in democratic nations:³¹

- (a) *Personal autonomy* - Privacy satisfies the human desire to avoid being manipulated or dominated by others. An invasion of privacy threatens this personal autonomy. By penetrating into an individual's "inner zone" and learning about his secrets, the intruder could expose that individual to ridicule and shame and exert domination over him. Furthermore, every individual lives behind a mask. The consequence can be deadly seriously if the mask is torn off:

"If this mask is torn off and the individual's real self bared to a world in which everyone else still wears his mask and believes in masked performances, the individual can be seared by the hot light of selective, forced exposure. The numerous instances of suicides and nervous breakdowns resulting from such exposures by government investigation, press stories, and even published research constantly remind a free society that only grave social need can ever justify destruction of the privacy which guards the individual's ultimate autonomy."³²

Achieving personal autonomy is also essential to the development and maintenance of individuality. It would relieve the pressure to live up to the expectations of others. Giving protection to individual privacy would facilitate sheltered experimentation and testing of ideas without fear of ridicule or penalty, and would provide an opportunity to alter opinions before they are made public.

- (b) Emotional release - There are at least five aspects of emotional release through privacy:³³
 - (i) Every individual plays a series of roles in daily life. This could generate tensions for many. Besides, individuals can sustain conflicting roles for reasonable periods of time only. To maintain physical and psychological health, there have to be periods of privacy which give individuals "a chance to lay their masks for rest. To be always 'on' would destroy the human organism."

²⁹ Above.

³⁰ *Report of the Committee on Privacy and Related Matter*, ("the Calcutt Report") (London: HMSO, Cmnd 1102, 1990).

³¹ A F Westin, 32-39.

³² A F Westin, 33-34.

³³ A F Westin, 35-36.

- (ii) Privacy also allows individuals to deviate temporarily from social etiquette when alone or among friends and acquaintances, as by swearing or putting feet on the desk.
 - (iii) Privacy serves the “safety-valve” function by allowing individuals to vent their anger at those who exercise authority over them without fear of reprisal. In the absence of such release, people would experience serious emotional pressure.
 - (iv) Privacy is essential for bodily functions and sexual relations.
 - (v) Individuals in sorrow, such as victims of crime or accidents, require privacy to recover. Those who are in public life who have suffered defeats or loss of face also need to retire from public view to recuperate.
- (c) *Self-evaluation* - Individuals need privacy to evaluate the data that they receive for various purposes and to integrate them into meaningful information. Reflective solitude and even day-dreaming during moments of reserve are conducive to creative ideas.³⁴
- (d) Limited and protected communication - Privacy provides individuals with the opportunities to share confidences with their intimates and other professional advisers such as doctors, lawyers and ministers.³⁵

1.25 Ruth Gavison has also given a detailed exposition of the positive functions that privacy has in our lives. She says that privacy is central to the attainment of individual goals such as autonomy, creativity, growth and mental health. By limiting access to individuals we could create an environment which facilitates the development of a liberal and pluralistic society. She explains the advantages of restricting access to an individual:

“By restricting physical access to an individual, privacy insulates that individual from distraction and from the inhibitive effects that arise from close physical proximity with another individual. Freedom from distraction is essential for all human activities that require concentration, such as learning, writing, and all forms of creativity. ... Restricting physical access also permits an individual to relax. Even casual observation has an inhibitive effect on most individuals that makes them more formal and uneasy. ... Furthermore, freedom from access contributes to the individual by permitting intimacy. ... Relaxation and intimacy together are essential for many kinds of human relations, including sexual ones. Privacy in the sense of freedom from physical access is thus not only important for individuals by themselves, but also as a necessary shield for intimate relations.”³⁶

³⁴ A F Westin, 36-37.

³⁵ A F Westin, 38.

³⁶ R Gavison (1980) 89 Yale LJ 421, at 446 - 447. Charles Fried argues that privacy is necessary for the development of love, friendship and trust by giving an individual control over the amount of personal information he would like to share with his friends and loved ones. Love and friendship are inconceivable without the intimacy of shared personal information. C Fried, “Privacy” (1968) 77 Yale LJ 475, 484; C Fried, *An Anatomy of Values: Problems of Personal and Social Choice* (Cambridge: Harvard University Press, 1970).

1.26 Gavison further points out that privacy enables individuals to deliberate and establish opinions without fear of any unpleasant or hostile reaction from others. It enables individuals to continue relationships without denying one's inner thoughts that the other party does not approve. Privacy therefore enhances the capacity of individuals to create and maintain human relations. Exposing an individual to the public eye would subject him to pressure to conform to society's expectations. This would lead to inhibition, repression and even mental illness in serious cases.³⁷

1.27 Apart from serving the individual interest in the attainment of individual goals, privacy also serves the public interest in the development of democracy. Privacy is essential to democratic government, not only because it contributes to the autonomy of the citizen, but also because it promotes liberty of political action:

"This liberty requires privacy, for individuals must have the right to keep private their votes, their political discussions, and their associations if they are to be able to exercise their liberty to the fullest extent. Privacy is crucial to democracy in providing the opportunity for parties to work out their political positions, and to compromise with opposing factions, before subjecting their positions to public scrutiny. Denying the privacy necessary for these interactions would undermine the democratic process."³⁸

1.28 Although the current system of government in Hong Kong is far from being a democracy, the Basic Law has promised that the election of all members of the Legislative Council will be by universal suffrage.³⁹ Since privacy encourages public participation in political decisions by enabling citizens to form judgments and express preferences on social issues, affording adequate protection to privacy will provide a congenial environment for Hong Kong to move towards greater democracy pursuant to the Basic Law. Furthermore, to the extent that public service means loss of expectations of privacy, a society which respects and protects privacy would reduce the costs of running for public office. Privacy therefore helps society attract talented individuals to serve the community.⁴⁰

Conclusion

1.29 Quite apart from the constitutional requirements and the international obligations undertaken by Hong Kong in respect of the right to privacy, there are, indeed, strong arguments why privacy ought to receive the protection of law. To the extent that privacy is a value which underpins other fundamental rights and freedoms, a free and liberal society like Hong Kong which is moving toward greater democracy should respect and protect individual's private life.⁴¹ In our opinion, privacy interests comprise both individual and public elements. The protection of privacy is in the interests of both the individual and society.⁴² It is in the public

³⁷ S Jourard, "Some Psychological Aspects of Privacy" (1966) 31 Law & Contemp Prob. 307.

³⁸ R Gavison (1980), at 456.

³⁹ Basic Law of the HKSAR, Article 68.

⁴⁰ R Gavison (1980), at 456.

⁴¹ See the preamble of the Australian Privacy Charter 1995, quoted in G Greenleaf, "Information and the Law" (1995) 69 ALJ 90, 91.

⁴² An example is the legal prohibition on publishing the names of rape victims. This serves the public interest in ensuring their safety and encouraging the reporting of such crimes. E Paton-

interest to protect the interests of individuals against injury to their emotions and mental suffering. To treat privacy as purely an individual interest and to pit it against other public interests is misguided. An individual whose privacy has been invaded ought to have a remedy in civil law. We acknowledge that it is difficult, if not impossible, to define the parameters of the right of privacy in precise terms, but this problem does not preclude us from examining whether an infringement of the privacy interests embodied in the right of privacy should be made a tort. The desirability of having a tort of privacy which defines privacy in general terms will be discussed in Chapter 6. This discussion will be followed by a detailed examination of the respective privacy interests embodied in the right of privacy.

1.30 We examine in the next chapter whether the right to privacy is compatible with freedom of speech and of the press. Whether the Personal Data (Privacy) Ordinance and the common law are adequate and effective in protecting individual privacy will be discussed in Chapters 3 and 4 respectively. The experience in other jurisdictions will be outlined in Chapter 5.

Simpson, "Human Interests: Privacy and Free Speech in the Balance" (1995) 16 New Zealand Universities LR 225, 242.

Chapter 2 - The right to privacy and freedom of expression

Introduction

2.1 The desire to keep something private frequently appears to conflict with freedom of expression. Protection from unwanted publicity is often perceived as a derogation of the right to freedom of speech and of the press. The common response to the “inherent conflict” between privacy and free speech is to strike a balance between the two “competing interests”, as if giving prominence to one interest would inevitably lead to a sacrifice of the other. But are privacy and free speech always in conflict or in competition with each other? We examine in this chapter whether regulation of unwanted publicity given to details of private life violates freedom of speech and of the press.

2.2 The traditional approach is to use either privacy or free speech as the starting point and then make allowances for the other. If the starting point is the right to privacy, disclosure of private facts would be justified only if it is “outweighed” or “overridden” by a public interest in disclosure. For instance, the Press Council Declaration of Principle on Privacy in the UK (1976) declared that: “The publication of information about the private lives or concerns of individuals without their consent is only acceptable if there is a legitimate public interest overriding the right of privacy.”

2.3 The alternative approach is that suggested by the European Court of Human Rights in *Sunday Times v United Kingdom*.¹ The Court held that it was “faced not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.” The Calcutt Committee adopted this approach. They started from a position that free speech is pre-eminent, but that certain exceptions protecting the individual may prove to be necessary.²

2.4 In Britain, John Browne’s Protection of Privacy Bill gave recognition to the competing interests of freedom of expression and the protection of individual privacy by allowing the defendant in an action for infringement of privacy to show that there was a public interest in using private information. If the defendant was able to satisfy the court that it was a genuine one, it was up to the plaintiff to show that the interest in such use was outweighed by the interest in privacy. Where this balance was evenly weighted the court would rule in favour of freedom of expression and the action would fail.³

¹ (1979) 2 EHRR 245.

² Calcutt Report, para 3.18.

³ CI 2(1). See Law Commission, *Breach of Confidence* (London: HMSO, Cmnd 8388, 1981), paras 6.77-6.82. The draft in the UK Government’s Response attempts to balance the freedom of expression against the right to privacy in a similar manner: “Where the [defendant] shows that the conduct complained of was undertaken for a purpose of legitimate public concern, it is for the [plaintiff] to show that his right to privacy outweighs the right to freedom of expression.” See Department of National Heritage, *Privacy and Media Intrusion* (London: HMSO, Cm 2918, 1995), Annex B, para 9(3). The UK Government’s Consultation Paper on

2.5 We doubt the wisdom of treating privacy and freedom of expression as discrete rights which are mutually exclusive. In our opinion, both the right to privacy and the freedom of expression are of equal importance. Rather than competing with each other, they serve the same values of a free society. Providing better protection to privacy would not impinge on freedom of expression. On the contrary, it would enable individuals exercise the right to free speech in a protected and more congenial environment. We explain how we come to this conclusion.

Freedom of expression

Basic Law of the Hong Kong SAR

2.6 Prior to the handover in July 1997, the rights and freedoms protected by the International Covenant on Civil and Political Rights were entrenched by the Hong Kong Letters Patent.⁴ Since July 1997, the Basic Law of the Hong Kong SAR has replaced the Letters Patent and the Royal Instructions as the constitution of Hong Kong. Article 39 of the Basic Law provides:

“The provisions of the International Covenant on Civil and Political Rights ... as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedom enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.”

2.7 The Preamble of the Basic Law states that the Basic Law was enacted “in order to ensure the implementation of the basic policies of the PRC regarding Hong Kong.” These “basic policies” were elaborated by the PRC Government in Annex I to the Sino-British Joint Declaration on the Question of Hong Kong, including the policy that the Hong Kong Government “shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong, including freedom of the person, of speech, [and] of the press”.⁵

2.8 Article 27 provides that Hong Kong residents are entitled to enjoy “freedom of speech, of the press and of publications”. This Article merely identifies a particular group of rights and freedoms which the Basic Law guarantees. It does not purport to prevent the enactment of restrictions on those rights. Article 39 permits restrictions on the rights to free speech and freedom of the press guaranteed by Chapter III of the Basic Law, provided that these restrictions are provided by law and are compatible with the international covenants on human rights.⁶

International Covenant on Civil and Political Rights

Infringement of Privacy (1993) remarked that it would be more usual for the defendant to have to make out his defence, without the burden shifting back to the plaintiff: para 5.67.

⁴ Paragraph 3 of Article VII. In essence, it provided that restrictions on rights and freedoms that were imposed by legislation passed after 8 June 1991 should not contravene the ICCPR as applied to Hong Kong.

⁵ Annex I, § XIII, first paragraph.

⁶ *Secretary for Justice v Oriental Press Group*, HCMP 407/1998, at 59.

2.9 Freedom of expression is one of the basic human rights protected under the International Covenant on Civil and Political Rights (ICCPR). Paragraphs 2 and 3 of Article 19 of the Covenant provide:

“2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) for respect of the rights or reputations of others;*
- (b) for the protection of national security or of public order (ordre public), or of public health or morals.”*

2.10 It is noteworthy that the following proposed sentence was not included in the General Comment of the UN Human Rights Committee on Article 19: “This is a right the effective enjoyment of which is essential to enable individuals to ensure for themselves the enjoyment of other rights protected in the Covenant.”⁷ It is arguable that the failure to include the sentence indicates that although freedom of expression is important, it is not accorded the pre-eminence given to it under the American constitution.⁸

2.11 Freedom of expression is capable of violating the rights of others, including privacy. Article 19 of the Covenant states that the exercise of the right to freedom of expression carries with it “special duties and responsibilities”. The reference to “special duties and responsibilities” was adopted in order to offer States Parties an express tool to counter abuse of power by the modern mass media. States which supported these proposals were of the opinion that freedom of expression was a “dangerous instrument” as well as precious heritage. They maintained that, in view of the powerful influence the modern media exerted upon the minds of man and upon national and international affairs, the “duties and responsibilities” in the exercise of the right to freedom of expression should be especially emphasised.⁹

2.12 The UN Human Rights Committee has not commented on the nature of these duties and responsibilities except that it is “the interplay between the principle of freedom of expression and such limitations and restrictions which determines the actual scope of the individual’s right.”¹⁰ But the expression is generally presumed to include the duty to present information and news truthfully, accurately and impartially.¹¹ It has also been suggested that it obligates the

⁷ SR 457 para 24.

⁸ See Dominic McGoldrick, *The Human Rights Committee - Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press, 1991), at 461.

⁹ M J Bossuyt, *Guide to the “Travaux Préparatoires” of the ICCPR* (Martinus Nijhoff Publishers, 1987), p 386.

¹⁰ General Comment 10/19 of 27 July 1983, para 2.

¹¹ K J Partsch, “Freedom of Conscience and Expression, and Political Freedoms”, in L Henkin (ed), *The International Bill of Rights - The ICCPR* (1981), p 210.

speakers not to abuse their power at the expense of others.¹² In determining the nature of the “duties and responsibilities”, one has to find out the status of the person in question, the content of the information expressed, and the medium chosen for such expression. It is arguable that a person who chooses to publish in a newspaper, private information about children, victims of crime, or other vulnerable persons, is under a special responsibility not to harm the individual concerned.

2.13 By virtue of the ICCPR, freedom of expression may be subject to such restrictions as are necessary for respect of the rights of others. Manfred Nowak remarks that none of the restrictions on freedom of expression, including censorship, prohibition of dissemination, confiscation, prohibitions regarding speaking at an assembly etc, is absolutely prohibited by Article 19.¹³ He says each type of interference must be examined on the basis of the limitations in paragraph 3 whether it is permissible in a particular case. The *travaux préparatoires* reveals that only with respect to prior censorship that an absolute prohibition was intended.¹⁴

2.14 A permissible restriction must be “provided by law”, may only be imposed for one of the specified purposes, and must be “necessary” for achieving that purpose. The requirement of necessity implies that the restriction must be proportional in severity and intensity to the purpose being sought. In contrast to other provisions in the Covenant, Article 19(3) lacks a reference to the necessity in a democratic society. It is therefore arguable that the relevant criterion for evaluating the necessity of restrictions is not the principle of democracy but rather whether it was proportional in a particular case.¹⁵

2.15 Although the General Comment given by the Human Rights Committee does not comment on the scope of the specified grounds of restriction in paragraph 3, the Committee has held that restrictions might be considered acceptable on the bases that a programme encourages homosexual behaviour, that the audience cannot be controlled, and that harmful effects on minors cannot be excluded.¹⁶ Nowak suggests that the “other rights” whose protection might justify restrictions on freedom of expression also include the right of privacy under Article 17:

“Even though the drafters of Art. 19 expressly adopted the right to seek information actively, this does nothing to change the duty on States Parties flowing from Art. 17 to protect the intimacy of the individual against sensational journalism. Above all, the legislature must prevent abusive access to personal data. Furthermore, Art. 14(1) expressly provides the possibility of limiting the access of the public and particularly the media to court proceedings in the interest of the private lives of the parties.

The protection of the rights and reputations of others may be ensured by measures of criminal, civil and/or administrative law. For instance,

¹² M Nowak, *UN Covenant on Civil and Political Rights - CCPR Commentary* (Strasbourg: N P Engel, 1993), 349.

¹³ M Nowak, above, 345.

¹⁴ A member said at a meeting of the UN Commission on Human Rights that “There was all the difference in the world between a system of censorship and a reminder to the journalist of his duties and responsibilities and of the limitations which might be placed upon him in the exercise of the right to freedom of expression.” See M J Bossuyt, *Guide to the “Travaux Préparatoires” of the ICCPR* (Martinus Nijhoff Publishers, 1987), pp 398-9.

¹⁵ M Nowak, above, pp 351-2.

¹⁶ *Hertzberg v Finland*, Doc A/37/40, p 161, para 10.4.

*criminal provisions dealing with defamation, derision or slander are as justified by Art. 19(3) as copyright provisions or compensation claims under civil law by a person whose honour has been violated or privacy otherwise infringed.*¹⁷

2.16 As regards the expression “protection of morals” in Article 19, it may imply safeguarding the moral ethos or moral standards of a society as a whole, but may also cover protection of the moral interests and welfare of certain individuals or classes of individuals who are in need of special protection because of lack of maturity, mental disability or state of dependence.¹⁸ As far as the protection of individuals is concerned, the expression protects the psychological as well as the physical well-being of individuals and, where a child is involved, it covers a child’s mental stability and freedom from serious psychic disturbance.¹⁹

2.17 Even if an interference cannot be brought within the exceptions in paragraph 3, resort may be had to Article 5(1) of the ICCPR which authorises interference in a narrow range of circumstances. This article ensures that the right to freedom of expression would not be misused by private parties to destroy the rights of others. It provides that:

“Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.”

2.18 The purpose of Article 5(1) is to prevent the abuse of any one of the rights and freedoms declared in the Covenant for the purpose of prejudicing one or more of the others. The rights capable of being misused includes the freedom of expression in Article 19. Hence, the freedom may be denied to a person who incites racial discrimination. For present purposes, there are two aspects to Article 5(1). First, any limitation on exercise of the right to freedom of expression must not be greater than is provided for in the Covenant. Secondly, the exercise of that right cannot aim at the destruction of the right of privacy under Article 17.

European Convention on Human Rights

2.19 Freedom of expression is also protected under Article 10 of the European Convention on Human Rights. The European Court of Human Rights expressed the view that freedom of expression constitutes “one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment,”²⁰ and that it is applicable to information and ideas that “offend, shock or disturb the State or any section of the community”.²¹

¹⁷ M Nowak, above, p 354. P van Dijk and G J H van Hoof express the view that the restriction “protection of the reputation or rights of others” is relevant if the protection of individual privacy is called for: P van Dijk and G J H van Hoof, *Theory and Practice of the European Convention on Human Rights* (Deventer-Boston: Kluwer Law & Taxation Publishers, 2nd edn, 1990), p 423.

¹⁸ *Dudgeon v UK* (1981) 4 EHRR 149, para 47.

¹⁹ *X v Sweden*, CD, vol 7, p 18.

²⁰ *Lingens v Austria* (1986) 8 EHRR 407, 418.

²¹ *Prager and Obershlick v Austria* (1995) 21 EHRR 1, 21.

2.20 In enunciating the principles underlining the freedom of expression, the Strasbourg authorities have put a high value on informed discussion of matters of public concern. The European Court has therefore ascribed a hierarchy of value, first to political expression, then to artistic expression and finally to commercial expression.²² Furthermore, the Court is mindful of the fact that journalistic freedom also covers “possible recourse to a degree of exaggeration, or even provocation.”²³ Although it must not overstep certain bounds set, *inter alia*, for the protection of the reputation of others, it is nevertheless incumbent on it “to impart - in a way consistent with its duties and responsibilities - information and ideas on political questions and on other matters of public interest.”²⁴

2.21 Common law recognise that press freedom has to be balanced against other interests. In carrying out this balancing exercise in a particular case, a judge would distinguish what he thinks deserves publication in the public interest and things in which the public are merely interested. Hoffmann LJ points out that a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. In his judgment:²⁵

“Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which ‘right-thinking people’ regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute. ...

It cannot be emphasised too strongly that outside the established exceptions, or any new ones which Parliament may enact in accordance with its obligations under the [European Convention on Human Rights], there is no question of balancing freedom of speech against other interests. It is a trump card which always wins.”
(emphasis added)

2.22 Jurisdictions in Europe which are State Parties to the European Convention on Human Rights treat the rights of privacy and free expression as fundamental human rights having equal status. Both rights are subject to limitations necessary for the protection of the rights of others.²⁶ There is no rights hierarchy under the Convention by reference to which a conflict between privacy and free expression may be resolved. According to this view, the two rights must be balanced. One will not inevitably trump the other.²⁷

2.23 Under the European Convention, the exercise of freedom of expression may be subject to such restrictions as are “necessary” in a democratic society for the protection of the rights of others. The adjective “necessary” has been construed by the European Court of Human Rights as implying the existence of a “pressing social need”. In addition, the interference must be “proportionate to the

²² D J Harris, M O'Boyle & C Warbrick, *Law of the European Convention on Human Rights* (Butterworths, 1995), at 414.

²³ *Prager and Obershlick v Austria* (1995) 21 EHRR 1, at 21.

²⁴ Above, at 19 - 20. Although the European Court has held that it is incumbent on the press to impart information and idea on matters of public interest, the “special responsibility” of the press has also been used as an additional argument for the justification of the ban on publication in *Handyside v UK* (1976) 1 EHRR 737.

²⁵ *R v Central Television Plc* [1994] Fam 192, at 203.

²⁶ European Convention on Human Rights, Articles 8(2) and 10(2).

²⁷ J Craig & N Nolte, “Privacy and Free Speech in Germany and Canada: Lessons for an English Privacy Tort”, [1998] EHRLR Issue 2, p 162, at 163 – 165.

legitimate aim pursued” and the reasons adduced to justify it must be “relevant and sufficient”.²⁸ The proportionality test implies that the pursuit of the countervailing interests mentioned in Article 10 of the Convention has to be weighed against the value of open discussion of topics of public concern. When striking a fair balance between the countervailing interests and the right to freedom of expression, the court should ensure that members of the public would not be discouraged from voicing their opinions on issues of public concern for fear of criminal or other sanctions.²⁹

2.24 The European Commission of Human Rights agrees that, in general, the restriction of true statements requires the application of a stricter test of necessity than the restriction of false or misleading allegations. However, it recognises that the truth of information cannot be the only criterion for being allowed to publish it. True statements can interfere with legitimate interests which deserve an equal degree of protection as freedom of expression, eg where the sphere of privacy or the honour and reputation of a person is at issue or where legal obligations of confidentiality have been breached.³⁰ The European Court of Human Rights affirms this view, holding that:

“even the publication of items which are true and describe real events may under certain circumstances be prohibited: the obligation to respect the privacy of others or the duty to respect the confidentiality of certain commercial information are examples. In addition, a correct statement can be and often is qualified by additional remarks, by value judgements, by suppositions or even insinuations. It must also be recognised that an isolated incident may deserve closer scrutiny before being made public; otherwise an accurate description of one such incident can give the false impression that the incident is evidence of a general practice.”³¹

First Amendment to the American Constitution

2.25 Justice Brandeis explained the origins of the First Amendment to the American Constitution, which states in part, “Congress shall make no law ... abridging the freedom of speech, or of the press ...”:

“Those who won our independence ... valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.”³²

²⁸ *Barthold v Germany* (1985) 7 EHRR 383, para 55.

²⁹ *Barfod v Denmark* (1989) 13 EHRR 493 at 499.

³⁰ *Markt Intern and Beermann v Germany* (1987) 11 EHRR 212 at 234 (European Commission decision).

³¹ *Markt Intern and Beermann v Germany* (1989) 12 EHRR 161 at 175 (European Court decision).

³² *Whitney v California*, 274 US 357, 375 (1927).

2.26 The US Supreme Court held that the First Amendment supports the view that the press must be left free to publish news without censorship, injunctions or prior restraints:

*“In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government’s power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.”*³³

2.27 However, the First Amendment does not confer an absolute right to publish, without responsibility, whatever one may choose. The authors of *American Jurisprudence* elaborate:

*“The extraordinary protections afforded by the First Amendment’s guarantee of free speech and press carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly, a duty widely acknowledged but not always observed by the press. It does no violence to the value of freedom of speech and press to impose a duty of reasonable care upon those who would exercise such freedoms; the states have a substantial interest in encouraging speakers to carefully seek the truth before they communicate, as well as in compensating persons actually harmed by false descriptions of their personal behavior. ... Whenever the constitutional freedoms of speech and associations are asserted against the exercise of valid governmental powers, a reconciliation must be effected, requiring an appropriate weighing and balancing of the respective interests involved.”*³⁴

2.28 Hence, although the language is absolute in its prohibition of limitations on the press, the right of free speech is not absolute at all times and under all circumstances. Freedom of speech does not comprise the right to speak whenever, however, and wherever one pleases, and the manner, place, or time of public discussion can be constitutionally controlled.³⁵

2.29 As Laurence Tribe explains, the US Supreme Court has developed two approaches for resolving First Amendment claims.³⁶ Government regulation which aims at ideas or information, in the sense of singling out actions for government control or penalty because of the specific message or viewpoint such actions express, is presumptively at odds with the First Amendment. On the other hand, if the regulation is not aimed at ideas and information but has the indirect result of restricting speech, the regulation is constitutional as long as it does not unduly restrict the flow of information and ideas. The latter approach requires the “balancing” of competing interests in the sense that the values of freedom of expression and the government’s regulatory interests will be balanced on a case-by-

³³ *New York Times Co v US*, 403 US 713 at 717 (1971).

³⁴ 16A Am Jur 2d, Constitutional Law, § 491 (footnotes omitted).

³⁵ 16A Am Jur 2d, Constitutional Law, § 491.

³⁶ L H Tribe, *American Constitutional Law* (New York: The Foundation Press, 2nd edn, 1988), § 12-2.

case basis. Hence, the American government is allowed to regulate speech on the ground that the expression falls outside the First Amendment's purposes or fails to satisfy its premises, as when the message suppressed poses a "clear and present danger" or otherwise falls within one of the categories of expression which are not privileged by the First Amendment, such as: (1) portrayal of minors in sexual roles, (2) infringement of copyright, (3) obscenity, (4) defamatory falsehood, (5) contempt of court, and (6) several categories of atomic, military and intelligence information.

2.30 Likewise, it is well settled that the right of free press may be subject to legislative restriction within proper limits. Although states cannot violate the constitutional guarantee of freedom of the press, the publisher of a newspaper or magazine has no special privilege to invade the rights and liberties of others.³⁷ They are subject to reasonable regulation like other citizens. So long it does not involve suppression or censorship, the regulation of newspapers is as broad as that over other private business.³⁸ The Court has held that the power to regulate the business of newspaper publishers may be exercised in the interest of public health, morals, safety, and welfare.³⁹ Nonetheless, a state may not punish a newspaper for the publication of truthful and lawfully obtained information about a matter of public significance, except when necessary to further a state interest of the highest order.⁴⁰

Reconciling privacy with freedom of speech

2.31 In order to understand the principles underlying freedom of speech, we examine in the following paragraphs, the political and philosophical arguments which might justify its inclusion in the international covenants. According to traditional views, the free speech principle serves four main functions: (a) ascertainment and publication of truth; (b) individual self-development and fulfilment; (c) participation in a democracy; and (d) safety valve function.⁴¹

Ascertainment and publication of truth

2.32 In accordance with this theory, open discussion with no restraint will lead to the discovery of truth. However, not all speech is protected by the free speech principle. Even the most liberal democracies ban speech which incites violence, interferes with the administration of justice, or discloses state secrets or confidential commercial information.⁴² Likewise, the requirement of decency and the interests in the protection of children require that hard-core pornography should be prohibited. Whereas publications about public officials and public figures are protected if they contain information relevant to the public's assessment of their suitability for office or general worth as a public figure, newspaper articles about the private lives of ordinary individuals do not generally constitute "speech" if the publication cannot be justified on any of the grounds supporting free speech.⁴³

³⁷ *Associated Press v NLRB*, 301 US 103, 132-133, 81 L Ed 953 (1937).

³⁸ *Chronicle & Gazette Publishing Co Inc*, 168 ALR 879, 884.

³⁹ 58 Am Jur 2d, Newspapers, § 19 & § 20.

⁴⁰ 58 Am Jur 2d, Newspapers, § 26. The American Supreme Court does not accept the contention that truthful publication may never be punished consistent with the First Amendment: *The Florida Star v BJF* 491 US 524, 105 L Ed 2d 443 (1989).

⁴¹ For a general understanding of freedom of speech, see F Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982).

⁴² E Barendt, *Freedom of Speech* (Oxford: Clarendon Press, 1987) pp 11 and 190 (concluding that "the case for applying for a free speech principle to invalidate actions for privacy is very weak, even where the disclosures are accurate.").

⁴³ E Barendt, above, p 189. See also M B Nimmer, "The Right to Speak from *Times* to *Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy" (1968) 56 Cal LR 935.

Although everyone should, in principle, have the liberty to express and publish true facts, this liberty does not extend to truth which causes private individuals annoyance or embarrassment without any corresponding benefit to the public. The publication of private facts which interferes with a person's private realm and is of no legitimate concern to the public should be restrained even though the facts are true.

2.33 Frederick Schauer argues that it is not always the case that knowing the truth is better than living under a misconception. Even if we are to accept that it is always better to know the truth than to be deceived by a false belief, knowing the truth does not necessarily put one in a better position than one who has no belief at all. The gain in knowledge may simply be an addition rather than the substitution of the true for the false.⁴⁴ Furthermore, it does not follow that an increase in knowledge by a person is good in itself, either for that person or for society. Knowledge that an identifiable individual is a gay, an alcoholic or a welfare recipient has no intrinsic value if the individual concerned is merely an ordinary citizen. An increase of knowledge about such private facts might harm the interests of the individuals concerned without any corresponding benefit to society and the publisher.

2.34 We would add that giving undue emphasis to attainment of truth would render investigative journalism and academic research using human subjects difficult:

“The more reliable and systematic methods of attaining truth about human matters, such as research and responsible ‘human interest’ journalism, could be threatened by the sensationalised and often misleading disclosures of the tabloid press. Journalists themselves get many of their best stories by guaranteeing the anonymity of their informants or subjects, or by agreeing that some things will be ‘off the record’ Often the truth on social issues and matters of lifestyle and human behaviour will more likely be discovered by protecting privacy than by violating it.”⁴⁵

Individual self-development and fulfilment

2.35 Freedom of expression is essential to the realisation of a person's character and potentialities as a human being. Restraining a person from expressing himself would not only inhibit the growth of his personality but would also affront his dignity. It is only through public discussion that individuals could formulate their own beliefs and develop intellectually and spiritually. But Alan Westin points out that privacy also contributes to the development of individuality:

“This development of individuality is particularly important in democratic societies, since qualities of independent thought, diversity of views, and non-conformity are considered desirable traits for individuals. Such independence requires time for sheltered experimentation and testing of ideas, for preparation and practice in

⁴⁴ F Schauer, “Reflections on the Value of Truth” (1991) 41 Case Western Reserve LR 699, 707-711.

⁴⁵ E Paton-Simpson, “Human Interests: Privacy and Free Speech in the Balance” (1995) 16 New Zealand Universities L R 225, 237.

*thought and conduct, without fear of ridicule or penalty, and for the opportunity to alter opinions before making them public.*⁴⁶

Freedom of speech and privacy therefore complement each other in working toward the same goal of individual self-fulfilment.

Participation in a democracy

2.36 The free speech principle may also be viewed as a means by which citizens participate in social and political decision-making. Public discussion and debate of social and political issues assist citizens in understanding such issues and forming their own opinion on matters affecting their lives. This would in turn enable them to check government misconduct and to participate effectively in the operation of a democratic government. Freedom of speech is therefore essential to representative self-government. The argument from democracy is particularly applicable to the press because speech via the mass media contributes more to the democratic dialogue than speech via other means.

2.37 However, free speech is not the only means to facilitate citizen participation in social and political decision-making. One of the basic requirements of democracy is the moral autonomy of citizens. To the extent that privacy fosters and encourages autonomy, privacy is also important to democratic government.⁴⁷ Allowing free discussion in private would contribute to a pluralistic society and protect those who question mainstream thoughts and values. Protecting individuals from unwanted publicity therefore facilitates public discussion and effective participation in a democratic government. The freedom to express ideas and opinions would be undermined if individual privacy is not protected against intrusion.

2.38 Ruth Gavison adds that protecting privacy can attract talented individuals to serve the community by assuring that they would not be exposed to unwanted publicity merely because they enter public life.⁴⁸ An absolute claim to free speech would discourage people from participating in public affairs:

“Because it is probably possible to unearth some embarrassing facts about anyone, many individuals may decide to avoid becoming public figures. Therefore, a pattern of investigation and disclosure may seriously limit the life plans of worthy individuals and cost society its more explorative and inventive potential leaders. The leaders are then likely to be individuals who have never tried anything nonconformist or extraordinary, who never challenged accepted norms, and who never made mistakes.”⁴⁹

2.39 As far as individual self-fulfilment and citizen participation are concerned, the interests in privacy are consistent with those in freedom of speech. Privacy and free speech serve the same values and are complementary to each other:

⁴⁶ A F Westin, *Privacy and Freedom* (New York: Atheneum, 1967) 34. See also R Gavison, “Privacy and the Limits of Law” (1980) 89 Yale LJ 421, at 448 and 449-450.

⁴⁷ R Gavison, “Privacy and the Limits of Law” (1980) 89 Yale LJ 421, 455.

⁴⁸ R Gavison, “Privacy and the Limits of Law” (1980) 89 Yale LJ 421, 456.

⁴⁹ R Gavison, “Too Early for a Requiem: Warren and Brandeis Were Right on Privacy vs. Free Speech” (1992) 43 S Carolina L Rev 437 at 469.

“In many cases where privacy and free speech conflict at a superficial level, they are at a deeper level merely two different modes of giving effect to the same underlying concerns. It is possible that in at least some of these cases, free speech values will be better served by protection of privacy than by permitting publication.”⁵⁰

Safety valve function

2.40 According to Thomas Emerson,⁵¹ freedom of expression provides a framework in which the conflict necessary to the progress of a society can take place without destroying the society. Open discussion promotes greater cohesion in a society because people are more ready to accept decisions that go against them if they have a part in the decision making process. On the other hand, suppression of discussion has the following disadvantages:

- it makes a rational judgment impossible, substituting force for reason;
- it promotes inflexibility and stultification, preventing society from adjusting to changing circumstances or developing new ideas; and
- it conceals the real problems confronting a society, diverting public attention from the critical issues.

Freedom of the press

General

2.41 The press is singled out for protection because it is more vulnerable to government control than individual speakers. Unless checked by the constitution, the government can impose restrictions on the press which would not be applicable to individual speakers, such as heavy taxation on publishing companies, requirements of large bonds to start a newspaper, and injunctions against future issues.⁵²

2.42 In an attempt to resolve the controversy as to whether the right to press freedom is a right of proprietors or a right of editors or journalists, it has been argued that press freedom is an institutional right rather than a set of individual free speech rights exercised by the individual journalists and proprietors.⁵³ Seen in this perspective, the primary purpose of the press clause is to create a fourth institution outside the Government as an additional check on the executive, legislature and judiciary.⁵⁴ It is in the interest of an informed electorate that the press should be free to seek and impart information; in particular, to inquire and scrutinise the actions of government. The institutional nature of the press clause also means that the government necessarily retains some discretion in deciding how the press is to be structured. In the opinion of Edwin Baker, rules specifically directing at the press should not be held unconstitutional under the press clause unless they are designed to undermine the press' integrity as an institution or its independence from government.⁵⁵

⁵⁰ E Paton-Simpson, above, p 234.

⁵¹ T I Emerson, *The System of Freedom of Expression* (New York: Random House, 1970), 6-7.

⁵² Z Chafee Jr, *Government and Mass Communications* (1947) at 34-35; cited in David Lange, "The Speech and Press Clauses" (1975) 23 UCLA Law Rev 77, fn 4.

⁵³ E Barendt, "Inaugural Lecture - Press and Broadcasting Freedom: Does Anyone have any Rights to Free Speech?" [1991] Current Legal Problems 63, at 79.

⁵⁴ P Stewart, "Or of the Press", (1975) 26 Hastings LJ 631.

⁵⁵ E Baker, *Human Liberty and Freedom of Speech* (Oxford University Press, 1989), ch 11.

2.43 Under the Basic Law, the Government of the Hong Kong Special Administrative Region is accountable to the Legislative Council which is constituted by election. The Basic Law guarantees that the election of all Council members shall be by universal suffrage. In a society moving towards a representative democracy, the electorate would like to find out more about the workings of the Government and what are being done in their name by their representatives in the legislature. If democracy is to function effectively, it is essential that the public is adequately informed as to the actions of Government officials and the elected representatives. That necessitates a free press. The European Court of Human Rights held that:⁵⁶

“Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.”

2.44 Vincent Blasi argues that free expression is valuable in part because of the function it performs in checking the abuse of official power.⁵⁷ His study reveals that those who drafted the First Amendment placed great emphasis on the role free expression can play in guarding against breaches of trust by public officials. Since the Government has more resources and political power than any political and private organisations, there is a need for the press which is well-organised and well-financed to serve as a counter-force to government. The press could play the role of professional critics who can acquire enough information to pass judgment on the actions of government, and disseminate their information and judgments to the general public. The American Supreme Court held:⁵⁸

“The Constitution specifically selected the press ... to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by government officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve.”

2.45 In summary, the media is a “purveyor of information and public watchdog”.⁵⁹ It provides a forum for public debate on topics affecting the life of the community. It ensures that the government is accountable to the public through, not only the dissemination of information, but also the exposure of corruption and abuse of power. To perform the checking and informative functions, the press must be constitutionally protected against governmental intervention in their internal operations.

Application of general laws to the news media

⁵⁶ *Castells v Spain* (1992) 14 EHRR 445 at 476.

⁵⁷ V Blasi, “The Checking Value in First Amendment Theory”, American Bar Foundation Research Journal (1977), No 3, p 521.

⁵⁸ *Mills v Alabama*, 384 US 214, 219 (1966).

⁵⁹ *Barthold v Germany* (1985) 7 EHRR 383.

2.46 Although press freedom is instrumental in the realisation of other rights and freedom, this does not mean that the press is free to investigate or publish anything they wish or anything that their readers wish to know. The Royal Commission on the Press in the United Kingdom explained:

“[P]roprietors, contributors and editors must accept the limits to free expression set by the need to reconcile claims which may often conflict. The public, too, asserts a right to accurate information and fair comment which, in turn, has to be balanced against the claims both of national security and of individuals to safeguards for their reputation and privacy except when these are overridden by the public interest. But the public interest does not reside in whatever the public may happen to find interesting, and the press must be careful not to perpetrate abuses and call them freedom.”⁶⁰

2.47 The Younger Committee was of the view that a substantial invasion of privacy may be justifiable where it could be shown that the object was to give news “in the public interest”, but much less often, if the object was to give news merely “of public interest”.⁶¹ They concluded that the processes of inquiry involved in investigative journalism should not be treated by the law in any different way from other journalistic activities. Investigative journalism was in principle a legitimate function of the press “provided that it is carried on within the same rules which bind the ordinary citizen and the ordinary working journalist alike.”⁶²

2.48 The press in the United States receives constitutional protection under the First Amendment. But Thomas Emerson has pointed out that such protection does not invest the press with a power to compel the production of private information:

“The press has a constitutional right to obtain information from private sources on a voluntary basis, but it does not have any constitutional power to compel the production of such information. Moreover, there are a number of limitations upon the methods that may be employed. Thus the press is controlled in its quest for information by traditional laws against trespass, theft, fraud, wiretapping, and so on. These recognized restrictions, which are similar to those protecting the right of privacy against any physical intrusion, have not occasioned any serious conflict”⁶³

2.49 The Supreme Court of the United States has affirmed that the First Amendment is not a license for the press to violate otherwise generally applicable laws. It noted that there is a “well-established line of decisions” holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and

⁶⁰ Royal Commission on the Press, *Final Report*, (London, Cmnd 6810, 1977), para 2.2.

⁶¹ *Report of the Committee on Privacy* (Chairman: The Rt Hon Kenneth Younger) (London: HMSO, Cmnd 5012, 1972), para 157.

⁶² Above, para 184. In *Lea v Justice of the Peace Ltd*, *The Times*, 15 March 1974, the court held that “the press has no right to go upon private property or into private places and intrude upon private people and into private rights, and that the standard of conduct and manners demanded of them is as high a standard as should be demanded of every citizen in a civilised community.” See also *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892.

⁶³ T I Emerson, above, p 396.

report news.⁶⁴ The lower federal and state courts have also rejected the argument that the press clause in the Constitution protects the press from criminal and civil liability. In *Dietemann v Time*, the Ninth Circuit held that the constitutional guarantee of the freedom of the press had never been construed to accord the media immunity from torts or crimes committed during the course of news-gathering:

*“We agree that newsgathering is an integral part of news dissemination. We strongly disagree, however, that the hidden mechanical contrivances are ‘indispensable tools’ of newsgathering. Investigative reporting is an ancient art; its successful practice long antedates the invention of miniature cameras and electronic devices. The First Amendment is not a licence to steal, or to intrude by electronic means into the precincts of another’s home or office. It does not become such a licence simply because the person subjected to the intrusion is reasonably suspected of committing a crime.”*⁶⁵

2.50 In Hong Kong, the media has always been subject to limitations imposed by the criminal law, including the laws of copyright, theft, fraud and other like offences. The freedom of the press under the Basic Law gives journalists a right to obtain information from private sources on a voluntary basis only. It does not give the press a power to compel a citizen to release information about himself which he is unwilling to disclose. Nor does it accord journalists immunity from liability for intruding upon the seclusion or solitude of another. Prohibiting the use of intrusive means to collect personal data would not violate the media’s right to freedom of the press. The media can always practise investigative journalism without employing intrusive means. As far as news-gathering activities are concerned, the freedom of the press is the freedom to gather news by fair and lawful means; it is not a freedom to gather news by means which are unlawful or unfair. From the readers’ and viewers’ point of view, they will continue to enjoy the right to receive information obtained by fair and lawful means.

2.51 Another point of significance is that the press in Hong Kong is not subject to any licensing controls. The registration of a local newspaper under the Registration of Local Newspapers Ordinance (Cap. 268) is purely a matter of formality. The registration fee is nominal and there are basically no restrictions on who can own a newspaper. If the press could enjoy privilege in the gathering of news, any person, including fraudsters and criminals, could take advantage of this privilege simply by registering as a newspaper proprietor. Needless to say, such a privilege is open to serious abuse. Insofar as law enforcement officers have to work within the confines of law and subject to all the checks and balances in the system, so should journalists who do not have to be registered with any professional body and are not accountable to anyone except their employers. Our views on the proposal to grant immunity to the media is best represented by the following opinion delivered by Fortas J in the American case of *Time v Hill*:⁶⁶

“The courts may not and must not permit either public or private action that censors or inhibits the press. But part of this responsibility is to preserve values and procedures which assure the ordinary citizen that the press is not above the reach of the law - that its special

⁶⁴ *Cohen v Cowles Media Co*, (1991) 115 L Ed 2d 586, 595-6. See 58 Am Jur 2d, Newspapers, § 20.

⁶⁵ *Dietemann v Time*, 449 F2d 244 at 249 (9th Cir, 1971). See also *Galella v Onassis*, 487 F2d 986 (2d Cir 1973); *Houchins v KQED* (1978) 438 US 1; 69 ALR4th 1059, 1078.

⁶⁶ *Time, Inc v Hill*, 385 US 374 (1967) at 420.

prerogatives, granted because of its special and vital functions, are reasonably equated with its needs in the performance of these functions. For this Court totally to immunize the press - whether forthrightly or by subtle indirection - in areas far beyond the needs of news, comment on public persons and events, discussion of public issues and the like would be no service to freedom of the press, but an invitation to public hostility of that freedom."

2.52 Press freedom under Article 27 of the Basic Law must be weighed against other rights and freedoms specified in the Basic Law. Of particular relevance to our study are the right not to be subjected to "arbitrary or unlawful ... intrusion into a resident's home or other premises" under Article 29 and the right to "freedom and privacy of communications" under Article 30. Except for a few privileges recognised by the law, the press should not have any special rights distinct from those of the ordinary citizen.

Freedom to seek, impart and receive information

2.53 Article 19 of the ICCPR provides that freedom of expression includes "freedom to seek, receive and impart information and ideas of all kinds". A motion to replace the word "seek" with "gather", thus excluding the right of active inquiry, was defeated in the UN General Assembly. The States voting against the motion stated that active steps to procure and study information should be protected and that any abuse on the part of journalists could be sufficiently prevented under the limitations clause in paragraph 3.⁶⁷ The right to seek information is of particular importance to the press. The right of the press to acquire information is justified on the grounds that it is desirable to have an informed electorate which is able to assess the wisdom of governmental decisions. Lord Simon said:

"The first public interest is that of freedom of discussion in a democratic society. People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on the facts and arguments relevant to the decisions. Much of such fact finding and argumentation necessarily has to be conducted vicariously, the public press being a principal instrument. This is the justification for investigative and campaign journalism."⁶⁸

2.54 No citizen can obtain for himself all the information needed for the intelligent discharge of his political and social responsibilities. The dissemination of information by the press is often the means by which the public first discovers that an issue is a matter of public importance. The American Supreme Court acknowledged that "the free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrence."⁶⁹ Although the Supreme Court has rejected the argument that the First Amendment creates a special right of the press to gain access to information, it has acknowledged that "without some protection for seeking out the news, freedom of the press could be eviscerated."⁷⁰

⁶⁷ M Nowak, above, 343.

⁶⁸ [1974] AC 273, 315.

⁶⁹ *Estes v Texas*, 381 US 532, 539 (1965)

⁷⁰ *Branzburg v Hayes*, 408 US 665, 681 (1971).

2.55 However, the argument that it is a function of the press to keep the public informed on social issues can only justify a right to impart or receive information without undue interference. It does not give the press a privilege to compel others to disclose information which they are unwilling to impart, nor does it entitle the press to use intrusive means to acquire personal information which others wish to keep private. The freedom to seek and receive information under Article 19 imposes no duty on any person to disclose information that he is reluctant to disclose. It does not provide a person with a right to extract information from an unwilling speaker.⁷¹

2.56 The European Convention on Human Rights makes it clear that the freedom to receive information and ideas is a freedom from interference by public authority.⁷² The right envisages access to general sources of information only. It does not entitle a person to obtain information from someone who is unwilling to impart information.⁷³ The right is therefore nothing more than a liberty to receive, without undue interference by the public authorities, information acquired from or imparted by a willing speaker. Freedom of speech and of the press are implicated where an injunction is sought against publication of personal information. This freedom is not violated if an injunction is sought against unlawful intrusion upon privacy by the press.⁷⁴

Freedom of expression on the Internet

2.57 The Internet is an international network of interconnected computers. It has been described as the posters of the late twentieth century. It allows individuals to publish on computer networks without revealing their true identity. It can enhance an individual's ability to promote truth, political and social participation and self-fulfilment. The cost is relatively low and it is available to people of modest means in Hong Kong.

2.58 About 40 million people used the Internet in 1996. This figure is expected to grow to 200 million by 1999.⁷⁵ Internet users may take advantage of various communication and information retrieval methods, including electronic mail, automatic mailing list services ("listservs"), "newsgroups", "chat rooms", and the "World Wide Web". All of these methods can be used to transmit sound, pictures and moving video images. They are available to anyone with access to the Internet. Any individual or organisation with a computer connected to the Internet can publish information to a world-wide audience consisting of millions of readers and viewers. The publisher may either make the material accessible to all Internet users, or restrict access to a group, such as those willing to register or pay for the right. One commentator explains how the information age has changed passive readers and viewers into interactive publishers and broadcasters:

⁷¹ See E Barendt, *Freedom of Speech*, (Oxford: Clarendon Press, 1987), chapter III.5.

⁷² Article 10.

⁷³ *Z v Austria*, 56 DR 13 (1988); 16A Am Jur 2d, Constitutional Law, §477. See P van Dijk & G J H van Hoof, *Theory and Practice of the European Convention on Human Rights* (The Netherlands: Kluwer Law and Taxation Publishers, 1990), at 417-418.

⁷⁴ T I Emerson, above, 394, citing *Galella v Onassis*, 487 F 2d 986 (2d Cir 1973) as authority.

⁷⁵ The District Court in *American Civil Liberties Union v Reno* 929 F Supp 824, 830-849 (ED Pa 1996) made extensive findings of fact on the character and dimensions of the Internet. The Supreme Court decision on 26 June 1997 (No 96-511), available at <<http://supct.law.cornell.edu/supct/html/96-511.ZO.html>>, contains a useful summary of such findings.

“The information superhighway will allow for two or more speakers to exchange information interactively. In addition, unlike the telephone, the information superhighway will allow individuals to communicate with large groups of people, turning more users into publishers by magnifying the reach of their message. These technological evolutions will shift the locus of editorial control from broadcasters and publishers toward viewers and users.”⁷⁶

“With current technology, the user is largely a passive recipient of information; except when using the telephone, she is actually not a speaker at all, but a viewer or listener. Interactivity will soon characterize all future media, however. Courts have already recognised that the First Amendment protects telephone callers’ speech. Presumably, such protection would also extend to other forms of interactive communications over the superhighway. Indeed, the ability to communicate interactively with a large segment of the public through point-to-multipoint transmissions will reinforce users’ First Amendment interests, in part because the speech will contribute to public discourse rather than to a merely private conversation.”⁷⁷

Privacy in networked communications

2.59 An individual’s privacy may be invaded by the publication of personal information on the Internet. It may also be invaded by obtaining unauthorized access to personal information on the Internet. Since e-mail facilitates publication and redistribution of personal information to large groups of people, the harm which might be caused to the individual by publishing sensitive information about him on the Internet is likely to be far more substantial than the publication of the same information in a local newspaper or magazine. The ability to reach a wide audience has given rise to concerns about loss of privacy. The Hon John Sopinka of the Supreme Court of Canada wrote:

“There is no doubt that electronic media have expanded the potential for individuals to express their views and engage in a free and open exchange of ideas. ... However, the greater the quantity of expression, the greater the likelihood that people will be exposed to messages which disregard the rights of persons living in a free and democratic society.”⁷⁸

“The fear of loss of personal privacy has dramatically increased due to the ease with which information can now be assimilated, processed and stored. Technology has afforded law enforcement agencies opportunities for surveillance of Orwellian proportions. To preserve our privacy, it may be necessary to regulate the developing

⁷⁶ “Note: The Message in the Medium: The First Amendment on the Information Superhighway”, (1994) 107 *Harvard Law Review* 1062, 1082. See also R Wacks, “Privacy in Cyberspace: Personal Information, Free Speech, and the Internet” in P Birks (ed), *Privacy and Loyalty* (Oxford: Clarendon Press, 1997).

⁷⁷ Above, 1086.

⁷⁸ J Sopinka, “Freedom of Speech and Privacy in the Information Age” - address at the symposium on Free Speech and Privacy in the Information Age held at the University of Waterloo on 26 November 1994; at <gopher://insight.mcmaster.ca:70/00/org/efc/doc/sfsp/sopinka>, p 1.

'information super-highway' in order to prevent intimate details of our lives being shared at the touch of a button."⁷⁹

2.60 A person who engages in online activities which are readily accessible to all users should have no expectations of privacy. For example, a message posted to a public newsgroup or bulletin board on the Internet is available for anyone to read and copy. Public postings made on the Internet may also be archived in searchable databases. Since search engines on the Internet use "robots" to peruse the World Wide Web and discussion groups on the Internet ("Usenet newsgroups"), and to record every message communicated in Usenet postings and archived listserv postings, it is possible to search the postings made by an Internet user to Usenet newsgroups and World Wide Web sites. Thus, although Usenet groups or listservs appear to allow for confidential exchange of information, the postings often achieve Internet-wide distribution when they are archived or included in the search engine databases.⁸⁰ The Privacy Rights Clearinghouse in the United States warns that "[t]here are virtually no online activities or services that guarantee an absolute right of privacy".⁸¹

2.61 An Internet Service Provider ("ISP") can keep track of almost everything that an Internet user, using their dial-in facilities, connects to or downloads. The ISP can therefore collect information about the user's online activities, such as the newsgroups which they have accessed or the sites which they have visited. Note that user identification requires matching (using the user's login name) the activity records with the ISP user records. The ISP can also access e-mails that use the ISP mail server as they are stored as files on that machine that can be accessed easily within the ISP office. However, when there are complaints of users sending junk e-mails, the ISP may need to look at e-mails sent via their mail server in order to identify the source of the abuse, despite the privacy risk.

2.62 A website administrator has much more limited scope for invading privacy. Unless users provide registration information voluntarily, the administrator only knows the Internet address of the computer, and the "referring address". The administrator only knows who the user's ISP is (by looking up the location of that address), unless the ISP provides them with the matching information of which user was using that connection at that time. The "referring address" is the address of the last web page visited by the user. This information may be sensitive. Note that the Internet address may be much more sensitive for people with permanent Internet addresses who may be uniquely identified.

2.63 "Cookies" are small files stored on the user's computer put there by the web browser at the request of a website. Their purpose is to retain knowledge of user identity and preferences. They are only accessible by the website that originally sent them. Cookie information may be embarrassing if the users have gained access to sensitive or controversial materials online. The privacy risk is that

⁷⁹ J Sopinka, p 9.

⁸⁰ S E Gindin, "Lost and Found in Cyberspace - Information Privacy in the Age of the Internet" 34 San Diego Law Review, August-September 1997, a draft of which is available at <<http://www.info-law.com/lost.html>> (visited on 16.12.97).

⁸¹ Privacy Rights Clearinghouse, "Fact Sheet #18: Privacy in Cyberspace" (1997), at <<http://www.privacyrights.org/fs/fs18-cyb.htm>>, pp 1-2. "The Internet raises some unique privacy concerns. Information sent over [the Internet] may pass through dozens of different computer systems on the way to its destination. Each of these systems may be managed by a different system operator ("sysop"), and each system may be capable of capturing and storing online communications. Furthermore, the online activities of Internet users can potentially be monitored, both by their own service provider and by the sysops of any sites on the Internet which they visit." *Idem*.

many commercial websites provide cookie information to their advertisers that allows matching of computers or registered users across websites, although this is likely to breach the data protection law, as there is rarely consent from the users.

2.64 We think that the public should be educated as to the potential hazards of computer use and the means to minimise privacy risks. Susan Gindin states that online users should be reminded of the potential security breaches inherent in communications technology, including the possibility of interception by Internet service providers, network administrators, and computer hackers. She says that users should be informed that by participating online they leave an electronic record of their activities which may be utilized by the online services and third parties.⁸² Since there is a general lack of awareness of privacy issues among the Internet service providers and Internet users, the publication of practical guidelines by the Privacy Commissioner's Office on measures that can be taken by service providers and Internet users to protect privacy is extremely timely.⁸³

2.65 We examine in the following two chapters the extent to which the right of privacy is protected under existing law.

⁸² S E Gindin, 29.

⁸³ See Office of the Privacy Commissioner for Personal Data, Hong Kong, *Personal Data Privacy and the Internet - A Guide for Data Users* (1998) and *Internet Surfing with Privacy in Mind - A Guide for Individual Net Users* (1998).

Chapter 3 - Remedies under the Personal Data (Privacy) Ordinance

Data Protection Principles

3.1 The Personal Data (Privacy) Ordinance (Cap 486) was enacted to implement the recommendations of the Law Reform Commission contained in its report on *Reform of the Law Relating to the Protection of Personal Data*.¹ The Ordinance has general provisions which seek to regulate the collection and use of personal data. It is important to bear in mind that the primary object of the Ordinance has been to regulate the collection and use of personal data, not to provide relief for invasion of privacy as such. A breach of a Data Protection Principle does not necessarily entail an invasion of privacy. Likewise, there may be an invasion of privacy without breaching a Data Protection Principle.

3.2 Data Protection Principle 1 in Schedule 1 to the Ordinance provides inter alia, that personal data shall be collected by means that are “lawful and fair in the circumstances of the case”.² This principle does not cover all cases of invasion of privacy by intrusion. For example, A may search B or his premises without consent in order to find out more about C. Although B is a victim of A’s intrusion, B has no remedy against A under the Ordinance because no recorded data have been collected to satisfy the requirement of the Ordinance.

3.3 As regards the use and disclosure of personal data, Data Protection Principle 3 provides that personal data may only be used for “the purpose for which the data were to be used at the time of the collection” or a directly related purpose unless the data subject consents otherwise. This Principle only limits the purpose of a disclosure or use of personal data; it does not aim at protecting the private life of individuals from unwanted publicity as such. In particular, it offers limited protection to people whose personal data are revealed in consequence of a crime, accident or tragedy. Personal data collected by journalists from public figures, victims and their friends and relatives are invariably for journalistic purposes. Journalists may argue that including these data in a newspaper or broadcast programme is consistent with the purpose for which the data were to be used at the time of the collection of the data. Hence individuals whose right of privacy has been infringed by the media publicising their data in connection with a newsworthy event may not have a remedy under the Ordinance if it was a journalist who had collected the data and the collection was lawful and fair in the circumstances.³ In other words, as long as the

¹ Topic 27, 1994.

² The Privacy Commissioner is of the opinion that covert collection of personal information is considered to be generally unfair unless there is an overriding public interest. Furthermore, if the individual, whether he is a celebrity or not, makes it clear that he does not wish to be photographed, the collection would also be regarded as generally unfair. *South China Morning Post*, 27 September 1997.

³ Although the media are not exempt from Data Protection Principle 1, section 61 of the Ordinance provides for an exemption for the disclosure of personal data *to the media*. As far as Data Protection Principle 3 is concerned, the exemption covers only the disclosure of personal data by a person to the newspaper proprietor or broadcaster. It does not apply to the

data are collected lawfully and fairly and the publication is for the purpose for which the data were to be used at the time of the collection, the Ordinance would not restrain the publication even though it amounts to an invasion of privacy.

Administrative remedy

3.4 A person whose personal data have been collected or used in contravention of a data protection principle may request the Privacy Commissioner to investigate the matter. Where the Commissioner is satisfied that the data user is contravening a data protection principle, or has contravened such a principle “in circumstances that make it likely that the contravention will continue or be repeated”, he may serve on the data user an enforcement notice directing him “to take such steps as are specified in the notice to remedy the contravention or, as the case may be, the matters occasioning it” within the specified period.⁴ The Ordinance fails to provide any remedy where the complaint concerns an isolated contravention or there is merely a threat or an attempt to act in contravention of a data protection principle. It compares unfavourably to section 6 of the Hong Kong Bill of Rights Ordinance (Cap 383) which provides, *inter alia*, that the court may grant such remedy or relief in respect of a “threatened violation” as it has power to grant in the proceedings.

Civil remedy

3.5 Although the Ordinance does not make a breach of a data protection principle a tort, an individual who suffers damage by reason of a breach of a data protection principle relating to that individual's personal data is entitled to “compensation” from the data user.⁵ It is not clear how “compensation” would be assessed except that “damage” includes injury to feelings. Thus any person whose personal data are collected or used in contravention of a data protection principle may seek compensation pursuant to the provisions of the Ordinance.⁶

3.6 Another limitation is that the Ordinance applies only to recorded data.⁷ Its provisions will not operate to control visual and aural surveillance unless and until the data user has put the data acquired by such means “in a form in which access to or processing of the data is practicable”.⁸ As a result, a data subject may not have a claim against an eavesdropper or Peeping Tom who intrudes upon the privacy of another without using any recording device and without putting the data obtained by the intrusion in a recorded form. Similarly, an individual who has carried out a body search or who has searched the premises of another without consent is not liable under the Ordinance if the search process is not recorded.

3.7 Personal data held by an individual only for recreational purposes or which are concerned only with the management of his personal, family or household

subsequent publication or broadcasting even though doing so is in the public interest, unless publicising the data is consistent with the purpose for which the data were to be used at the time of collection, or a publisher or broadcaster can rely on one of the exemptions under Part VIII of the Ordinance (e.g. crime prevention or protection of health).

⁴ Cap 486, section 50. For an overview of the Ordinance, see M Berthold & R Wacks, *Data Privacy Law in Hong Kong* (Hong Kong: FT Law & Tax Asia Pacific, 1997).

⁵ Cap 486, section 66.

⁶ See also paras 12.11 - 12.15.

⁷ See the definition of “personal data” in section 2(1) of the Ordinance.

⁸ Above. See HKLRC, *Report on Reform of the Law Relating to the Protection of Personal Data* (1994), paras 8.10 - 8.11.

affairs are exempt from the Data Protection Principles.⁹ However, these data may contain sensitive or embarrassing personal information about another. Under the Ordinance, as long as these data are intended to be and are in fact used by the data user for recreational purposes, their collection needs not comply with DPP 1 and the data user may use unfair means to collect them.

3.8 Another difficulty with enforcing the data protection principles under the Personal Data (Privacy) Ordinance relates to their content. As they are intended to be statements of principle, the data protection principles are expressed in general terms. The Privacy Commissioner has stated that Data Protection Principles 1 and 3 are open to wide interpretation. Paragraph 2 of Data Protection Principle 1, for instance, merely provides that personal data shall be collected by means which are “lawful” and “fair in the circumstances of the case”. It fails to define in precise terms the circumstances under which liability would be imposed on wrongdoers. The Privacy Commissioner and the Court have a wide discretion in determining whether a collection or use constitutes a contravention.

3.9 The way the Ordinance is drafted also puts the complainant or plaintiff, as the case may be, in a disadvantageous position. The Ordinance places the burden on him to show that the data in question falls within the definition of “personal data” in the Ordinance. This requires him to satisfy the Privacy Commissioner or the Court that none of the specified exemptions applies to the data. The data user who is alleged to have contravened a data protection principle has no obligation to show that the collection or disclosure can be justified on one of the grounds prescribed in the Ordinance.

3.10 In the light of the limitations of the Personal Data (Privacy) Ordinance, it is clear that the Ordinance cannot always provide satisfactory relief to victims of invasion of privacy.¹⁰

⁹ Section 52.

¹⁰ See also Chapter 5 of the *Consultation Paper on The Regulation of Media Intrusion* (1999) published by the HKLRC Sub-committee on Privacy.

Chapter 4 - Protection of privacy at common law -

Introduction¹

4.1 We have concluded in our consultation paper on stalking that existing law fails to provide adequate and effective remedies against stalking or harassment of individuals.² We examine in this chapter the more important issue of whether common law affords adequate protection against invasion of individual privacy.

4.2 The common law does not recognise a general right to privacy.³ A person whose privacy has been intruded upon has to show that the conduct of the intruder amounts to the commission of a well-recognised tort for which the victim has a cause of action. The protection of individual privacy is therefore merely incidental to the granting of relief for recognised torts. If the privacy-invasive act inflicting the injury is otherwise lawful, it does not give rise to an action for damages even though the act is inflicted maliciously and has caused embarrassment or emotional distress. Another difficulty is that the common law does not recognise any principle upon which compensation can be granted for mere injury to feelings. The plaintiff cannot maintain an action in tort unless the breach has caused him physical harm or psychiatric illness. We examine below to what extent privacy interests are protected through the recognised heads of tortious liability.

Trespass to land⁴

4.3 The plaintiff has a cause of action in the tort of trespass to land when, without justification, the defendant enters on the plaintiff's land, remains on such land or places any object upon it. This tort can be used to protect the owner of premises from unjustified invasion of privacy if the invasion involves physical encroachment upon premises. This will be the case when the defendant installs a listening device inside the private premises of the plaintiff,⁵ or when the defendant enters upon the plaintiff's premises to collect information without the plaintiff's consent. Hence entry onto premises by a television crew with cameras rolling will constitute trespass unless they have express or implied licence to enter. In *Lincoln Hunt Australia Pty Ltd v Willesee*, the court held that the implied licence for the public to visit commercial premises "was limited to members of the public bona fide seeking information or business with it or to clients of the firm, but not to people, for

¹ See D J Seipp, "English Judicial Recognition of a Right to Privacy" (1983) 3 *Oxford J of Legal Studies* 325; R Wacks, *Privacy and Press Freedom* (London: Blackstone Press, 1995), chapter 3; Younger Report, Appendix I; Lord Chancellor's Department and the Scottish Office, *Infringement of Privacy: Consultation Paper* (1993), Annex A; HKLRC, *Report on Reform of the Law Relating to the Protection of Personal Data* (1994), chapter 4.

² See HKLRC Privacy sub-committee, *Stalking - Consultation Paper* (1998), chapter 2.

³ *Kaye v Robertson* [1991] FSR 62; *Malone v MPC* [1979] Ch 344.

⁴ An interesting development is the application of the tort of trespass to unsolicited e-mail. In *CompuServe Inc v Cyber Promotions Inc* 1997 US Dist LEXIS (SD Ohio 1997), the US District Court granted the plaintiff an interlocutory injunction to restrain the defendant from sending unsolicited e-mail to the plaintiff's subscribers. The court held that the defendant's e-mailings constituted trespass to personal property because the e-mailings burdened the operation of the plaintiff's network and damaged their goodwill.

⁵ *Sheen v Clegg*, (1967) *Daily Telegraph*, 22 June; *Greig v Greig* [1966] VR 376.

instance, who wished to enter to hold up the premises and rob them or even to people whose motives were to go onto the premises with video cameras and associated equipment or a reporter to harass the inhabitants by asking questions which would be televised throughout the State.”⁶ Yet even if the plaintiff could obtain an injunction against trespass, he may not be able to obtain an injunction against publication of photographs or films obtained during the course of the trespass.⁷

4.4 The law of trespass protects a person’s property and his enjoyment of it. It does not exist to protect his privacy as such. If a person’s property is adjacent to the highway and he owns the soil over which the highway goes, he may maintain an action of trespass against anyone who loiters on the highway in order to spy upon him.⁸ But a person commits no trespass when he takes a sketch, photograph or video tape of someone else’s property by standing on a public street or on adjoining property⁹ - a person does not commit a tort merely by looking.¹⁰ It is also clear that a court will not grant an injunction to prevent a landowner from opening windows which enables him to observe the activities of his neighbours.¹¹ In *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*, Latham CJ held that-

“[any] person is entitled to look over the plaintiff’s fences and to see what goes on in the plaintiff’s land. If the plaintiff desires to prevent this, the plaintiff can erect a higher fence. ... The defendant does no wrong to the plaintiff by looking at what takes place on the plaintiff’s land. Further, he does no wrong to the plaintiff by describing to other persons, to as wide an audience as he can obtain, what takes place on the plaintiff’s ground. The court has not been referred to any principle of law which prevents any man from describing anything which he sees anywhere if he does not make defamatory statements, infringe the law as to offensive language, etc, break a contract, or wrongfully reveal confidential information.”¹²

⁶ (1986) 4 NSWLR 457, at 460. In *Le Mistral Inc v Columbia Broadcasting System* 402 NYS 2d 815 (1978), the court held that a trespass was committed when a television station sent a team unannounced to the plaintiff’s restaurant to highlight a story about unhealthy restaurant.

⁷ *Gorden Kaye v Andrew Robertson & Sport Newspapers Ltd* [1991] FSR 62. In *R v Central Independent Television plc* [1994] 3 WLR 20, the defendant obtained some footage of an arrest of an alleged paedophile which took place on private property. Although the issue of trespass was not before the court, Neill LJ suggested at p 29 that the defendant was “entitled to publish the programme in full, and ... there was no legal bar to prevent them from including pictures of the place of arrest”. Cf *Emcorp Pty Ltd v Australian Broadcasting Corporation* [1988] 2 Qld R 169. The court granted an injunction on the grounds that the audio-visual material obtained by the defendants were obtained in flagrant disregard of the plaintiff’s property rights and at a time when the defendants were trespassing.

⁸ *Harrison v Duke of Rutland* [1893] 1 QB 142. Cf P H Winfield, *Privacy* (1931) 47 LQR 23.

⁹ *Hickman v Maisey* [1900] 1 QB 752; *Re Penny* (1867) 7 E & B 660.

¹⁰ Lord Camden in *Entick v Carrington* (1765) 19 Howell State Tr 1029 said at 1066 that “the eye cannot by the laws of England be guilty of a trespass.”

¹¹ *Turner v Spooner* (1861) 30 L J Ch 801. The court in *Tapling v Jones* (1865) 11 HLC 290, at 305 held that “invasion of privacy by opening windows” was not a wrong for which the law would give a remedy. Lord Westbury C. said, “If A is the owner of beautiful gardens and pleasure grounds, and B is the owner of an adjoining piece of land, B may build on it a manufactory with a hundred windows overlooking the pleasure grounds, and A has neither more nor less than the right, which he previously had, of erecting on his land a building of such height and extent as will shut out the windows of the newly erected manufactory.”

¹² (1937) 58 CLR 479, at 494. Cf *Sports and General Press Agency Ltd v “Our Dogs” Publishing Co Ltd* [1917] 2 KB 125; *Bathurst City Council v Saban* (1985) 2 NSWLR 704. A further exception to the rule that there is no tortious conduct involved in taking a photograph of another person’s property without his consent is the publication of photographs of a ward of court: *Re X (A Minor) (Wardship: Injunction)* [1985] 1 All ER 53.

4.5 Indeed a person has no right in law to prevent another taking a photograph of his picture even within his own premises. In *Sports and General Press Agency Ltd v "Our Dogs" Publishing Co Ltd*, the court refused to prevent the defendant publishing photographs taken at a dog show by an independent photographer. Horridge J held that "no one possesses a right of preventing another person photographing him any more than he has a right of preventing another person giving a description of him, provided the description is not libellous or otherwise wrongful."¹³

4.6 In *Bernstein of Leigh (Baron) v Skyviews & General Ltd*¹⁴ the defendant took aerial photographs of the defendant's house without their consent and then offered the photographs for sale. The court did not grant an injunction restraining the defendant from entering his airspace. It held that a flight several hundred feet above his property did not interfere with his enjoyment of land, nor was the mere taking of a photograph without committing trespass on his land unlawful.¹⁵ In the opinion of Griffiths J, there was no law against taking a photograph:

*"the mere taking of a photograph cannot turn an act which is not a trespass into the plaintiff's air space into one that is a trespass. ... he could not prevent the defendants taking the virtually identical photograph from the adjoining land provided they took care not to cross his boundary, and were taking it for an innocent as opposed to a criminal purpose."*¹⁶

4.7 The law of trespass is helpless where the surveillance is carried out from a distance. It does not protect individuals from eavesdropping with the aid of parabolic microphone where no wire-tapping or other physical intrusion upon plaintiff's property takes place. Likewise, it is not a trespass to listen in to another's telephone conversation as long as this does not involve physical encroachment upon the plaintiff's land.¹⁷

4.8 A further difficulty is that the law of trespass only protects plaintiffs who have a proprietary interest in land. A person who does not have any interest in land has no right to sue. The cause of action is of no avail to a guest or lodger. The Younger Report highlighted the difficulties faced by a person who is not in possession of the premises:

*"the ordinary overnight visitor at an hotel may sleep in but does not 'occupy' the bedroom allotted to him and hence has no remedy in trespass against the intruder who plants a microphone in the room; the hotel proprietor will have an action in trespass but he may be unwilling to bring it; indeed he may have put the microphone in the room himself or be in collusion with someone who did so."*¹⁸

Private nuisance

¹³ [1916] 2 KB 880; affirmed by the Court of Appeal in [1917] 2 KB 125. The landowner may prohibit the taking of photos in his premises by making it a condition of entry.

¹⁴ [1978] QB 479.

¹⁵ Section 8(1) of the Civil Aviation Ordinance (Cap 448) provides that no action shall lie in respect of trespass or nuisance by reason only of the flight of an "aircraft" over any property at a reasonable height above the ground. "Aircraft" is widely defined in Cap 1.

¹⁶ At 488.

¹⁷ *Malone v Commissioner of Police of the Metropolis (No 2)* [1979] 2 All ER 620 at 642-644.

¹⁸ Younger Report, Appendix I, para 13. Cf *Silverman v Imperial London Hotels Ltd* (1927) 43 TLR 260.

4.9 The essence of the tort of private nuisance is “a condition or activity which unduly interferes with the use or enjoyment of land”.¹⁹ The interference must continue for a prolonged period of time. It may take the form of physical damage to the property or the imposition of discomfort upon the occupier.

4.10 The occupier may have a cause of action in private nuisance if he is harassed by telephone calls which cause him inconvenience and annoyance, thereby interfering with the ordinary and reasonable use of the property.²⁰ Likewise, watching and besetting premises may constitute a private nuisance.²¹ However, the plaintiff could not maintain an action if the property suffers no physical injury or the beneficial use of the property was not interfered with. A person who has taken a single photograph of another can never be liable in nuisance. But Griffiths J said that:

*“[if] the circumstances were such that a plaintiff was subjected to the harassment of constant surveillance of his house from the air, accompanied by the photographing of his every activity, I am far from saying that the court would not regard such a monstrous invasion of his privacy as an actionable nuisance for which they would give relief.”*²²

4.11 Subject to the exception that a person who is in exclusive possession of land could sue even though he could not prove title to it, a person who has no interest in the land could not sue in private nuisance. Thus persons with no proprietary interest with whom the owners share their homes, such as wives, husbands, partners, children and other relatives could not sue. The action is developed to protect private property or rights of property rather than the privacy of individuals occupying private property.²³

4.12 This cause of action is of limited use in the protection of privacy against surveillance activities. As rightly pointed out by the Younger Committee, “[the] eavesdropper or spy does not seek to change the behaviour of his victim; on the contrary he hopes that it will continue unchanged, so that he may have the opportunity of noting it unobserved.”²⁴ There can be no interference with the use of property if the occupier was not aware of the intrusion at the time.

¹⁹ *Clerk & Lindsell on Torts*, (16th edn, 1989), para 24-01. A public nuisance is a criminal offence. It is an act or omission which materially affects the reasonable comfort and convenience of life of a section of the public. In *R v Johnson (Anthony)* [1997] 1 WLR 367, the defendant made numerous obscene telephone calls to at least 13 different women. The Court of Appeal held that in determining whether conduct constituted a public nuisance it was necessary to consider its cumulative effect. If cumulatively the telephone calls had materially affected the reasonable comfort and convenience of a section of the public, and had been so widespread in range and indiscriminate in effect that it was not reasonable to expect one person to take proceedings on her own responsibility, the person making such calls may be charged with the offence of causing a public nuisance by using the telephone system to cause annoyance, harassment, alarm and distress.

²⁰ *Khorasandjian v Bush* [1993] QB 727; *Stoakes v Brydges* [1958] QWN 5; *Motherwell v Motherwell* (1977) 73 DLR (3d) 62.

²¹ *Hubbard v Pitt* [1976] 1 QB 142.

²² *Bernstein (Baron) v Skyviews Ltd.* [1978] 1 QB 479, at 489. Wacks argues that it is hard to see how the aerial photography of a stately home invades its owner's “privacy”. See R Wacks, “No Castles in the Air” (1977) 93 LQR 491.

²³ *Hunter v Canary Wharf Ltd, The Times*, 25 April 1997; overruling the Court of Appeal decision in *Khorasandjian v Bush* [1993] QB 727. Cf *Motherwell v Motherwell* (1977) 73 DLR (3d) 62.

²⁴ Younger Report, Appendix I, para 18.

Breach of confidence

4.13 If A gives information concerning his private life to B on a confidential basis, a subsequent unauthorized disclosure by B to a third party would amount to a breach of his duty of confidence to A as well as an infringement of A's right of privacy. Hence, revelation of marital confidences²⁵ or sexual conduct of an individual²⁶ may be restrained through the equitable remedy of breach of confidence. There are three elements necessary to succeed in an action for breach of confidence.²⁷

- a) The information must have the necessary quality of confidence about it.
- b) The information must have been imparted in circumstances importing an obligation of confidence.
- c) There must be an unauthorized use of that information to the detriment of the party communicating it.

4.14 Where a person uses a photograph without the consent of the subject, the latter has a remedy in the law of confidence if the person using the photograph owes the subject an obligation of confidence.²⁸ In *Li Yau-wai, Eric v Genesis Films Ltd*²⁹ the plaintiff allowed himself to be photographed by the defendant on the understanding that the photograph was to be used for casting purposes. The court held that revealing the photograph to a wider audience thus making him a public figure would amount to a breach of confidence.

4.15 There are signs that the action for breach of confidence may be developed to afford protection to individual privacy. Lord Keith in the "Spycatcher" case stated:

"Most of the cases [of breach of confidence] have arisen in circumstances where there has been a threatened or actual breach of confidence by an employee or ex-employee of the plaintiff, or where information about the plaintiff's business affairs has been given to someone who has proceeded to exploit it for his own benefit. ... In other cases there may be no financial detriment to the confider, since the breach of confidence involves no more than an invasion of personal privacy. Thus in Duchess of Argyll v Duke of Argyll³⁰ an injunction was granted against the revelation of marital confidences. The right to personal privacy is clearly one which the law should in this field seek to protect."³¹

²⁵ *Stephens v Avery* [1988] 1 Ch 449. The information in question was about the lesbian relationship of the plaintiff with a third party.

²⁶ *Duchess of Argyll v Duke of Argyll* [1967] 1 Ch 302.

²⁷ *Koo Chih Ling (Linda) v Lam Tai Hing* [1994] 1 HKLR 329; *Li Yau-wai, Eric v Genesis Films Ltd* [1987] HKLR 711. For a discussion of the latest development of the law relating to breach of confidence, see R Wacks, *Privacy and Press Freedom* (London: Blackstone Press, 1995), chapter 3 (pp 48-80). The chapter contains a comparison between the tort of breach of confidence and the American tort of "public disclosure of private facts".

²⁸ *Pollard v Photographic Co* (1889) 40 Ch D 345; *Hellewell v Chief Constable of Derbyshire* [1995] 4 All ER 473.

²⁹ [1987] HKLR 711.

³⁰ [1967] Ch. 302.

³¹ *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 255. Laws J in *Chief Constable of Derbyshire* [1995] 1 WLR 804 at 807 said: "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 subsequent disclosure of the photograph would, in my judgment, as surely

4.16 The Annex of this Paper contains an account of the extent to which the law of confidence may afford protection against unauthorized disclosure of personal information obtained by illegal means. The topic of breach of confidence will be examined in detail in a separate report to be issued by the Law Reform Commission.

4.17 The breach of confidence action is helpful only if confidential information is disclosed or otherwise used by the confidant without authority. Whereas the law of privacy protects unauthorized disclosure of personal information regardless of there being any relationship or duty of confidence, the law on breach of confidence protects information which is imparted in confidence regardless of the offensiveness of its content. The remedy aims at preserving the trust which the plaintiff has reposed in the confidant. It does not aim at protecting individuals from emotional distress and embarrassment caused by an unauthorized use.

4.18 The person who is able to sue for breach of confidence is the one who initially gave the information in confidence, or on whose behalf the information was received. The mere fact that a person has an interest in maintaining the secrecy of the information does not of itself give him a right to sue. The law of confidence does not impose an obligation of confidence by reason only of the use of unlawful or improper means to obtain the information.³² In the absence of any special relationship of confidence between the person who wishes to keep the information secret and the person who has obtained the information, an unauthorized disclosure of information obtained by the latter would seem not to constitute a breach of confidence. Hence, if A imparts information about B in confidence to C, B cannot maintain an action for breach of confidence if C publishes the information without A's authority. This will be the case even though the publication is objectionable and offensive.

4.19 Furthermore, a person who acquires personal information without actual or constructive knowledge of its confidential character may disclose or use the information even though it is in fact subject to an obligation of confidence. The action is therefore not normally available to those who suffer because of unwanted publicity.

Infringement of copyright

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

³² In *Malone v Metropolitan Police Commissioner (No 2)* [1979] 1 Ch 344, Megarry VC held that a person who overheard a telephone conversation, whether by means of tapping or otherwise, was not under an obligation of confidence to the parties to the conversation. However, an Australian court has held that a person who used trade secrets acquired by improper covert means could be held liable for breach of confidence even though there was no relationship of confidence between the parties: *Franklin v Giddings* [1978] Qd R 72 (SC, Queensland). Indeed Browne-Wilkinson VC has also suggested in *Stephens v Avery* [1988] 1 Ch 449 at 456 that an injunction may be granted to protect confidentiality on the ground that "it is unconscionable for a person who has received information on the basis that it is confidential subsequently to reveal that information." It is therefore arguable that a relationship of confidence is not a necessary element of a breach of confidence action and that an unauthorized disclosure of personal information obtained by unlawful or improper means is actionable at the suit of the individual concerned. See Wacks, *Privacy and Press Freedom*, 59-64.

4.20 There is an infringement of copyright if a person copies or publishes a private letter or family photograph the copyright of which is owned by another.³³ There are, however, limitations to protecting privacy under the law of copyright. An action for infringement of copyright is only actionable at the suit of the owner of the copyright. A person whose photograph has been taken by another person cannot bring an action for infringement of copyright if the photograph is reproduced or published by that other person without his authority. The only exception is that the person whose privacy has been invaded is also the person who has commissioned the work and such reproduction or publication constitutes “exploitation” of the commissioned work “for any purpose against which he could reasonably take objection”.³⁴ In cases where the publication of a private photograph in magazine or newspaper amounts to an invasion of privacy, the photograph is rarely a commissioned work. Furthermore, there is no copyright in a person’s name, likeness or image; nor is there any copyright in information as such. Thus a person may read a private letter and then reproduce the information contained in the letter in his own words without infringing the copyright of the author of the letter.

4.21 In *Oriental Press Group Ltd v Apple Daily Ltd*,³⁵ the plaintiff took a photograph of a popular entertainer Faye Wong without her consent in the baggage claim area of an airport in Beijing. Godfrey JA, delivering the judgment of the Court of Appeal, noted that: “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.” He suggested that the court may have to hold that the protection of copyright will not be extended to photographs of public figures taken on private occasions without their consent if the legislature fails to introduce measures to protect the privacy of public figures.³⁶

Breach of contract

4.22 A contract may expressly or impliedly restrict the use or disclosure of personal information furnished by a party to the contract. In *Pollard v Photographic Company*,³⁷ a photographer was restrained from using the plaintiff’s photograph for advertising purposes. The court held that it was an implied term of the contract that prints taken from the negative of photographs taken at the defendant’s shop were not to be used for an unauthorized purpose. It is open to the person who has been surreptitiously photographed by hotel staff when staying at a room in a hotel that it is

³³ An author also has two “moral rights” under the Copyright Ordinance (Cap 528), namely, the right to be identified as the author (section 89) and the right to object to derogatory treatment of his work (section 92). The Ordinance does not provide for a right not to have copies issued to the public, exhibited or shown in public, or broadcast or included in a cable programme service. Cf Copyright, Designs and Patents Act 1988 (UK), section 85.

³⁴ Under section 15 of the Copyright Ordinance (Cap 528), the person who commissions a work has the power to restrain “any exploitation of the commissioned work for any purpose against which he could reasonably take objection.”

³⁵ [1997] 2 HKC 525.

³⁶ Godfrey JA based his opinion on the public policy grounds that no copyright can subsist in matters which have a grossly immoral tendency. See *Stockdale v Ownlyn* (1826) 5 B & C 173; *Stephens v Avery* [1988] Ch 449. He reasoned that if other newspapers or periodicals could re-publish without fee a photograph of a public figure which was taken surreptitiously without his consent, no newspaper or periodical would pay a large sum for such photographs. This would go some way towards reducing the incidence of invasion of privacy by taking photographs against the wishes of the subject.

³⁷ (1889) 40 Ch D 345.

an implied term of the contract with the hotel that the room is free from surveillance by his staff.³⁸

Intentional infliction of emotional distress

4.23 A person who by extreme and outrageous conduct causes severe emotional distress to another is liable for such emotional distress, provided that bodily harm results from it. The action for intentional infliction of emotional distress is based on the principle laid down in *Wilkinson v Downton*. The plaintiff in this case became ill as a result of being frightened by false news about her husband, which she had been told by the defendant as a practical joke. Wright J said:

*“The defendant has wilfully done an act calculated to cause harm to the plaintiff - that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act.”*³⁹

4.24 The Australian court in *Bradley v Wingnut Films Ltd* held that the action requires a plaintiff to establish something more than a transient reaction of emotional distress, however initially severe. That reaction must translate into something physical which also had a duration which was more than merely transient. Furthermore, the plaintiff must show that the defendant had wilfully done an act calculated to cause physical harm to the plaintiff and that the shock and illness were natural consequences of the wrongful act.⁴⁰ A person who deliberately intrudes on a woman in her bath, causing her psychiatric illness, might be liable under this head.⁴¹ But mere mental suffering, although reasonably foreseeable, if unaccompanied by physical injury or psychiatric illness, is not a basis for a claim for damages.⁴²

4.25 The action would not assist the individual aggrieved by an invasion of privacy in the majority of cases. Although the surreptitious use of a recording device in a person's premises and the publication of the details of his private life may cause him embarrassment or annoyance, it is only in extreme circumstances that physical or mental harm would ensue. Another difficulty is that the individual aggrieved by an invasion of privacy is rarely able to prove that the wrongful conduct was calculated to cause him physical harm or psychiatric illness; he is normally able to show that it is negligent at most.

Defamation

4.26 Defamation consists in the publication of a false statement which tends to damage the reputation of another without lawful justification. It might, for example, be libellous if the defendant took a photograph of a person who wished to

³⁸ The Princess of Wales was surreptitiously photographed when practising in a gymnasium. The photographs were taken by the owner of the gymnasium and sold to a newspaper for publication. She might have an action against the owner for breach of contract. *The Times*, 9 Feb 1995.

³⁹ *Wilkinson v Downton* [1897] 2 QB 57, 59; *Janvier v Sweeney* [1919] 2 KB 316, 322.

⁴⁰ *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415. In *Burnett v. George* [1992] 1 FLR 525, the court held that the plaintiff may succeed in obtaining an injunction restraining harassment by telephone calls only if there was evidence that the health of the plaintiff was being impaired by molestation or interference calculated to cause such impairment.

⁴¹ Example given in Younger Report, Annex I, para 23.

⁴² *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310; *Khorasandjian v Bush* [1993] 3 WLR 476, 482H-483A.

be let alone and published a photograph of him in fancy costume.⁴³ The plaintiff in the following circumstances was found to have a cause of action in defamation: a dental advertisement showing a picture of a young actress as if she had no teeth;⁴⁴ a photograph in a newspaper of a person on a hot day, with a caption implying that his feet would smell so badly at the end of the day that they would need to be soaked in the defendant's disinfectant;⁴⁵ an advertisement showing the face of the plaintiff, who did not seek publicity, mounted upon the body of a man dressed in a foppish manner, carrying a cane and eye-glass.⁴⁶

4.27 The primary purpose of defamation is to protect an individual's reputation. It fails to afford a remedy where the offending statement or representation is true.⁴⁷ However, the object of the law of privacy is not "to prevent inaccurate portrayal of private life, but to prevent its being depicted at all".⁴⁸ The law of defamation is therefore marginally relevant to the protection of individual privacy. It is true that the individual may be portrayed in a favourable light. But this fact of itself should not preclude him from seeking recovery if the matter publicised is offensive and objectionable to a reasonable person. In the "Spycatcher" case which involved a breach of confidence, Lord Keith observed that:⁴⁹

"Information about a person's private and personal affairs may be of a nature which shows him up in a favourable light and would by no means expose him to criticism. The anonymous donor of a very large sum to a very worthy cause has his own reasons for wishing to remain anonymous, which are unlikely to be discreditable. He should surely be in a position to restrain disclosure in breach of confidence of his identity in connection with the donation. So I would think it a sufficient detriment to the confider that information given in confidence is to be disclosed to a person whom he would prefer not to know of it, even though the disclosure would not be harmful to him in any positive way."

We think that the same principles should also apply to privacy actions.

Malicious falsehood

4.28 The court in *Ratcliffe v Evans* held that an action would lie for "written or oral falsehoods, not actionable per se, or even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage".⁵⁰ The plaintiff is required to prove that the statements complained of were untrue, they were made maliciously, and that the plaintiff has suffered special damage as a result.⁵¹ The Younger Report gave the example of the malicious publication in a newspaper to the effect that X, a famous pop-singer, had commenced his novitiate with a closed order of monks. The publication would not lower him in the esteem of right-thinking people, but would

⁴³ *Monckton v Ralph Dunn* [1907] *The Times*, 30 January.

⁴⁴ *Funston v Pearson* [1915] *The Times*, 12 March.

⁴⁵ *Plumb v Jeyes Sanitary Compounds Co Ltd* [1937] *The Times*, 15 April.

⁴⁶ *Dunlop Rubber Co Ltd v Dunlop* [1921] AC 347.

⁴⁷ "Unless a man's photograph, caricature or name be published in such a context that the publication can be defamatory within the law of libel, it cannot be made the subject-matter of complaint by action at law." *Tolley v Fry* [1930] 1 KB 467, 468 per Greer LJ.

⁴⁸ Warren and Brandeis, 218.

⁴⁹ *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 255.

⁵⁰ [1892] 2 QB 524, 532.

⁵¹ See Defamation Ordinance (Cap 21), section 24.

lose him engagements and therefore income, and therefore be actionable at his suit.⁵² The tort has been developed to protect commercial interests.⁵³ An action for malicious falsehood would not avail the person whose personal information is accurately published in the newspaper.

Kaye v Robertson

4.29 One of the best cases to illustrate the failure of the common law to protect individual privacy is *Gorden Kaye v Andrew Robertson and Sport Newspapers Ltd.*⁵⁴ Mr Kaye was a well-known actor. He suffered severe injuries to his brain and was hospitalised in a private room which had a notice asking visitors to see a member of the staff before visiting. The defendant journalists ignored the notice and entered the room. Although Mr Kaye apparently agreed to talk to them and did not object to them taking photographs inside the room, it was confirmed at the trial that he was in no fit condition to be interviewed or to give any informed consent to be interviewed.

4.30 The court held that in English law there was no right to privacy and accordingly there was no right of action for breach of a person's privacy. Invasion of a person's privacy, however gross, did not of itself entitle him to relief in English law. Glidewell LJ said that the facts of the case were a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision could be made to protect the privacy of individuals. In the absence of a right of privacy, the plaintiff relied on the following causes of action: (a) trespass to the person; (b) passing off; (c) libel; and (d) malicious falsehood.

- (a) *Trespass to the person* - The court did not accept the argument that the taking of a photograph or, indeed, the flashing of a light amounted to a battery. In any event, an injunction would not be granted to prevent the defendant from profiting from the taking of the photographs, i.e. from their own trespass.
- (b) *Passing off* - The plaintiff failed under this head because he was not in the position of a trader in relation to his interest in his story about the accident and his recovery.⁵⁵
- (c) *Libel* - The plaintiff argued that the article written by the defendant implied that the plaintiff consented to giving the interview and to be photographed by the defendant. The representation was untrue and the implication in the article would have the effect of lowering him in the esteem of right-thinking people. The court held that although the article was capable of having a defamatory meaning, this was not a sufficient basis for granting an interlocutory injunction because the conclusion that the article was libellous was not inevitable.

⁵² Younger Report, Annex I, para 8.

⁵³ Examples are actions for "slander of title" and "slander of goods".

⁵⁴ [1991] FSR 62; B S Markesinis, "Our Patchy Law of Privacy - Time to do Something about it" (1990) 53 *MLR* 802; P Prescott, "Kaye v Robertson - a reply" (1991) 54 *MLR* 451.

⁵⁵ Markesinis argues that the tort of passing off may be extended by relying on *Sim v Heinz* [1959] 1 *WLR* 313. See B S Markesinis, "Our Patchy Law of Privacy - Time to do Something about it" (1990) 53 *MLR* 802, at 803.

- (d) *Malicious falsehood* - The tort of malicious falsehood consists in the defendant maliciously publishing statements about the plaintiff which are false, and the plaintiff suffering special damage as a result. Since what was written in the article was false and it was apparent to the defendant that the plaintiff was in no condition to give informed consent, and that the plaintiff's right to sell the story of this accident and his recovery would be seriously diminished if the defendant was able to publish their article, the court agreed to grant an injunction on this cause of action.

4.31 The injunction granted on the basis of malicious falsehood was narrower in scope than what was sought by the plaintiff. It afforded limited protection because the defendant was still allowed to publish the photographs and story as long as the paper made it clear that they were taken without the plaintiff's consent.

Concluding remarks

4.32 Since the courts do not recognise a right of privacy, the interest in privacy has been protected only if another interest of an individual which is recognised by the courts has also been violated. Although some of the existing causes of action may incidentally afford some protection of privacy interests, their primary focus has been the protection of an individual's interest in his property. By insisting upon proof of actual harm beyond insult or hurt feelings, the courts have rendered "most of the old common law torts irrelevant to protecting the intimate interests that may be at stake in defence of individual privacy."⁵⁶ As privacy interests are much wider in scope than the interests recognised by the existing torts, protection of privacy by common law is not only patchy but also partial and less than adequate. Bingham LJ cited with approval the following comment made by Basil Markesinis:

"English law, on the whole, compares unfavourably with German law. True, many aspects of the human personality and privacy are protected by a multitude of existing torts but this means fitting the facts of each case in the pigeon-hole of an existing tort and this process may not only involve strained constructions; often it may also leave a deserving plaintiff without a remedy".⁵⁷

4.33 Contrary to the position in England, the right of privacy is protected by the law of torts in most jurisdictions in the United States. In the American case of *Barber v Time Inc.*,⁵⁸ the defendant was held liable for invasion of privacy on the basis that it had published a photograph of the plaintiff which was taken while she was confined to a hospital bed. After referring to the law of privacy in the United States, Leggatt LJ made the following observation in the case of *Kaye v Robertson*:

"We do not need a First Amendment to preserve the freedom of the press, but the abuse of that freedom can be ensured only by the

⁵⁶ Law Reform Commission of Australia, *Privacy and Intrusions* (Discussion Paper No 13, 1980), 24 - 25.

⁵⁷ B S Markesinis, *The German Law of Torts* (Oxford: Clarendon Press, 2nd edn, 1990), 316; cited in *Kaye v Robertson*, at 70.

⁵⁸ (1942) 348 Mo 1199, 159 SW2d 291.

*enforcement of a right to privacy. This right has so long been disregarded here that it can be recognised now only by the legislature. Especially since there is available in the United States a wealth of experience of the enforcement of this right both at common law and also under statute, it is to be hoped that the making good of this signal shortcoming in our law will not be long delayed.*⁵⁹

4.34 We conclude that the protection of privacy interests should not be confined to “parasitic damages” arising out of defamation and injury to contractual or proprietary rights.⁶⁰ Apart from the United States, the law of many countries, including both civil and common law jurisdictions, recognise the right of privacy in one way or another. We explore this “wealth of experience” in some detail in the next chapter.

⁵⁹ *Kaye v Robertson*, at 71.

⁶⁰ G Dworkin, “Privacy and the Press” (1961) 24 MLR 185, 187.

Chapter 5 - The law of privacy in other jurisdictions

5.1 We have briefly reviewed the law of privacy in Australia, Canada, China, France, Germany, Ireland, New Zealand, United Kingdom and the United States of America. Their experience is instructive and has shaped some of our proposals in the following chapters.

Australia

5.2 Australian law does not recognise infringement of privacy as an independent basis for civil liability. However the courts have held that if information is obtained during a trespass by, for instance, taking photographs or film, the court has jurisdiction to grant an injunction to prevent its publication. Such an injunction will be granted only if publication would in the circumstances be unconscionable, if the plaintiff will otherwise suffer irreparable damage, and if the balance of convenience favours the grant of an injunction.¹

5.3 *The South Australian Privacy Bill 1973* - Two attempts had been made to enact legislation for the creation of a general right of privacy. The first was the South Australian Privacy Bill 1973 which provided that every person has a right of privacy, any infringement of which should be actionable without proof of special damage. The term “right of privacy” was defined as “the right of a person to be free from a substantial and unreasonable intrusion upon himself, his house, his family, his relationships and communications with others, his property and his business affairs”. Some specific matters were mentioned, including disclosure of facts likely to cause distress, annoyance or embarrassment and the use of a person’s name, identity or likeness for another’s advantage. The Bill was defeated in the Legislative Council.²

5.4 *The Tasmanian Privacy Bill 1974* - The second attempt was the Tasmanian Privacy Bill 1974 which made it unlawful for any person to violate the privacy of an individual or, knowing or having reasonable cause to suspect that the privacy of any individual has been violated, to make use of that violation to his own advantage or to the detriment of that individual. A violation of privacy under the Bill would be a tort actionable by the individual concerned without proof of special damage. The definition of privacy was similar to that in the South Australian Bill. This bill was not enacted into legislation.³

5.5 *Law Reform Commission of Australia* - The Australian Law Reform Commission produced in 1979 a report on unfair publication which covered

¹ *Lincoln Hunt Australia Pty Ltd v Willesee* [1986] 4 NSWLR 457.

² Law Reform Commission of Australia, *Unfair Publication: Defamation and privacy* (Report No. 11, Canberra, 1979), para 221.

³ Law Reform Commission of Australia, *Unfair Publication: Defamation and privacy* (Report No. 11, Canberra, 1979), para 222.

defamation and privacy.⁴ The Commission was not persuaded that it was appropriate to create a general tort of invasion of privacy. But they found the idea of creating a specific and closely circumscribed tort of privacy attractive. They concluded that legislation should specify the area in which there is an undoubted claim for privacy protection.⁵ In their opinion, only “serious, deliberate exposures of a person’s home life, personal and family relationship, health and private behaviour” should be made unlawful by legislation. It is reported that the recommendations have not been implemented, in the absence of a consensus on a uniform defamation law.

5.6 The issue of creating a general tort of privacy was also discussed in the report on personal information and privacy published by the Australian Law Reform Commission in 1983. The report concluded that a general tort of interference with privacy was undesirable at that stage.⁶

5.7 In December 1995, the Australian Privacy Charter Council launched a charter of privacy rights for Australians which declares that: “People have a right to the privacy of their own body, private space, privacy of communications, information privacy (rights concerning information about a person), and freedom from surveillance.”⁷

Canada⁸

Common law

5.8 Invasion of privacy *per se* is not a tort recognised by the courts in Canada.⁹ To maintain an action for acts which constitute an invasion of privacy, the plaintiff has to show that the defendant has committed some well-established tort such as trespass, nuisance, defamation, injurious falsehood and deceit. However, there are indications that the courts are prepared to stretch the scope of a particular tort so as to bring within the ambit of such tort acts which would otherwise be legitimate, on the ground that such acts amount to an invasion of privacy of the plaintiff.

5.9 In *Motherwell v Motherwell*¹⁰ the Alberta Court of Appeal held that the constant making of telephone calls to harass the plaintiff’s family was an actionable nuisance. It stated that even persons who did not have any legal or equitable interest in the land where the nuisance was suffered would be entitled to relief on the ground that what occurred was an invasion of privacy. Similarly, in *Poole v Ragen and Toronto Harbour Commissioners*,¹¹ the defendant was held liable for watching and besetting the plaintiff’s boats. Although the technical ground of liability was nuisance, the underlying reason for liability was that persistent and unwarranted surveillance constituted “an affront to the dignity of any man or woman”.

⁴ Part III.

⁵ Para 234.

⁶ Law Reform Commission of Australia, *Privacy* (Report No 22, Canberra, 1983), vol. 2, paras 1075 - 1081.

⁷ The text of the Australian Privacy Charter is reproduced in G Greenleaf, “Information Technology and the Law” (1995) 69 ALJ 90.

⁸ L D Rainaldi (ed), *Remedies in Tort*, (Toronto: Carswell, 1987), vol 3, chapter 24 (by A E Cullingham); G H L Fridman, *The Law of Torts in Canada*, (Toronto: Carswell, 1990), vol 2, chapter 9.

⁹ *Victoria Park Racing and Recreational Grounds Co v Taylor* (1937), 58 CLR 479.

¹⁰ (1976) 73 DLR (3d) 62.

¹¹ (1958) OWRN 77.

5.10 Although there is no tort of invasion of privacy as such, the courts have ruled that there is a tort of “appropriation of personality” at common law. This tort is actionable where “the defendant has appropriated some feature of the plaintiff’s life or personality, such as his face, his name or his reputation, and made use of it improperly, i.e., without permission, for the purpose of advancing the defendant’s own economic interests.”¹²

Privacy legislation

5.11 Four provinces in Canada have enacted privacy legislation. They are British Columbia, Manitoba, Newfoundland and Saskatchewan. These statutes create the tort of “violation of privacy” which is actionable without proof of damage. They aim at correcting the failure of the common law to develop a general tort remedy for invasion of privacy. While the Manitoba, Newfoundland and Saskatchewan statutes create a general tort of invasion of privacy which includes appropriation of personality, the British Columbia legislation creates two separate torts, namely, invasion of privacy and appropriation of personality. Fridman observes that not many cases have been reported on these Privacy Acts and there has been very little judicial comment on their meaning and scope.¹³

5.12 Invasion of privacy is actionable in Quebec. A Quebec court held that the right to privacy under the Quebec Charter of Human Rights and Freedoms includes two facets: (a) the right to anonymity or to live one’s life without interference and (b) the right to solitude. Further, it was not necessary for the plaintiff to prove that he suffered pecuniary loss. He had to prove only that there had been an “unjustified publication of information of a purely personal nature”.¹⁴

China

5.13 *Mainland China* - The Constitution of the People’s Republic of China stipulates that the “personal dignity” and “residences” of citizens are inviolable and that citizens’ “freedom and privacy of correspondence” are protected by law.¹⁵ The General Principles of Civil Law further provides that: “All citizens and legal persons are entitled to the right to reputation. The personal dignity of citizens is protected by law. The use of insults, defamatory statements and other means to damage the reputation of citizens and legal persons is prohibited.”¹⁶ In the opinion of the Supreme People’s Court, a person who uses such means as giving publicity to the private facts of another in writing or in spoken words, or publicly subjecting the personality of another to ridicule by the fabrication of facts, or using insults or defamatory statements to damage the reputation of another, should be liable for infringement of the right to reputation if his conduct has caused special damage.¹⁷ The Supreme People’s Court further advises that a person who publishes the private facts of an individual, or gives publicity to the same in writing or in spoken words,

¹² G H L Fridman, 194.

¹³ He suggested that it was an error to restrict jurisdiction over this cause of action to the superior courts: above, p 201.

¹⁴ See L D Rainaldi, p 24-13, para 6.1.

¹⁵ Articles 38 - 40.

¹⁶ Article 101.

¹⁷ Supreme People’s Court’s Tentative Opinion on the Enforcement of the PRC General Principles of Civil Law, 26 January 1988, para 140.

without the permission of that individual so that his reputation has been damaged may be tried for infringement of the right to reputation.¹⁸

5.14 *Taiwan* - The Civil Code in Taiwan protects the right of personality.¹⁹ The right seeks to protect the intrinsic value and dignity of man and to maintain the integrity and inviolability of his personality. It includes the right to life, physical body, health, freedom, reputation, name, privacy, likeness, secrecy and honour. Anyone whose right of personality is infringed by another may apply to the court for relief.

France²⁰

5.15 Article 1382 of the Civil Code provides that any person who by his fault causes damage to another is under an obligation to repair that damage. The claimant is required to show that the victim has suffered harm. This has been taken to include non-pecuniary harm such as injury to human feelings. The courts have characterised as “fault” the publication of confidential letters, the dissemination of facts about a person’s private life, or the unauthorized use of a person’s name.²¹

5.16 In 1970 a right of privacy was specifically created by virtue of Article 9 of the Civil Code. The Article provides that “everyone has the right to respect for his private life” and that the courts may grant such relief as is appropriate to prevent or stop an invasion of privacy. No definition is given to the concept of “private life” but it has been held to include “any references to the plaintiff’s love life or family life and to extend to disclosure of the private address or telephone number of a public figure, or the revelation of an individual’s salary.”²² It seems that the definition of private life extends to any fact which the plaintiff does not wish to have revealed. In determining whether the right of privacy has been infringed, the courts would take into account the freedom of expression and freedom of the press.

Germany²³

5.17 Article 1 of the Federal Constitution of 1949 imposes on all state authorities a duty to respect and protect “the dignity of man”. Article 2 provides that “Everyone shall have the right to the free development of his personality in so far as it does not infringe the rights of others or offend against the constitutional order or the moral code.” This general right of personality provides an alternative way of protecting the right not to be defamed or the right to prevent the unauthorized use of a person’s name.

5.18 In addition to the protection under the Constitution, an invasion of privacy is actionable under paragraph 1 of Article 823 of the Civil Code. It provides:

¹⁸ Supreme People’s Court’s Answers to Questions about the Trial of Reputation Cases, 7 August 1993, Question 7.

¹⁹ Articles 18, 184 & 195.

²⁰ Law Reform Commission of Ireland, *Consultation Paper on Privacy: Surveillance and the Interception of Communications* (1996), paras 9.2 - 9.4; *Report of the Committee on Privacy and Related Matters* (“Calcutt Report”), (London, Cm 1102, 1990), paras 5.11 - 5.15; Younger Report (1972), 308 - 309.

²¹ Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law*, (Oxford: Clarendon Press, 2nd rev edn, 1987) vol. II, 387.

²² R Redmond-Cooper, “The Press and the Law of Privacy” (1985) 34 *ICLQ* 769, at 771.

²³ Law Reform Commission of Ireland, (1996), paras 9.5 - 9.8; *Report of the Committee on Privacy and Related Matters* (“Calcutt Report”), (London, Cm 1102, 1990), paras 5.16 - 5.21; B S Markesinis & S F Deakin, *Tort Law* (Oxford: Clarendon Press, 3rd edn, 1994), 608.

“A person is obliged to pay compensation for either negligently or intentionally violating the life, health, freedom, property or any other right of another where:

- (i) there has been an act that has violated an interest and caused damage;*
- (ii) the violation of the right is unlawful and not justified;*
- (iii) it was caused by intentional or negligent fault.”²⁴*

5.19 The Federal Court has held that a person’s right to his personality is an “other right” under the paragraph. This enables the courts to apply the law of tort against conduct injurious to human dignity such as the unauthorized publication of the details of a person’s private life. The courts have held it actionable to use the name of a famous artiste in an advertisement without his consent, to publish a fictitious interview with a well-known figure, to publish a picture which gave the impression that the person portrayed was a murderer, or to make an inaccurate or incomplete report in a newspaper.²⁵

Ireland²⁶

5.20 Irish courts do not explicitly recognise a general right to privacy at common law. Privacy interests are protected by a wide range of torts such as trespass, nuisance and the equitable remedy of breach of confidence. However, the courts have developed a constitutional right to privacy on the basis of Article 40.3.1 of the Constitution under which the State guarantees to respect, defend and vindicate the personal rights of the citizen. The Supreme Court in *McGee v The Attorney General*²⁷ held that privacy was among the personal rights which the State guarantees in the Article. Although two of the three judges in the majority specifically limited their treatment of privacy to the field of marital relations, subsequent cases have indicated that the Article affords some protection against threats to privacy posed by interception of communications and surveillance.²⁸

5.21 The Irish Law Reform Commission published a consultation paper on *Privacy: Surveillance and Interception of Communications* in 1996. It contains a draft Surveillance Privacy Bill which aims at protecting the privacy of the individual from intrusive surveillance. The Paper recommends the creation of statutory torts of invasion of privacy by means of surveillance, and disclosure or publication of information obtained by means of privacy-invasive surveillance.

New Zealand²⁹

²⁴ Quoted in Law Reform Commission of Ireland (1996), para 9.5.

²⁵ Konrad Zweigert & Hein Kotz, *Introduction to Comparative Law*, (Oxford: Clarendon Press, 2nd rev edn, 1987) Vol. II, 384.

²⁶ B M E McMahon & W Binchy, *Irish Law of Torts*, (Dublin, Butterworths (Ireland), 2nd edn, 1990), chapter 37; Law Reform Commission of Ireland, *Consultation Paper on Privacy: Surveillance and the Interception of Communications* (1996), chapters 3 & 4. [1974] IR 284.

²⁷ Law Reform Commission of Ireland (1996), paras 3.5 - 3.8.

²⁸ S M D Todd (ed), *The Law of Torts in New Zealand* (Sydney: The Law Book Co Ltd, 1991), chapter 18; J Katz, “Sex, Lies, Videotapes and Telephone Conversations: The Common Law of Privacy from a New Zealand Perspective” [1995] 1 EIPR 6.

5.22 Privacy interests were protected only if the plaintiff had a cause of action in other heads of tortious liability. Nevertheless the courts had indicated that they were prepared to listen to the argument that there was in New Zealand a separate tort of invasion of personal privacy at least by public disclosure of private facts. In interlocutory proceedings in *Tucker v News Media Ownership Ltd*, the court stated that the common law may adapt the *Wilkinson v Downton* principles to protect privacy.³⁰ Eventually in *Bradley v Wingnut Films Ltd*,³¹ the court held that the tort of invasion of privacy formed part of the law of New Zealand. If the tort is to be established, there must be public disclosure of private facts and the disclosure must be one which would be highly offensive and objectionable to a reasonable person of ordinary sensibility. It appears that there is a trend on the part of New Zealand courts towards recognizing a right to privacy.

United Kingdom

England and Wales

5.23 The court in *Kaye v Robertson*³² held that there was no right of action for breach of privacy. Actions for infringement of privacy have to be founded on recognised heads of tortious liability. While protection from physical intrusion is to a certain extent afforded by the torts of trespass and nuisance, information privacy is mainly safeguarded by the Data Protection Act 1984 as well as the law of defamation, copyright and breach of confidence. The protection as is available at common law is patchy and ineffective.³³

5.24 As early as in 1931, Winfield proposed that the “offensive invasion of the personal privacy of another” should be recognised as an independent tort.³⁴ The following is an outline of the legislative proposals made in the United Kingdom for the better protection of individual privacy.

1961 Lord Mancroft presented a Right of Privacy Bill in the House of Lords in February 1961. The object of the Bill was to protect a person from unjustifiable publication relating to his private affairs. It was given a Second Reading but withdrawn at the end of the debate to go into Committee.

1967 Alexander Lyon presented another Privacy Bill in February 1967. The Bill was introduced in the House of Commons under the Ten-minute Rule. It was given its First Reading but made no further progress.

1969 Brian Walden presented a Privacy Bill in November 1969. It was withdrawn after Second Reading debate upon the Government undertaking to carry out a detailed examination of the subject of privacy. The Bill was identical to that produced by JUSTICE in 1970.

³⁰ [1986] 2 NZLR 716, at 733. The *Wilkinson v Downton* principles are stated in the following terms: “One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is liable for such emotional distress, provided that bodily harm results from it”: *Restatement*, 2d, Torts, § 46.

³¹ [1993] 1 NZLR 415, 423.

³² [1991] FSR 62, CA.

³³ See Chapter 4.

³⁴ P H Winfield, “Privacy” (1931) 47 LQR 23, at 41.

- 1970 The Committee on Privacy of “JUSTICE”, the British Section of the International Commission of Jurists, published a report on *Privacy and the Law* in January 1970.³⁵ They concluded that legislation ought to create a general right of privacy applicable to all situations. The report included a draft Right of Privacy Bill.
- 1972 The National Council for Civil Liberties (“NCCL”) submitted a draft Right of Privacy Bill to the Younger Committee for consideration. The Younger Report concluded that, on balance, there was then no need for a general law of privacy. However, it recommended the creation of a tort of unlawful surveillance which should be actionable without proof of actual damage. It also suggested that it should be a tort to disclose or use information which the discloser knows or ought to have known was obtained by illegal means. The recommendation on the tort of unlawful surveillance was not implemented but the proposal on disclosure of information obtained by illegal means was accepted by the English Law Commission as one of the recommendations in its report on breach of confidence.
- 1987 William Cash presented a Privacy Bill in 1987 which was virtually identical to the Walden and JUSTICE Bills. It did not receive a Second Reading.
- 1989 John Browne introduced the Protection of Privacy Bill. It sought to confer remedies for the unauthorized public use or public disclosure of private information rather than a general right for the protection of privacy. Although it passed Committee stage, it was withdrawn at Report stage when the Government announced that it was appointing a committee, to be chaired by David Calcutt QC, to consider what measures were needed to give further protection to individual privacy from the activities of the press.
- 1989 Lord Stoddart introduced a Bill which was identical to the Browne Bill. It did not receive a Second Reading.
- 1990 The Calcutt Committee published a report entitled *Report of the Committee on Privacy and Related Matters* in 1990.³⁶ It concluded that an overwhelming case for then introducing a statutory tort of infringement of privacy had not been made out.
- 1993 Sir David Calcutt QC concluded in his *Review of Press Self-Regulation* published in January 1993 that press self-regulation under the Press Complaints Commission had not been effective.³⁷ He recommended that the Government should give further consideration to the introduction of a new tort of infringement of privacy.
- 1993 The National Heritage Committee of the House of Commons published a report on *Privacy and Media Intrusion* in March 1993.³⁸ They were dissatisfied with the way the Press Complaints Commission had dealt with the complaints and recommended a Protection of Privacy Bill with

³⁵ JUSTICE, *Privacy and the Law* (London, Stevens and Sons, 1970).

³⁶ *Report of the Committee on Privacy and Related Matters*, (London, Cm 1102, 1990).

³⁷ D Calcutt, *Review of Press-Regulation* (London, Cm 2135, 1993).

³⁸ National Heritage Committee, *Privacy and Media Intrusion* (London: HMSO, 294-I, 1993).

both civil and criminal provisions. The first part of the Bill listed various civil offences leading to a tort of infringement of privacy.

- 1993 In July 1993, the Lord Chancellor's Department and the Scottish Office issued a consultation paper on *Infringement of Privacy* ("the UK Consultation Paper").³⁹ The paper dealt with the question whether there should be a general civil wrong of infringement of privacy.
- 1995 The UK Government's response to the National Heritage Committee Report and the 1993 Consultation Paper was contained in a paper entitled *Privacy and Media Intrusion* published in July 1995.⁴⁰ The paper revealed that the Government strongly preferred the principle of self-regulation. It concluded that statutory intervention in this area would be a significant development of the law and the Government then was not convinced that the case had been made out for it.
- 1996 Sir Patrick Cormack presented the Protection of Privacy (No. 2) Bill in the House of Commons in March 1996. The object was to create an offence to sell or buy tapes or transcripts of private conversations without the consent of both parties.
- 1998 The UK Government introduced the Human Rights Act 1998 which incorporates the European Convention on Human Rights into English law.

Scotland

5.25 The position in Scotland is slightly different from that in England and Wales. Scottish decisions seem to be moving towards the recognition of an explicit right of action for invasions of privacy. Seipp summarises the position as follows:

"In addition to warrantless searches and the activities of peeping Toms, police surveillance of a dwelling-house without probable cause has been considered to give rise to a cause of action. Scottish courts based their refusal to allow publication of private letters on the grounds of injury to reputation and to feelings, rather than on the property grounds maintained by English courts Scottish law carried privacy protection furthest in opposition to press intrusions, settling by the mid-nineteenth century that damages could be awarded for publications of truthful information about 'some old and generally forgotten immoral act or act of impropriety' or 'some physical deformity or secret defect'. Personal ridicule was only allowed ... 'so long as the privacy of domestic life is not invaded'. ... These cases proceed on the broad principle of the actio injuriarum, which affords remedies for affronts to reputation, honour, and feelings. Privacy has fitted well within this scheme of values in Scottish law."⁴¹

³⁹ Lord Chancellor's Department & the Scottish Office, *Infringement of Privacy - Consultation Paper* (1993).

⁴⁰ Department of National Heritage, *Privacy and Media Intrusion - The Government's Response* (London, Cm 2918, 1995).

⁴¹ D J Seipp, "English Judicial Recognition of a Right to Privacy" (1983) 3 Oxford J of Legal Studies 325, at 366 - 367.

5.26 Although both the Constitution and the law of tort in the United States protect an individual's right to privacy, privacy as guaranteed by the Constitution is different in nature from privacy as protected by the law of torts. While constitutional privacy rights protect against acts by the Government, tort law privacy rights primarily protect against acts by private parties. The common law right operates as a control on private behaviour, while the constitutional right operates as a control on Government.⁴²

5.27 Constitutional privacy affords protection against the following types of intrusion:⁴³

- a) Government intrusion into a person's mind and thought processes and the related right to control information about oneself.⁴⁴
- b) Government intrusion into a person's zone of private seclusion. For example, the Government is precluded from unreasonable search and seizure within that zone of seclusion.
- c) Government intrusion into a person's right to make certain personal decisions in relation to marriage, procreation, contraception, family relationships and child rearing and education.

Tort law privacy rights

5.28 The development of the law of privacy in the United States was influenced by the seminal article written by Warren and Brandeis in 1890. They argued that common law implicitly recognised the right to privacy by drawing upon English cases of defamation, property, breach of copyright, and breach of confidence. They concluded that "the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone", and that "the existing law affords a principle which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds."⁴⁵ The ideas propounded in the article were subsequently taken up and developed by the courts in most jurisdictions in the United States.

5.29 The law of privacy as developed in the United States comprises four distinct kinds of invasions of four different interests of the individual.

(a) Invasion of privacy by intrusion upon the plaintiff's solitude or seclusion

The tort of "intrusion upon seclusion" consists of intrusion (physical or otherwise) upon the solitude or seclusion of another or his private affairs or

⁴² J T McCarthy, *The Rights of Publicity and Privacy* (Clark Boardman Callaghan, 1994), § 5.7[B].

⁴³ J T McCarthy, § 5.7[C].

⁴⁴ "The disclosure strand of the [constitutional] privacy interest ... includes the right to be free from the government disclosing private facts about its citizens and from the government inquiring into matters in which it does not have a legitimate and proper concern." See *Ramie v City of Hedwig Village, Texas*, 765 F2d 490, 492 (5th Cir 1985), quoted in J T McCarthy, § 5.7[C].

⁴⁵ S D Warren and L D Brandeis, at 205 - 206.

concerns which is highly offensive to a reasonable person. This tort requires proof of an unauthorized intrusion or prying into the plaintiff's seclusion which is offensive to a reasonable person as to a matter which the plaintiff has a right to keep private.

(b) Invasion of privacy based on public disclosure of private facts

The "disclosure" type of tort of invasion of privacy consists of publicity of a highly objectionable kind, given to private information about the plaintiff, even though it is true and no action would lie for defamation. It is triggered by the public disclosure of private facts in which the disclosure is highly offensive to a reasonable person. The facts disclosed are true, and no element of falsity is involved.

(c) Invasion of privacy by appropriation of name or likeness

The appropriation form of invasion of privacy consists of appropriation of the plaintiff's name or likeness for the defendant's benefit or advantages. It usually involves the unauthorized commercial use of a person's identity which causes injury to dignity and self-esteem with resulting mental distress damages.⁴⁶ The plaintiff may seek a remedy under this head if his name or picture, or other likeness, has been used without his consent to advertise the defendant's product, or to add lustre to the name of a company, or for any other business purposes.

(d) False light in the public eye

It consists of publicity which places the plaintiff in a false light in the public eye. Examples of this form of invasion include publicity attributing to the plaintiff some opinion, such as spurious books or articles; the unauthorized use of the plaintiff's name on a petition, or as a candidate for office; and the use of the plaintiff's picture to illustrate an article with which he has no reasonable connection, with the implication that such a connection exists.⁴⁷ The false light must be something that would be objectionable to the ordinary reasonable person in the circumstances. Further, the invasion must be intentional such that the defendant must know or had reason to know that the invasion would be highly offensive and would cause severe mental stress. The false light is more often than not a defamatory one but the making of defamatory statement is not an element of this tort.

Concluding remarks

5.30 The experience in other jurisdictions shows that although the difficulties of defining and drafting a general tort of privacy may be enormous, drafting specific torts which address the specific privacy interests should be neither

⁴⁶ J T McCarthy, §5.8.

⁴⁷ W P Keeton (ed), *Prosser and Keeton on Torts* (Minn, St Paul, West Publishing Co, 5th edn, 1984), p 863 *et seq.*

formidable nor intractable.⁴⁸ We examine in the next chapter whether a general tort of privacy should be created by statute in Hong Kong.

⁴⁸ B S Markesinis, "Our Patchy Law of Privacy - Time to do Something about it" (1990) 53 MLR 802, at 807; B S Markesinis, "The Calcutt Report Must Not be Forgotten" (1992) 55 MLR 118. Markesinis said that the type of facts litigated in the *Kaye* case had led to liability (in many instances both criminal and civil) in many countries.

Chapter 6 - Arguments for and against the creation of a general tort of privacy by statute

6.1 Opponents of a general tort of privacy claim that the concept of privacy is difficult to define. It is inherently vague and imprecise and it means different things to different people. According to Wacks, “privacy” is often confused with confidentiality, secrecy, defamation and the proprietary interest in one’s name and likeness. While he acknowledges the need for legal protection of personal information, he argues that the concept of privacy “be refused admission to English law”.¹

6.2 A statutory tort of privacy which is defined in general terms would introduce an element of uncertainty into the law. It would give insufficient guidance to the individual, to legal advisers and the courts. It would also fail to satisfy the “foreseeability test” referred to by the European Court of Human Rights in the *Sunday Times* case.² The Australian Law Reform Commission’s Report on Unfair Publication says:

*“Many years would necessarily elapse before there were sufficient decided cases to enable the courts to formulate principles. In the meantime there would be considerable uncertainty as to the scope of the general right; what type of infringement it covered, what invasions were considered to constitute unreasonable conduct, what circumstances excused the publication of otherwise private information. These matters are too important to be left in doubt.”*³

6.3 However, uncertainties in the law are not unusual. To decline to reform the law because of the difficulty in defining the wrong is “a doctrine of despair” which could be applied to any proposed legal reform. Creating a general tort of privacy would mean that the legislation should recognise the existence of a general right of privacy and define the circumstances in which civil remedies for invasions of privacy would be available. Such a flexible approach would allow the courts discretion to apply the general principles to the particular facts of the case. The courts are well experienced in balancing conflicting freedoms. They already exercise discretion in interpreting what is “reasonable” in negligence cases and in assessing whether a defamatory statement is “a fair comment on a matter of public interest”.⁴ In time, a comprehensive body of case law on the right of privacy would

¹ R Wacks, “The Poverty of Privacy” (1980) 96 LQR 73 at 74.

² In *Sunday Times v UK* (1979) 2 EHRR 245, para 49, the Court held that “a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”

³ Law Reform Commission of Australia (1979), para 233.

⁴ The Calcutt Report noted that the absence of a precise or exhaustive definition has not presented insuperable problems in the areas of negligence and defamation. Concepts such

be developed for the guidance of the public. The law of privacy developed in such manner would be capable of adapting itself to changing social needs. This approach works well in a number of civil jurisdictions in Europe including Germany, Switzerland and France. There is no evidence that a tort of privacy has led to unwarranted claims or blackmailing action in such jurisdictions.

6.4 It has been argued that complaints about invasions of privacy in Hong Kong are not substantial and that reforming the law of privacy is an excessive response to a minor problem in society. Even if it is true that such complaints are rare, it does not indicate that invasion of privacy is not prevalent. Such rarity may be explained by the fact that many invasions of privacy are, by definition, difficult to uncover. Whereas the victim usually knows when he is assaulted or his property is stolen or damaged, it is unlikely that a person would notice that he is being observed or followed by another. The difficulty in detecting invasion of privacy is particularly acute if the intruder is a professional who has some knowledge of surveillance devices. Unless the information obtained by the intruder is used or disclosed to the public, the victim would have no way to find out that his privacy has been invaded and to take legal action against the intruder.

6.5 Privacy is an important value which should be protected by law as a right in itself and not merely incidentally to the protection of other rights. The Universal Declaration of Human Rights and the ICCPR recognise the right of privacy in somewhat general terms. Creating a new tort would enable the Hong Kong Special Administrative Region to fulfil its obligations under the both the International Covenant and the Basic Law. An explicit commitment to privacy as a legal concept would modify people's behaviour and encourage them to respect and be more sensitive to each other's privacy needs. Liability for invasion of privacy would also have a deterrent effect which would make potential intruders think twice before they act.

6.6 The Calcutt Committee thought that any means of redress should be "as simple, as informal and as speedy as is practicable, while remaining fair".⁵ As any legal action in tort is bound to be cumbersome and expensive, the Committee was not persuaded that a tort of infringement of privacy would perform very well against such criteria. Nevertheless, it agreed that the introduction of a new form of legal protection should not be rejected on what are essentially administrative grounds.⁶

6.7 Some have argued that the development of the law of privacy should be left to the courts. Traditional torts such as trespass and nuisance could be developed by the courts to provide better protection to individual privacy. The developments in Canada, Ireland, New Zealand and the United States show that this is possible. However, the English Court of Appeal in *Kaye v Robertson* stated categorically that there was no tort of invasion of privacy at common law. Although the Court of Appeal in *Khorasandjian v Bush*⁷ held that harassment by unwanted telephone calls was actionable as a private nuisance notwithstanding that the plaintiff had no proprietary interest in the property, the House of Lords in *Hunter v Canary Wharf Ltd*⁸ refused to depart from established principles and held that mere

as "reasonable man" and "right-thinking members of society" are to be found there in daily use. Calcutt Report, para 12.12.

⁵ Calcutt Report, above, para 2.10.

⁶ Calcutt Report, above, paras 12.34 and 12.35.

⁷ [1993] 3 WLR 476.

⁸ [1997] 2 All ER 426.

licensees on land do not have a right to sue in private nuisance. Development of the law of privacy by the courts is uncertain both as to timing and as to content. It would be unfair to litigants if they have to incur huge sums of legal expenses to assert what most would regard as a fundamental human right. Glidewell LJ remarked that the facts of the *Kaye* case were a “graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provisions can be made to protect the privacy of individuals.” In *Malone v Metropolitan Police Commissioner*,⁹ Sir Robert Megarry V-C expressed the view that-

“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 a judge deciding a particular case: only Parliament can create such a right.”

6.8 In a similar vein, Sir Nicholas Browne-Wilkinson V-C stated:

“[t]he legal difficulties of defining what is privacy and what are the proper defences are too elaborate. The courts, I would have to say, are quite good at some things, but they are not famed for their delicacy of touch, and when you have matters which are a very complicated balancing of imponderables, where the essence of the matter is flexibility, not certainty, I believe, the courts may not be the ideal body to administer it.”¹⁰

6.9 The protection of privacy may conflict with freedom of the press. The news media are concerned that restrictions imposed by a privacy tort would undermine the freedom of speech and inhibit the discovery and dissemination of truth. It has been argued that the right of privacy should not be recognised unless a Freedom of Information Ordinance is in place. The media is also understandably concerned that a tort of privacy could become a means of preventing legitimate publication by way of gagging writs:

“there was concern that the availability of injunctive relief and interdict, which might be sought in particular by unscrupulous people, would undermine legitimate investigative journalism. At an early stage in an investigation a journalist might not have uncovered sufficient evidence to persuade a court that publication should not be prevented; the balance would always favour complainants.”¹¹

6.10 We acknowledge that freedom of information is important to the well-being of society. But as pointed out by Lyon:

“that is far from saying that the public is entitled to know all the truth about an individual or group. Some area of a man’s life is his business alone. ... The law already puts curbs on dissemination of true facts in the area of breach of confidence, criminal libel, copyright

⁹ [1979] Ch 344.

¹⁰ Address to the International Press Institute in 1988, quoted in Calcutt Report, para 12.10.

¹¹ Department of National Heritage, *Privacy and Media Intrusion* (London, Cm 2918, 1995), para 4.9.

*and patent. To these we now propose to add curtailment of the use of electronic and photographic devices and the use of information obtained by unlawful methods.*¹²

6.11 The Calcutt Report stated:

*“Serious investigative journalism would be outside the scope of such a law, especially when exposing serious wrong-doing. There is a clear distinction between infringements of privacy deriving from prurient curiosity and those associated with legitimate journalism. Most people have little difficulty in recognising where the boundary lies.”*¹³

6.12 In order to give due recognition to freedom of the press, the law may provide for exceptions for disclosure of personal information which is in the public interest. There has been no suggestion that press freedom has suffered in those jurisdictions which provide for an enforceable right of privacy.

6.13 The JUSTICE Report considered two approaches to legislation. One approach would be “to make the minimum adjustments to the existing common law causes of action necessary to extend their effect to the main types of privacy situation which are at present not covered.” JUSTICE rejected this approach as being somewhat artificial. It would mean that “well-established and well-defined common law causes of action well adapted to their traditional roles would have to be extended, modified and even distorted to deal with situations of quite a different type.”¹⁴

6.14 Another approach would be to treat the matter piecemeal by reference to particular classes of infringement. If one were to adopt this approach, the classification now accepted in the United States could be used as a point of reference. This approach is attractive but “it is open to the objection that it endeavours to confine a wide subject within limited categories, which may not, in the course of time, prove sufficient. It also fails to recognise adequately that one principle should underlie all these different types of case.”¹⁵ The JUSTICE Report stated:

*“It would seem that the principles which ought to determine the balance of the competing interests of the intruder and the individual are the same in any privacy situation, and that if Parliament can define them for one purpose it can define them for all. We have, therefore, come to the conclusion that legislation ought to create a general right of privacy applicable to all situations, and that to allow flexibility in a changing society the language of such a statute must be general.”*¹⁶

6.15 Lyon claims that the lack of a comprehensive law would lead to frustration felt by those who are harmed by intrusion and then find that there is no legal remedy in their case as there is in other cases. If a general tort is in place, it would cover almost all invasions of privacy which could be conceived, including those which have not yet become apparent. “[It] is the principles rather than the

¹² Younger Report, paras 8 - 9.

¹³ Calcutt Report, para 12.25.

¹⁴ JUSTICE, para 127.

¹⁵ JUSTICE, para 127.

¹⁶ JUSTICE, para 128.

methods of intrusion which are of the essence of this problem, and the principles can be decided only in comprehensive legislation.”¹⁷

6.16 The third approach would be to give a wide definition of the right to privacy followed by examples of infringements. The four provinces in Canada which have a statutory tort of violation of privacy adopt this approach. Although none of the privacy statutes contains a definition of right of privacy, all of them give examples of violation of privacy. The British Columbia Act states that “privacy may be violated by eavesdropping or surveillance”.¹⁸ The Manitoba Act is more detailed. It provides that privacy may be invaded:

- “(a) *by surveillance, auditory or visual, whether or not accomplished by trespass, of that person, his home or other place of residence, or of any vehicle, by any means including eavesdropping, watching, spying, besetting or following;*
- (b) *by the listening to or recording of a conversation in which that person participates, or messages to or from that person, passing along, over or through any telephone lines, otherwise than as a lawful party thereto or under lawful authority conferred to that end;*
- (c) *by the unauthorized use of the name or likeness or voice of that person for the purposes of advertising or promoting the sale of, or any other trading in, any property or services, or for any other purposes of gain to the user if, in the course of the use, that person is identified or identifiable and the user intended to exploit the name or likeness or voice of that person; or*
- (d) *by the use of his letters, diaries and other personal documents without his consent or without the consent of any other person who is in possession of them with his consent.”*¹⁹

6.17 The UK Consultation Paper commented that the Canadian legislation had the advantage of flexibility and it would still be applicable when society’s attitude to aspects of privacy changed. Nevertheless it suggested that this approach was not sufficiently precise and was likely to lead to uncertainty. It preferred a tighter definition which concentrated on the core of privacy and minimised the need to plead defences.²⁰

¹⁷ House of Commons Official Report, 23 January 1970, cols. 888 and 889.

¹⁸ Section 1(4).

¹⁹ Section 3. The lists in the Saskatchewan and Newfoundland legislation are similar but they provide that proof of the conduct stated in the list without the necessary consent is merely *prima facie* proof of a violation of privacy. See Newfoundland Act, section 4; Saskatchewan Act, section 3.

²⁰ Lord Chancellor’s Department & the Scottish Office, *Infringement of Privacy - Consultation Paper* (1993), para 5.21. The Paper proposed at para. 5.22 that the new tort be drafted in the following terms: “A natural person shall have a cause of action, in tort or delict, in respect of conduct which constitutes an infringement of his privacy, causing him substantial distress, provided such distress would also have been suffered by a person of ordinary sensibilities in the circumstances of the complainant. A natural person’s privacy shall be taken to include matters appertaining to his health, personal communications, and family and personal relationships, and a right to be free from harassment and molestation.”

6.18 We are aware that the provisions of the Personal Data (Privacy) Ordinance provide some protection against infringement of privacy. The common law might also be developed to address privacy concerns. But the availability of remedies under the Ordinance and the possible development of the law of torts to cater for privacy concerns do not of themselves preclude us from considering whether it is desirable to introduce a new right of action to protect privacy. Overlap between different causes of action and between civil law and criminal law is not uncommon. The introduction of a new tort should not be ruled out on this ground.

6.19 In view of the fact that no jurisdiction has been able to offer a satisfactory definition of privacy in the statute book, and that a right defined in general terms would make the law uncertain and difficult to enforce, we have decided not to recommend the creation of a general tort of invasion of privacy. We believe that the proper approach is to isolate and specify the privacy concerns in which there is an undoubted claim for protection by the civil law. This would require the establishment, by statute, of one or more specific torts of invasions of privacy which clearly define the act or conduct which unjustifiably frustrates the reasonable expectations of privacy of the individual. In this connection, we note that the Nordic Conference on the Right of Privacy identified the following invasions as falling within a law of privacy:

“(a) Intrusion upon a person’s solitude, seclusion or privacy

An unreasonable intrusion upon a person’s solitude, seclusion or privacy which the intruder can foresee will cause serious annoyance ... should be actionable at civil law; and the victim should be entitled to an order restraining the intruder. In aggravated cases, criminal sanctions may also be necessary.

(b) Recording, photographing and filming

The surreptitious recording, photographing or filming of a person in private surroundings or in embarrassing or intimate circumstances should be actionable at law. In aggravated cases, criminal sanctions may also be necessary.

(c) Telephone-tapping and concealed microphones

(i) The intentional listening-in to private telephone conversations between other persons without consent should be actionable at law.

(ii) The use of electronic equipment or other devices - such as concealed microphones - to overhear telephone or other conversations should be actionable both in civil and criminal law.

(d) The use of material obtained by unlawful intrusion

The use, by publication or otherwise, of information, photographs or recordings obtained by unlawful intrusion (paras (a), (b), and (c) above) should be actionable in itself. The victim should be entitled to an order restraining the use of

such information, photograph or recording, for the seizure thereof and for damages.

(e) *The use of material not obtained by unlawful intrusion*

(i) *The exploitation of the names, identity or likeness of a person without his consent is an interference with his right to privacy and should be actionable.*

(ii) *The publication of words or views falsely ascribed to a person, or the publication of his words, views, name or likeness in a context which places him in a 'false light' should be actionable and entitle the person concerned to the publication of a correction.*

(iii) *The unauthorised disclosure of intimate or embarrassing facts concerning the private life of a person, published where the public interest does not require it, should in principle be actionable."*

6.20 We shall examine in the next four chapters whether the following acts or conduct constitute an unreasonable invasion of privacy, and if so, whether such acts or conduct ought to be actionable as a tort:

- a) intrusion upon the seclusion, solitude or privacy of another;
- b) unauthorized disclosure of private facts obtained by lawful or unlawful means;
- c) exploitation or appropriation of a person's identity or likeness without his consent; and
- d) publicity placing someone in a false light.

Chapter 7 - Intrusion upon the seclusion or solitude of another

Basic Law of the Hong Kong Special Administrative Region

7.1 Although the Basic Law of the Hong Kong Special Administrative Region does not make explicit reference to the right of privacy, Articles 28, 29 and 30 of the Basic Law provide a basic framework within which the individual's reasonable expectations of privacy are protected at a constitutional level. Any unauthorized surveillance or interception of communications are liable to be subjected to scrutiny under these articles. Article 28 of the Basic Law provides:

"The freedom of the person of Hong Kong residents shall be inviolable.

No Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment. Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited."

7.2 According to Manfred Nowak, the right to privacy protects that particular area of individual autonomy that does not touch upon the sphere of liberty and privacy of others. He says:

"Human actions are normally directed at others and thus involve the danger of interfering with the privacy, i.e., the sphere of liberty, of others. According to the classical, liberal concept of liberty, this is precisely the point at which the absolute protection of individual liberty comes to an end. That sphere of individual autonomy whose existence and field of action does not touch upon the sphere of liberty of others is what we call privacy. It entitles the individual to isolate oneself from one's fellow human beings, to withdraw from public life into one's own private area, in order to shape one's life according to one's own (egocentric) wishes and expectations."¹

7.3 The importance of protection from intrusion upon privacy to the enjoyment of individual liberty was well expressed by Judge Cobb in the following terms:²

"Liberty includes the right to live as one will, so long as that will does not interfere with the rights of another or of the public. One may desire to live a life of seclusion; another may desire to live a life of

¹ M Nowak, 288.

² *Pavesich v New England Life Ins Co*, 122 Ga 190 at 196 (1905); quoted in E J Bloustein, 1002.

publicity; still another may wish to live a life of privacy as to certain matters and of publicity as to others. ... Each is entitled to a liberty of choice as to his manner of life, and neither an individual nor the public has a right to arbitrarily take away from him his liberty."

7.4 Article 29 of the Basic Law is even more specific as to the right of the individual to be protected from arbitrary or unlawful intrusion into private premises. It provides:

"The homes and other premises of Hong Kong residents shall be inviolable. Arbitrary or unlawful search of, or intrusion into, a resident's home or other premises shall be prohibited."

7.5 This Article is based on Article 39 of the Constitution of the People's Republic of China³ but the former is wider than the latter in two respects:

- a) The protection from intrusion under the Basic Law extends from "homes" to "other premises".
- b) The Basic Law prohibits not only "unlawful" intrusion but also "arbitrary" intrusion.

7.6 The protection from invasion of privacy is further strengthened by Article 30 of the Basic Law which provides that "[the] freedom and privacy of communications of Hong Kong residents shall be protected by law." The protection from unauthorized interception of communications covers all communications of Hong Kong residents regardless of where the communications take place.

Need for protection from intrusion upon privacy

7.7 In the privacy context, the word "intrusion" may include "prying, spying, telephone-tapping, 'bugging', interception of correspondence, searches, and other physical intrusions." Bloustein contends that intrusion into private affairs is wrongful because it is an assault on human personality and a blow to human dignity:

"The fundamental fact is that our Western culture defines individuality as including the right to be free from certain types of intrusions. This measure of personal isolation and personal control over the conditions of its abandonment is of the very essence of personal freedom and dignity, is part of what our culture means by these concepts. A man whose home may be entered at the will of another, whose conversation may be over-heard at the will of another, whose marital and familial intimacies may be overseen at the will of another, is less of a man, has less human dignity, on that account. He who may intrude upon another at will is the master of the other and, in fact, intrusion is a primary weapon of the tyrant."⁴

7.8 The potential for intrusion upon privacy has been made all the easier by technological developments in electronic surveillance. Listening and optical

³ Article 39 of the PRC Constitution provides: "The residences of citizens of the People's Republic of China are inviolable. Unlawful search of, or intrusion into, a citizen's residence is prohibited."

⁴ E J Bloustein, at 973-974.

devices are becoming more and more sophisticated and many of them are now available on the local market at a low price. Technical devices which may be used for surveillance include:

- parabolic microphones which can pick up conversations at considerable distances;
- microphones hidden in pens and watches;
- microwave-beam devices which can penetrate walls and other obstacles;
- miniature tape recorders built into cigarette lighters;
- long-range cameras which enable photographs to be taken at night; and
- optical devices which can be operated by remote control in complete darkness.

7.9 In the past, simple precautions could be taken by the individuals to protect themselves from being overheard or observed by others. Such precautions are no longer effective with the advances in the technology of surveillance devices. Surveillance technology now allows the penetration of physical barriers which, but for the use of such devices, would have been adequate for the protection of privacy against unwanted monitoring. It also renders legal protection of territorial privacy by the torts of trespass and nuisance inadequate if not irrelevant.

7.10 Failure to provide adequate protection from intrusion by surreptitious surveillance has a chilling effect on freedom of communications. Richard Posner explains:⁵

“Prying by means of casual interrogation of acquaintances of the object of the prying must be distinguished from eavesdropping, electronically or otherwise, on a person’s conversations. A in conversation with B disparages C. If C has a right to hear this conversation, A, in choosing the words he uses to B, will have to consider the possible reactions of C. Conversation will be more costly because of the external effects, and the increased costs will result in less, and less effective, communication. After people adjust to this new world of public conversation, even the C’s of the world will cease to derive much benefit in the way of greater information from conversational publicity, for people will be more guarded in their speech. The principal effect of publicity will be to make conversation more formal and communication less effective rather than to increase the knowledge of interested third parties.”

7.11 An illustration which shows that safeguarding privacy would facilitate full and frank communication is the waiver provision in the United States Family Educational Rights and Privacy Act of 1974.⁶ That law gives students a right to inspect and review confidential letters of recommendation written about them, unless they waive in advance their right to inspect or review. The overwhelming majority of students execute such waivers because they know that the value of a letter of recommendation to which they have access is much less than that of a private letter of recommendation.

⁵ R A Posner, “The Right of Privacy” (1978) 12:3 *Georgia Law Review* 393, 401. This analysis can be extended to efforts to obtain letters and private papers of another.

⁶ § 99.12; 20 USC § 1232g(a)(1); example given in R A Posner, 401-2.

7.12 We note that many conscientious reporters are reluctant to gather news by privacy-invasive means but nevertheless feel obliged to comply with the instructions of their superiors. If the use of intrusive means to obtain personal information is made unlawful by a statutory tort of privacy, it would operate to protect the journalists as well as ordinary citizens.

7.13 In order to protect the fundamental rights and freedoms guaranteed under the Basic Law and to impose civil liability for illegitimate surveillance whether conducted with or without the assistance of technical devices, a tort of invasion of privacy by intrusion should be created by statute. This would remove the need for the individual who is aggrieved by an invasion of privacy to seek relief by relying on a right of action in tort which is not primarily designed for the protection of individual privacy.

Intrusion upon the “solitude” or “seclusion” of another

7.14 Intrusion upon seclusion or solitude is actionable in the American courts. The *Restatement of the Law of Torts* in the United States⁷ defines the intrusion tort as follows:

“One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”

7.15 This tort requires proof of:

- an unauthorized intrusion or prying into the plaintiff’s seclusion;
- which is highly offensive or objectionable to a reasonable person;
- as to a matter which the plaintiff has a right to keep private; and
- causes anguish and suffering.

7.16 “Solitude” and “seclusion” have the following meanings in the *New Shorter Oxford English Dictionary*:

“Seclude 1. Shut off, obstruct the access to (a thing). ... 2. Shut or keep out from; deny entrance to; debar (*from*); prevent *from doing*. b. Prohibit (something), preclude. 5. Enclose, confine, or shut off so as to prevent access or influence from outside; *spec.* hide or screen from public view; *refl.* live in retirement or solitude. ... 6. Separate, keep apart.”

“secluded a. that has been secluded; (of a place) remote, screened from observation or access, seldom visited on account of distance or difficulty of approach ...”

“seclusion 1. The action of secluding something or someone. ... 2. The condition or state of being secluded; retirement, privacy; a period of this. ...”

⁷ The *Restatement* represents the preponderance of opinion in American jurisdictions.

“solitary A. *adj.* 1. Of a person or animal: unaccompanied; deprived of or avoiding the society of others; keeping apart or aloof; living alone. b. Sole, single; unsupported, unparalleled. 2. Of a place: remote, unfrequented, secluded, lonely. 3. Of an action, state, etc.: characterized by the absence of all companionship or society. ...”

“solitude 1. The state of being or living alone, solitariness. Later also, absence of life or disturbance. 2. A lonely, unfrequented, or uninhabited place. ...”

7.17 An individual has a reasonable expectation of privacy when in a state of solitude or seclusion. He must be able to retreat from time to time into his private spaces to work, relax or recover. One of the main functions of privacy is to keep certain aspects of an individual’s life or body out of the public realm. According to this view, a person experiences privacy when he is neither looked at nor listened to against his wish.⁸ Another way to put it is that he experiences privacy when his private life is not exposed to the senses of others.

7.18 We think that individuals should be free to indulge in their personal preferences in sex, religion, reading, research, play or manner of communication in settings where they are not aurally or visually accessible to others. The ability to choose the circles in which we carry on such activities and to control the dissemination of personal information is important to a society which places a high value on liberal individualism.

7.19 One way to protect privacy is to prevent other people from gaining unwanted access to an individual. According to Ruth Gavison, an individual loses privacy when others gain physical access to him:

“Physical access here means physical proximity - that Y is close enough to touch or observe X through normal use of his senses. ... The following situations involving loss of privacy can best be understood in terms of physical access: (a) a stranger who gains entrance to a woman’s home on false pretenses in order to watch her giving birth; (b) Peeping Toms; (c) a stranger who chooses to sit on ‘our’ bench, even though the park is full of empty benches; and (d) a move from a single-person office to a much larger one that must be shared with a colleague. In each of these cases, the essence of the complaint is not that more information about us has been acquired, nor that more attention has been drawn to us, but that our spatial aloneness has been diminished.”⁹

7.20 Loss of privacy is often accompanied by an increase of knowledge about the subject. This increases the ability of the possessor of that knowledge to manipulate or exercise control over the subject: “by possessing information about B that B does not want known, A will have greater power over B and, concomitantly, B will have less power over A.”¹⁰ Protecting the privacy of B will enable him to enjoy a greater degree of freedom of action.

7.21 Insofar as the right to privacy entails the liberty of the individual to restrict physical access to his person or his private affairs or concerns, and to avoid

⁸ J J Thomson, “The Right to Privacy” (1975) 4 Philosophy and Public Affairs 295, 300.

⁹ R Gavison, “Privacy and the Limits of Law” (1980) 89 Yale LJ 421, at 433.

¹⁰ F Schauer, 715-6.

the society of others by retiring himself into a state of being or living alone, the law should protect the individual's interests in seclusion and solitude by creating a tort of invasion of privacy by intrusion upon the seclusion or solitude of others. The claims for solitude and seclusion should be recognised not only because personal information should be protected from unauthorized acquisition but also because it serves to meet the basic needs such as relaxation and freedom from inhibition. No publication or communication to third persons is required where the invasion consists of an intrusion upon an individual's seclusion or solitude.¹¹

Intrusion

7.22 To be actionable for the intrusion tort, there must be something in the nature of prying or intrusion. Offensive manners and insulting gestures should not be enough. Moreover, the thing into which there is prying or intrusion must be private. *Prosser and Keeton on Torts* states:

"The plaintiff has no right to complain when his pretrial testimony is recorded, or when the police, acting within their powers, take his photograph, fingerprints or measurements, or when there is inspection and public disclosure of corporate records which he is required by law to keep and make available. On the public street, or in any other public place, the plaintiff has no legal right to be alone; and it is no invasion of his privacy to do no more than follow him about and watch him there. Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which anyone would be free to see. On the other hand, when the plaintiff is confined to a hospital bed, and when he is merely in the seclusion of his home, the making of a photograph is an invasion of a private right, of which he is entitled to complain."¹²

7.23 We think that whether an intrusion amounts to an invasion of privacy depends on whether the individual has a reasonable or legitimate expectation of privacy. We agree with the view adopted by the United States courts that a person has a reasonable expectation of privacy if (a) he, by his conduct, has exhibited an actual (or subjective) expectation of privacy, that is, he has shown that he seeks to preserve something as private; and (b) his subjective expectation of privacy is one that society is prepared to recognise as reasonable, that is, the expectation, viewed objectively, is justifiable under the circumstances.¹³ An individual does not have a subjective expectation of privacy if he has been put on notice that his activities in a particular place would be watched by others for a legitimate purpose. Factors determining the reasonableness of an expectation of privacy include: (a) whether the area is generally accessible to the public; (b) whether the individual has a proprietary interest in the area; (c) how the area is used; and (d) the general understanding of society that certain areas deserve the most scrupulous protection from intrusion.¹⁴

Physical intrusion

¹¹ *Fowler v Southern Bell Tel & Co* (1965, CA5 Ga) 343 F2d 150.

¹² W P Keeton (ed), 855-6.

¹³ *Smith v Maryland*, 442 US 735.

¹⁴ Cf *Oliver v United States*, 466 US 170, 178-183.

7.24 Where a person has secluded himself in his home or office or in a room in a hotel or hospital, he should have a right to bring an action against any one who ignores his objection and, without any proper authority, forces his way into the premises. Whether the place in which a person has secluded himself is private or public in nature is immaterial. The question of ownership is not decisive when it comes to the protection of privacy. A person is entitled to the privacy of his room or flat in which he has lawfully secluded himself even though he has no proprietary interest in it. The classic example of physical intrusion is the placement of a transmitting device inside the target premises. But eavesdropping may also be carried out by attaching a microphone to the outside of a window or by fixing a bug anywhere on the phone line. In *Katz v United States*,¹⁵ FBI agents attached an electronic listening device to the outside of a glass telephone booth. Stewart J stated that:

*“the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. ... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”*¹⁶

7.25 Although the person using the telephone booth was visible to the public, what he sought to exclude was not the intruding eye but the uninvited ear. Taking a photograph of two persons sitting inside a private car who are visible to the public is one thing; but placing an electronic device in the vehicle compartment for the purposes of listening and recording their conversations inside the compartment is another. The Supreme Court of the United States held that the surveillance in the *Katz* case was a “search” under the Fourth Amendment. We may add that although the right to privacy protects people, not places, the place where the intrusion occurs is also a major consideration. The level of privacy an individual expects depends on where he is and on the norms that society has prescribed for places of the same kind.

Non-physical intrusion

7.26 Apart from physical intrusion on a person’s home or room, non-physical intrusions such as looking onto a person’s private property and eavesdropping on private conversations are also objectionable. A person who surreptitiously overhears or observes the private affairs of another by the use of his senses, whether with or without the use of technical aids, intrudes upon another’s solitude or seclusion even though he has not trespassed on another’s property. If the intrusion tort is limited to physical intrusions, persons who conduct visual or aural surveillance without encroaching upon the premises in which the target is located or otherwise interfering with the target’s property would be able to avoid liability. This would be unjust to the persons who are subjected to surveillance. Peeping into a bedroom or overhearing a private conversation conducted inside a bedroom without technical aid is no less invasive than placing or using a surveillance device in the bedroom. The tort should therefore cover both physical and non-physical intrusions.

7.27 Non-physical intrusion may be effected by surveillance devices which do not need to physically intrude on property or come close to the target. These devices operate by intercepting at a distance information transmitted by satellite,

¹⁵ 389 US 347 (1967).

¹⁶ At 351-2.

microwave and radio, including mobile telephone transmissions. Some devices may even intercept electromagnetic radiation emitted from electronic equipment. Electronic devices such as computers and printers emit radiation through the air or through wires. A private detective can monitor and retrieve information in any electronic device while it is being processed without the knowledge of the user. Emanation monitoring is difficult to detect because it is passive and can be done at a distance from the target. Although much of such electromagnetic radiation is not intended to transmit information, the intercepted material may be reconstructed into useful intelligence. It is now technically possible to reconstruct the contents of computer terminal screens, the contents of a computer's memory, or the contents of its mass storage devices at a distance.¹⁷

7.28 The Commission report on the regulation of interception of communications recommends that the interception of telecommunications while the messages are in the course of transmission be a crime. Telecommunications presuppose the existence of a sender and a recipient. The word "telecommunications" indicates that the sender is seeking to send signals or messages to the intended recipient by electronic equipment; it does not refer to the inadvertent emission of electromagnetic radiation. Insofar as emanated transient electromagnetic pulses are not telecommunications nor would they be regarded as a form of communication, the monitoring of electromagnetic emanations of electronic equipment would not be covered by the proposed interception offence. We think that such monitoring should give rise to liability in tort.

Aural surveillance

7.29 Aural surveillance generally refers to the surreptitious overhearing, either directly by ear or by means of some technical device such as a wiretap, microphone or amplifier, of conversations, or the preservation of such conversations by a recording device. Eavesdropping on private conversations intrudes on the solitude and seclusion of the parties to the conversations and enables the eavesdropper to pry into another's private affairs. It constitutes an invasion of privacy and the victim should be able to maintain a civil action against the eavesdropper. The European Court of Human Rights recently held that intercepting telephone calls from an office in a police headquarters amounted to a breach of privacy under Article 8 of the European Convention on Human Rights.¹⁸

7.30 A victim of the interception offence proposed in the Commission report on Interception of Communications would have a right of action against the accused for invasion of privacy. Failure to impose liability on the eavesdropper would effectively deny the individual other rights and freedoms guaranteed under the Basic Law.¹⁹ In *Rhodes v Graham*, which involved the tapping of a telephone line, the court held that-

¹⁷ J McNamara, "The Complete, Unofficial TEMPEST Information Page" (1997) at <<http://www.eskimo.com/~joelm/tempest.html>>; C Seline, "Eavesdropping on the Electromagnetic Emanations of Digital Equipment: The Laws of Canada, England and the United States" (1989), at <<http://www.jya.com/tempest.htm>>. TEMPEST is an acronym for Transient Electromagnetic Pulse Emanation Standard. It is a specification on the amount of electromagnetic radiation that a device may emit without compromising the information it is processing. TEMPEST technology can be used to intercept information stored in computers or displayed on computer terminals.

¹⁸ *Halford v United Kingdom* [1997] *The Times*, 13 July .

¹⁹ See A M Swarthout, "Eavesdropping as Violating Right of Privacy", 11 ALR3d 1296.

*"[i]t is the legal right of every man to enjoy social and business relations with his friends, neighbors, and acquaintances, and he is entitled to converse with them without molestation by intruders. ... The evil incident to the invasion of the privacy of the telephone is as great as that occasioned by unwarranted publicity in newspapers and by other means of a man's private affairs for which courts have granted the injured person redress. Whenever a telephone line is tapped, the privacy of those talking over the line is invaded and conversations wholly proper and confidential may be overheard."*²⁰

7.31 Eavesdropping by amplifying, transmitting or recording device is equally offensive. In *McDaniel v Atlanta*,²¹ the defendant caused a listening device to be installed in the plaintiff's hospital room in which personal and private conversations with her husband, nurses and friends were held. As a result, what was said and done by the plaintiff was listened to and recorded by the defendant. The court held that the defendant's conduct was "as effectively an intrusion upon or an invasion of privacy of the plaintiff as if the agent had actually been in the room." Similarly in *Hamberger v Eastman*,²² the landlord had installed an eavesdropping device in the bedroom of the plaintiffs who were a husband and wife. The plaintiffs alleged that as a result of the discovery of the device, they were "greatly distressed, humiliated, and embarrassed," and that they sustained "intense and severe mental suffering and distress, and have been rendered extremely nervous and upset." The court held that it was highly offensive to intrude into marital bedrooms. It also ruled that an invasion of privacy is "an injury to personality. It impairs the mental peace and comfort of the individual and may produce suffering more acute than that produced by a mere bodily injury."²³

7.32 An individual's right to privacy does not automatically cease when he leaves the confines of his home or other secluded premises. Intrusion by eavesdropping may occur in public places as well as private premises. A conversation between two persons sitting on a bench in a public park with no one sitting or standing nearby should be protected even though it is conducted in a public place. Granting legal protection to that conversation is in accordance with the reasonable expectations of the individuals because the words spoken are not sufficiently in the public domain as to justify their being overheard by another.

Visual surveillance

7.33 The respondents to the Baseline Opinion Survey commissioned by the Privacy Commissioner considered the opening of their personal mail by another and the taking of pictures of them through a window by an outsider as highly invasive.²⁴ Whether visual observation of a person or his personal property amounts to an intrusion upon another's seclusion depends mainly on whether the individual has a reasonable expectation of privacy in the area in which he or his property is located. Where a picture of an individual is taken in a public place, it is most unlikely that his right to privacy has been violated, even though it is taken without his consent

²⁰ 238 Ky 225 (1931), quoted in 11 ALR3d 1296 at 1301.

²¹ 60 Ga App 9 (1939) 2; cited in 11 ALR3d 1296 at 1303.

²² 106 NH 107; 206 A2d 239 (1964).

²³ 106 NH 107 at 112; 206 A2d 239 at 242 (1964); quoting R Pound, *Jurisprudence* (1959) 58.

²⁴ Office of the Privacy Commissioner for Personal Data & HKU Social Sciences Research Centre, *Baseline Opinion Survey: Public Attitudes to and Preparedness for the Personal Data (Privacy) Ordinance - Key Findings* (March 1997), Figure 4.

and may annoy him.²⁵ An individual has a reasonable expectation of privacy as to visual surveillance only when he is in areas not visible to the general public. He has no reasonable expectations of privacy if he allows himself or places his personal property in such a position that he or his property is readily accessible to the public. Surveillance through an open window of an individual's home constitutes no invasion of privacy because any information acquired thereby is knowingly exposed by him.²⁶ Under this plain view doctrine, much of a vehicle's interior is within the plain view of passers-by and is not protected from intrusion by curious onlookers.²⁷ A driver cannot complain if a journalist takes a picture of him driving the vehicle on the road. Nor can the shopowner complain if a journalist spots him selling prohibited drugs to customers over the counter which is accessible to the public. Where the individual or his property is in plain view and is perceptible to the naked eye, others may use binoculars or long-lens cameras to observe or record without infringing the individual's expectation of privacy. However, there is an invasion of privacy if a technical device is used to collect data which would otherwise be shielded from observation but for the use of the device.²⁸

7.34 In *X v United Kingdom*,²⁹ the applicant took part in a demonstration during a rugby match. She was photographed during the demonstration and again at the police station. The European Commission of Human Rights found that the taking and retention of the photographs did not interfere with her private life because the authorities had not entered her home and taken photographs of her there; the photographs related to a public incident in which she participated voluntarily; they were taken solely for the purpose of her future identification on similar public occasions; and there was no suggestion that the photographs would be made public or used for any other purpose.³⁰

7.35 Where the photograph is taken within the privacy of a person's home or hospital room, the photographer should normally be liable for invasion of privacy.³¹ The taking of photographs of another on a "private occasion" is also objectionable. The Court of Appeal in *Oriental Press Group Ltd v Apple Daily Ltd* noted that "[p]ublic 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".³² In the aftermath of the tragic death of the Princess of Wales, Alan Rusbridger, editor of *The Guardian*, went so far as saying that "a woman going out with a boyfriend for dinner is not by any conceivable stretch of the imagination a public occasion."³³ While we may not support this, we do agree that the fact that an individual is a public figure does not mean that reporters could freely take photographs of him wherever he goes.

²⁵ This may, however, constitute an "unfair" collection of personal data in contravention of Data Protection Principle 1 under the Personal Data (Privacy) Ordinance.

²⁶ *United States v Whaley*, 479 US 1055 (1987).

²⁷ *Maryland v Macon*, 472 US 463.

²⁸ K J Rampino, "Observation through Binoculars as Constituting Unreasonable Search" 48 ALR3d 1178; Younger Report (1972), paras 553-559.

²⁹ Appl No 5877/72, 45 CD 90.

³⁰ Although taking a photograph of an individual in a public place does not normally invade his privacy, the photographer would be liable for the tort of harassment proposed in our Consultation Paper on *Stalking* if such behaviour amounts to harassment and is carried on persistently without justification: HKLRC, Privacy Sub-committee, *Stalking - Consultation Paper* (1998).

³¹ P E Hassman, "Taking Unauthorized Photographs as Invasion of Privacy", 86 ALR3d 374.

³² [1997] 2 HKC 525.

³³ "Public Fury is Aimed at Tabloids", *International Herald Tribune*, 1 September 1997.

7.36 There are some matters about an individual which are not exhibited to public gaze even though he is in a public place.³⁴ An example is a person's underwear or lack of it. An intrusion into such matters is an invasion of privacy whether or not it takes place in a public place provided that the individual has sought to preserve their privacy wherever he goes. Thus, where a woman has taken precautions to protect her underwear from public view by wearing a skirt, other persons should not use covert means to observe or record data relating to her underwear. A person who takes a picture of her underwear should be liable for infringing her right of privacy no matter where the infringement takes place. However, no liability should be attached if a photograph is taken of a woman whose skirt is accidentally blown up by the wind. Some people put the blame on the individuals concerned for not putting on proper clothing. We agree that if a woman wears a mini-skirt which is so short that her underwear is easily exposed to public view, she may be taken as having waived her privacy as far as her underwear is concerned, or be held as having a lower expectation of privacy than those wearing a longer skirt.

7.37 It has been suggested that gathering news by taking photographs of individuals is acceptable as long as the reporter does not obstruct the activities being carried out by the person photographed.³⁵ This suggestion runs the risk of legitimizing the unauthorized installation or use of hidden devices within or without private premises by reporters notwithstanding that it constitutes a gross violation of the right of privacy.

7.38 We conclude that a person should be liable when he has intruded into a private place, or has otherwise invaded a private seclusion that the subject of intrusion has thrown about his person or affairs. A journalist who enters a person's home or office by subterfuge or without consent to take a photograph should be liable for the intrusion tort.³⁶ Although the publications of material obtained by the intrusion may be justified if the publication is in the public interest, the legality of the subsequent publication does not affect the journalist's liability for the original intrusion. A person should not be exempt from liability for unauthorized intrusion merely because the eventual disclosure can be justified in the public interest.³⁷

Aerial surveillance

7.39 Aerial observation does not constitute an intrusion unless the individual has a reasonable expectation of privacy in the area exposed to aerial view. The factors which are taken into consideration by the American courts in determining whether warrantless aerial surveillance constitutes a "search" for the purposes of the Fourth Amendment are: "the height of the aircraft, the size of the objects observed, the nature of the area observed, including the uses to which it is put, the frequency of flights over the area, and the frequency and duration of the surveillance."³⁸

Intrusion into the private affairs or concerns of another

³⁴ *Restatement, Torts 2d*, § 652B, Comment c.

³⁵ See *Apple Daily*, 7 September 1997.

³⁶ *Dietemann v Time, Inc.*, (1971, CA9 Cal) 449 F2d 245; 1 *Media LR* 2417.

³⁷ See Chapter 11.

³⁸ See 68 Am Jur 2d, *Searches and Seizures*, § 59.

7.40 “Peeping Toms” and those who open another’s private and personal mail or examine another’s personal belongings such as diaries, handbags and private bank accounts should be liable for invasion of privacy by intrusion into another’s private affairs or concerns. Intrusions of this nature may take place in a private or public place.

Harassment

7.41 Whether unsolicited mails, house calls or telephone calls amount to intrusion depends on a number of factors:

- the number of mailings and calls received;
- whether the sender or caller persists in total disregard of the victim’s responses or distress caused;
- whether abusive or vicious language was used; and
- whether the intrusion occurred at unreasonable hours.³⁹

7.42 Harassment of a debtor by persistent telephone calls and mailings may amount to an intrusion upon the debtor’s seclusion. Although a creditor has a legal right to take reasonable action to pursue a debtor for the purpose of collecting a debt, the creditor would be liable for invasion of privacy if he takes action which exceeds the bounds of reasonableness.⁴⁰ The need to address by specific legislation the problems associated with harassing behaviour is examined in our consultation paper on *Stalking*.⁴¹

Intrusion and the acquisition of personal information

7.43 An interference with private life does not necessarily involve an acquisition of personal information. Overhearing or observing an individual in circumstances where he has reasonable expectations of privacy is objectionable even though the person overhearing or observing does not acquire any sensitive or intimate information about him. The objection has no necessary connection with the quality of information obtained.⁴² It is more to do with the loss of control over what, when and how information about the individual is disclosed. The acquisition of personal information should not be an element of the intrusion tort.

The basis of liability

7.44 The UK Consultation Paper examined whether a defendant should be liable only if he intended to invade the plaintiff’s privacy, or if he was reckless or negligent, or whether there should be strict liability, so that the defendant would be liable even though he could not be said to be at fault. The defendant may be said to be reckless in invading the plaintiff’s privacy if he has created a risk that the plaintiff’s privacy would be intruded upon and yet has gone on to take the risk, or has not given any thought to the possibility of there being any such risk. We think that indifference to the consequences of an invasion of privacy is as culpable as intentionally invading another’s privacy. The UK Consultation Paper commented that to limit liability to cases of intention would unduly restrict plaintiffs’ right to a

³⁹ 62A Am Jur 2d, § 64.

⁴⁰ 62A Am Jur 2d, § 65.

⁴¹ HKLRC Privacy sub-committee, *Stalking - Consultation Paper* (1998).

⁴² R Wacks, (1993), 247-248.

remedy, but that the balance would be tilted too much in their favour if the tort were made one of strict liability. It suggested that the defendant should be liable where the infringement was caused intentionally, recklessly or negligently.⁴³

7.45 There are two routes to establishing a claim against the defendant. The first is for the plaintiff to prove that the invasion was caused by the defendant intentionally or recklessly. The alternative is to hold the defendant liable regardless of his intention whenever the plaintiff is able to prove that he has invaded the plaintiff's privacy. It is then up to the defendant to show that the invasion is innocent. For example, the statute may provide for a defence that "the defendant, having exercised reasonable care, neither knew nor should reasonably have known that the act, conduct or publication constituting the invasion would have invaded the privacy of any person."⁴⁴

7.46 We believe that it is better to place the burden on the plaintiff to prove all the elements of the tort, rather than for the defendant to prove that the intrusion is innocent. We agree that the plaintiff should not be allowed to recover if the intrusion was accidental or the defendant was merely negligent. The law should require that the intrusion was either intentional or reckless. The court may infer that the defendant committed the tort intentionally if he knew or ought to have known that the exposure of plaintiff's private matters would follow from the his wrongful act.

Offensiveness to a reasonable person

7.47 Not every invasion of privacy warrants the imposition of civil liability. The bringing of trivial claims should be discouraged by the law. As Hong Kong is a densely populated city, all residents must accept that they are subject to a certain degree of scrutiny by their neighbours. An objective test should be adopted to determine the liability of the intruder. We think that an intrusion upon privacy should not be actionable unless it amounts to a substantial and unreasonable infringement of the right of privacy. The plaintiff must show that the intrusion is seriously offensive and objectionable to a reasonable person. This would ensure that the right of privacy would be determined by the norm of a person of ordinary or reasonable sensibilities and not that of a hypersensitive person. Where the intrusion would have caused mental distress or embarrassment to a person of ordinary sensibilities but the plaintiff himself was not substantially hurt, the plaintiff would be entitled to nominal damages only.⁴⁵

Conclusion

7.48 On the basis of the foregoing discussion, we conclude that the new intrusion tort requires proof of the following elements:

- a) either an intrusion upon the solitude or seclusion of another or an intrusion into another's private affairs or concerns;
- b) the intrusion may be physical or non-physical;

⁴³ Above, para. 5.35.

⁴⁴ Manitoba Act, section 5(b).

⁴⁵ *American Jurisprudence* provides: "In order to constitute an invasion of the right of privacy, an act must be of such a nature as a reasonable person can see might and probably would cause mental distress and injury to anyone possessed of ordinary feelings and intelligence, situated in like circumstances as the complainant." See 62A Am Jur 2d, Privacy, § 40.

- c) the intrusion must be done intentionally or recklessly; and
- d) the intrusion must be seriously offensive and objectionable to a reasonable person of ordinary sensibilities.

Recommendation 1

We recommend that any person who intentionally or recklessly intrudes, physically or otherwise, upon the solitude or seclusion of another or into his private affairs or concerns, should be liable for a statutory tort of invasion of privacy, provided that the intrusion is seriously offensive and objectionable to a reasonable person of ordinary sensibilities.

Practical examples of reasonable expectations of privacy

(a) Privacy in public toilets⁴⁶

7.49 Jurisprudence in the United States has considered what amounts to a reasonable expectation of privacy in public toilets. On the one hand, public toilets are private places because they have physical features designed to protect users from being watched by others on the street while performing intimate bodily functions. On the other hand, the toilets are accessible to the general public of the same sex. The male toilets also have urinals in the common area as well as enclosed toilet stalls. Toilet stalls have a higher level of expectation of privacy than the common area.

7.50 *Common areas* - In *People v Lynch*,⁴⁷ the defendant had been videotaped while engaging in homosexual activities in the common area of the public toilet. People who wished to visit the toilet had to go through the front door, vestibule and inner door before entering the common area. Hence anyone inside the common area would be warned of any incoming persons. The Court of Appeals held that although the structure preserved a certain amount of privacy to the users, "it can be presumed that any member of the public would expect that in the common area of the facility their privacy is not absolute and that any activity in that area is open to public examination." The defendant had a subjective expectation of privacy in the common area of a public toilet, but that expectation was not reasonable because it was readily accessible to the public.

7.51 *Enclosed toilet stalls* - In one case,⁴⁸ the defendant was monitored by a video camera installed by the police in the ceiling above the bathroom stall. The court held that the bathroom stalls, like the telephone booth in the *Katz* case, were "temporarily private places whose momentary occupants' expectations of privacy are recognised by society as reasonable." It recognised that an expectation of privacy

⁴⁶ See J R Scharrer, "Covert Electronic Surveillance of Public Rest Rooms: Privacy in the Common Area?" (1989) 6 *Cooley LR* 495; 68 Am Jur 2d, *Searches and Seizures* § 34.

⁴⁷ No 86-55700, slip op (Ingham Cir Ct Jan 11, 1988); cited in J R Scharrer, 504. See also *People v Heydenberk* 171 Mich App 494, 430 NW 2d 760 (1988); cited in J R Scharrer, 504.

⁴⁸ *People v Dezek*, 107 Mich App 78, 308 NW 2d 652 (1981); cited in J R Scharrer, 506.

may be partial and yet receive constitutional protection. In another case,⁴⁹ the defendant and another man committed a homosexual act below the partition between two toilet stalls. The court held that he did not have a reasonable expectation of privacy in what could be seen from the common area:

“[A] bathroom stall ... does not afford complete privacy, but an occupant of the stall would reasonably expect to enjoy such privacy as the design of the stall afforded, i.e., to the extent that defendant’s activities were performed beneath a partition and could be viewed by one using the common area of the restroom, the defendant had no subjective expectation of privacy, and, even if he did, it would not be an expectation which society would recognise as reasonable”⁵⁰

7.52 We believe that a person has no reasonable expectations of privacy in the common area of a public toilet which is readily accessible to the public even though it is secluded and shielded from public view. However, a person has a reasonable expectation of privacy while he is in an enclosed toilet stall but only to the extent that his activities inside cannot be seen from the common area. A person who installs a camera in the ceiling of the stall or who looks down through ceiling vents should be liable for intruding upon the privacy of persons occupying the stall.

(b) Privacy in the workplace⁵¹

Traditional workplace privacy

7.53 Although an individual may have a privacy interest in his place of work, his expectations of privacy in the workplace is less than that in his residence. Workplace may include the reception area, general registry, rooms for senior staff, toilets, changing rooms, common rooms, canteen, locker rooms, company vehicles, and other open areas such as car park and areas which serve customers. Employees have different expectations of privacy in different parts of the workplace. A salesman in a departmental store expects less privacy than an office manager who has his own room. It should not be overlooked that surveillance in a place of work which is accessible to the public also puts the privacy of the general public at stake.

7.54 Generally speaking, offices are provided to employees for the sole purpose of facilitating the work of an organisation. Employees can easily avoid exposing their personal belongings by not bringing them to the office. However, if an employee has taken affirmative steps to put his closed personal luggage, handbag or briefcase in a place which is not accessible to the employer, he can reasonably expect privacy in the contents of such personal belongings even though they happen to be within the employer’s premises.

⁴⁹ *People v Kalchik*, 160 Mich App 40, 407 NW 2d 627 (1987); cited in J R Scharrer, 506.

⁵⁰ At 48-49, 407 NW 2d at 631; cited in J R Scharrer 506.

⁵¹ International Labour Organisation, “Monitoring and Surveillance in the Workplace” in *Conditions of Work Digest* (Vol 12, No 1, 1993); D R McCartney, “Electronic Surveillance and the Resulting Loss of Privacy in the Workplace” (1994) 62:4 *University of Missouri-Kansas City Law Review* 859; M S Dichter & M S Burkhardt, “Electronic Interaction in the Workplace: Monitoring, Retrieving and Storing Employee Communications in the Internet Age” (paper delivered at the Fourth Annual Conference of The American Employment Law Council in October 1996), at <<http://www.mlb.com/speech1.htm>>; J Green, “Electronic Monitoring in the Workplace: The Need for Standards”, (1984) 52:3 *George Washington Law Review* 438; The Privacy Committee of NSW, *Invisible Eyes: Report on Video Surveillance in the Workplace* (No 67, 1995); NSW Law Reform Commission, *Surveillance* (Issue Paper 12, 1997), ch 6.

7.55 In *O'Connor v Ortega*,⁵² a state hospital searched the office of one of its employees in connection with an investigation of alleged wrongdoing. The Supreme Court of the United States held that an employee has a reasonable expectation of privacy which must be determined in the context of the employment relation, subject to the “operational realities” of the workplace which reduce employee expectations by virtue of actual office practices and procedures or by legitimate regulation. An office, for instance, is not a private enclave free from entry by supervisors, other employees, and business and personal invitees. The supervisors may have to gain access to official property which is only available in the employee’s office or desk while he is away from office. They may also need to carry out a search to investigate violations of workplace rules or government regulations. The court therefore concluded that the employee in that case had a reasonable expectation of privacy at least in his desk and file cabinets on the grounds that (a) he did not share his desk or file cabinets with other employees, (b) his work related files were not kept in his office, (c) personal materials had been kept in his office for 17 years, and (d) the employer had no regulation or policy that discouraged employees from storing personal items in their desk or file cabinets. In another case, the employees were allowed to use the lockers provided by the employer with their own locks. The court held that the company violated the employee’s privacy by searching his locker even though the locker was owned by the company.⁵³

Electronic surveillance in the workplace

7.56 Developments in surveillance technologies have increased the incidence of infringement of individual privacy in the workplace. Employers may monitor the performance, behaviour and communications of their employees in the following ways:

- Telephone calls with clients and customers may be intercepted and employee communications may be monitored through electronic and voice mail.
- Data appearing on the computer screen or stored in the computer network of the company may be monitored by employers.
- The keystroke speed of employees involved in word-processing jobs may be monitored.
- Employers may monitor the performance of employees by examining the amount of time the latter spent on the computer.
- Movements in the workplace may be observed and recorded by video cameras.

7.57 The International Labour Organisation states that the use of surveillance technology in the workplace gives rise to the following privacy concerns:

- “1. *Their use is a violation of basic human rights and dignity, and is often carried out without adequate consideration for such interests.*

⁵² 480 US 709 (1987).

⁵³ *K-Mart v Trotti*, 677 S W 2d 632 (1984), cited in K L Casser, p 10. More recently, a partner of a law firm searched the office of a lawyer employed by the firm. The partner discovered a letter from the lawyer’s doctor relating to the latter’s HIV status. The court held that a search of an employee’s work area which is conducted in such a way as to reveal matters unrelated to work may constitute an invasion of privacy. *Doe v Kohn, Nast & Graf*, 862 F Supp 1310 at 1326 (E D Pa 1994); referred to in M S Dichter & M S Burkhardt, at p 8.

2. *Computer data banks and telephone and video monitoring make prying into the private lives of workers easier and more difficult to detect than ever before.*
3. *Monitoring and surveillance give employees the feeling that they are not to be trusted and thus foster a divisive mentality which is destructive to both workers and employers.*
4. *Such practices can be used to discriminate or retaliate against workers, which may be difficult for workers to discover.*
5. *Monitoring and surveillance involve both issues of exercising control over workers and control over data relating to specific workers.*⁵⁴

7.58 Paragraph 6.14 of the International Labour Organisation's Code of Practice on the Protection of Worker's Personal Data further provides.⁵⁵

- (1) *If workers are monitored they should be informed in advance of the reasons for monitoring, the time schedule, the methods and techniques used and the data to be collected, and the employer must minimize the intrusion to the privacy of workers.*
- (2) *Secret monitoring should be permitted only: (a) if it is in conformity with national legislation; or (b) if there is suspicion on reasonable grounds of criminal activity or other serious wrongdoing.*
- (3) *Continuous monitoring should be permitted only if required for health and safety or the protection of property."*

7.59 Members of the Congress in the United States have introduced several bills in an attempt to regulate electronic surveillance of employees by employers. One of them is the proposed Privacy for Consumers and Workers Act.⁵⁶ The Act permits surveillance of employees by their employer if the latter has notified the former of matters such as the form of surveillance used, time of surveillance, type of data to be collected, use of the data and how the printouts would be interpreted. Prospective employees would be notified of the employer's intent to use electronic surveillance in connection with the job for which they are applying. The employer need not give notice if he has reasonable suspicion that an employee may violate a criminal or civil law, or that the employee may cause the employer significant economic loss or injury.

Oral and telephone communications of employee

⁵⁴ International Labour Organisation, "Monitoring and Surveillance in the Workplace", p 20 in *Conditions of Work Digest* (Vol 12, No 1, 1993).

⁵⁵ See "ILO Adopts Workers' Privacy Code", in: *I-Ways: Digest of the Global Information Infrastructure Commission*, First Quarter 1997, 41 - 46.

⁵⁶ S 984, 103d Cong, 1st Sess (1993); introduced by Senator Paul Simon. It was reported that no significant progress had been made with respect to the bill. Discussed in D R McCartney, "Electronic Surveillance and the Resulting Loss of Privacy in the Workplace" (1994) 62:4 *UMKC Law Review* 859, 882 *et seq.*

7.60 Individuals have the right to send and receive communications without unlawful or arbitrary interference. Monitoring of employee communications is not arbitrary if the employer has the express or implied consent of the employee. Thus, employers are generally not precluded from monitoring employee communications if they are business-related. Employees do not have a reasonable expectation of privacy in their business communications either on the ground that their performance is subject to the supervision of their employers under the terms of their contract of employment, or that they are deemed to have implicitly consented to allowing their employers access to their business communications made in the course of their employment using equipment provided by employers.

7.61 In a case concerning the application of the consent exception under the US Wiretap Act,⁵⁷ the employer informed its employees that it would be monitoring all of their telephone calls and that personal calls would be monitored only to the extent necessary to determine whether a particular call was business or personal. The American court held that the employees consented to the monitoring of business calls but not personal calls. It reasoned that consent should be found only when the employee knew or ought to have known of a policy of constantly monitoring calls, or when the employee has a personal conversation over a telephone line that is expressly reserved for business purposes only.⁵⁸

7.62 The requirement of consent necessitates that certain communications among employees are protected even though such communications are made in the place of work. Hence, employees have a reasonable expectation of privacy in their oral communications engaged in an area normally restricted to employee use, e.g. recreation rooms and toilets.

Employee electronic communications

7.63 Employers can monitor employee electronic communications by using the “Internet Management Software” which analyses Internet and intranet usage. It is now possible for an employer to track the web sites and “chat” groups that employees visit. A survey conducted by the Society for Human Resources Management in the United States found that 36% of the respondents monitored employee e-mail.⁵⁹ Another survey by MacWorld showed that about two-thirds of employers who monitored employee’s electronic communications and files did so without warning the employees.⁶⁰

7.64 Employers may monitor employee e-mail for the following reasons:

- to review business e-mail correspondence;
- to prevent online harassment of company staff;
- to prevent company resources from being substantially used for private business;

⁵⁷ *Watkins v L M Berry & Co*, 704 F 2d 577 (11th Cir 1983); referred to in M S Dichter & M S Burkhardt, at p 17.

⁵⁸ Cf *Deal v Spears*, 980 F 2d 1153 (8th Cir, 1992), referred to in M S Dichter & M S Burkhardt, at p 18 (No implied consent where an employee is informed by her employer that her telephone calls might be monitored because of theft and her excessive personal calls as opposed to being informed that her calls are being monitored.)

⁵⁹ “E-mail Snooping is OK in the Eyes of the Law”, *Wall Street J*, 19 March 1996, A1; referred to in S E Gindin, above.

⁶⁰ C Piller, “Bosses with X-Ray Eyes” *Macworld*, July 1993, at 118, 123; cited in S E Gindin, above.

- to prevent the company from being held liable for infringement of copyright by using pirate software;
- to prevent the company from being held liable for defamation; and
- to ensure that company trade secrets are not disclosed.

7.65 Since many employees are provided with computers with the ability to connect to the Internet, they are more likely than in the past to carry out personal activities when in the office. The question is whether employees have any expectations of privacy in their e-mail and voice mail. Access to most e-mail and voice-mail systems requires passwords chosen by the employee, but the United States courts have generally held that employees did not have reasonable expectations of privacy in their workplace e-mail and employers could read e-mail messages received at the employer's computer system even though they are addressed to their employees. This is particularly the case where the employer owned the e-mail system and the employees have agreed that their use of company computers should be restricted to business use.

7.66 In *Bourke v Nissan Motor Corporation*,⁶¹ the defendant company reviewed the plaintiffs' e-mail messages after it was informed that one of the plaintiffs had sent an e-mail message which was of a "personal, sexual nature and not business-related". The plaintiffs sued the defendant for invasion of privacy. The court held that although the plaintiffs had an expectation of privacy in the e-mail system because they were given passwords to gain access to the system and were told to safeguard their passwords, they had no objectively reasonable expectation of privacy in their e-mail messages because they had signed a waiver agreeing to restrict use of the system for business purposes and were aware that their e-mail messages were read by their co-workers.

7.67 In *Smyth v The Pillsbury*,⁶² the employee exchanged e-mail messages with his supervisor that contained offensive references and threats concerning the company's management. After reading the printouts of these messages, the company executives read all the employee's e-mail messages. The employee argued that the interception of his messages was an intrusion upon seclusion. The court held that there is no reasonable expectations of privacy in e-mail communications made by an employee to a supervisor over a company-wide e-mail system even though the company had assured him that such communications would not be intercepted by the company. It stated that "the company's interest in preventing inappropriate and unprofessional comments or even illegal activity over its e-mail system outweighed any privacy rights the employee may have had in those comments."

7.68 Mark Dichter and Michael Burkhardt explain how the particular working environment could determine the level of privacy which employees are entitled to expect:⁶³

"Normally, an employee creates an individual password to access his/her own e-mail messages. A personal password ... may support an argument that an employee's e-mail messages are private, especially if the employees are unaware that their employer retains the ability to override passwords and access their e-mails. In addition,

⁶¹ No B068705 (Cal Ct App, 1993) (unreported); referred to in M S Dichter & M S Burkhardt, at p 7.

⁶² 914 F Supp 97 (E.D.Pa. 1996); referred to in M S Dichter & M S Burkhardt, at pp 6 - 7.

⁶³ *Op cit*, at 8.

if the e-mail messages are encrypted or coded so that only the sender and the recipient can read the messages, a further expectation of privacy may be created. Absent a policy explaining that e-mail messages are not private, or explaining that the employer can gain access to e-mail despite a personal password, an employer is at greater risk that a court may find that the employee had a reasonable expectation of privacy with respect to his/her e-mail messages.”

7.69 We agree that employer monitoring of computer systems should be allowed if it is carried out in accordance with the data protection principles, as when it is done for reasonable business purposes, on prior notices to employees, and the use of any resulting information is consistent with employee expectations. However, where the electronic mail system has an option for marking messages as “private”, employees have a reasonable expectation of privacy that such messages be kept confidential and not subject to interception by employers unless the employees have been advised to the contrary.⁶⁴ Karen Casser states that it is important that employees be informed when and what is being monitored and what will be done with the resulting information. She suggests that the following action programme may be adopted:⁶⁵

- “1. Develop or extend corporate policies to address employee privacy expectations.*
- 2. Determine the extent of any current monitoring and limit monitoring to ‘work related’ and supervisory activities. State extent of monitoring in policy.*
- 3. Educate and periodically remind employees and management of policy.*
- 4. Post a notice when employees log onto the computer network and require an affirmative acknowledgement by having the employee indicate that she has read the screen before moving on. The notice should state clearly that the system and e-mail are not private and will be audited and the parameters of employee use. ...*
- 5. Address backup and retention of stored mail.*
- 6. Set forth how any accessed information will be used.”*

7.70 We agree that it is essential for an employer to establish an e-mail policy governing access to, and use and disclosure of e-mail sent and received by

⁶⁴ The Law Reform Commission’s *Report on Privacy: Regulating the Interception of Communications* (1996) commented at para 4.89: “As an employee is generally expected to devote all his working hours to performing official duties and a letter addressed to a company is normally treated as official unless the envelope indicates otherwise, we are of the opinion that in general all employers are implicitly authorised to open and read all incoming communications (including electronic mail) unless it is clear in the circumstances that the communication is intended to be private. In other words, a communication addressed or directed to a company should be presumed work-related unless words like ‘private’ or ‘personal’ are marked on the cover (or shown in the subject heading where it is an electronic communication).”

⁶⁵ K L Casser, “Employers, Employees, E-mail and the Internet”, in: The Computer Law Association, *The Internet and Business: A Lawyer’s Guide to the Emerging Legal Issues* (1996), at <<http://cla.org/RuhBook/chp6.htm>>, p 6.

employees on office communications systems.⁶⁶ The policy should balance the employees' reasonable expectations of privacy with the legitimate business interests of the employer.

Video surveillance in the workplace

7.71 Video surveillance can be used for a variety of purposes. The Report on Video Surveillance in the Workplace published by the Privacy Committee of New South Wales found that employers may use video surveillance for the following reasons:⁶⁷

- to prevent and detect theft of company property by employees or customers;
- to prevent and detect theft of employee assets;
- to prevent and detect misappropriation of trade secrets;
- to protect company premises from vandalism;
- to exercise quality control over the performance of employee;
- to improve customer service;
- to train employees;
- to ensure the smooth running of the production process;
- to safeguard the production process against sabotage and contamination;
- to protect the health of employees against health hazards;
- to protect the safety of employees, e.g. from robberies;
- to safeguard against potential liability for defamation, copyright infringement, harassment, and discrimination; and
- to determine the liability of employer, employee and third party in case a dispute arises.

7.72 Employees work under stress if they are placed under constant video surveillance. Certain private behaviour and activities of employees such as scratching the body and adjusting clothing can be embarrassing but may be monitored without the knowledge of the employees. Other sensitive personal data might also be collected. Recordings may be compiled in such a way as to give a false impression of an employee's performance or put his character in a false light. This may be highly prejudicial to the employees' reputation or promotion prospects. Further, knowledge that a supervisor is watching their conduct would inhibit their movements and communications. If the monitoring has been covert but is eventually discovered by the employees, it would seriously undermine staff morale and create distrust between employer and employees. Another danger is that although employers may have a legitimate purpose for engaging in video surveillance, it can easily be used for other purposes without the knowledge of the employees after the cameras are installed. The use to which the tapes may be put is also difficult to control.

7.73 We think that video surveillance of employees should not be allowed if the data collected on the employees are not confined to the employees' work. The monitoring of employees in bathrooms, washrooms, locker rooms, dressing rooms and similar places should generally be prohibited. Video surveillance should be carried out for a legitimate purpose. Employees should be provided with a

⁶⁶ A sample e-mail (and Internet) policy can be found in M S Dichter & M S Burkhardt, at pp 25 - 29.

⁶⁷ The Privacy Committee of NSW, § 2.

reasonable opportunity to review the information obtained by the employer unless the information is collected in connection with an investigation conducted by the employer.

7.74 We have briefly reviewed the guidelines on overt video surveillance laid down by the Privacy Committee of New South Wales.⁶⁸ We suggest that the following principles should apply to the conduct of video surveillance in the workplace:⁶⁹

- the conduct of surveillance must be for a legitimate purpose;⁷⁰
- other less privacy-invasive method is not available;
- the employees should be informed of the form and purpose of the monitoring at the time their data are collected or as soon as practicable afterwards;⁷¹
- surveillance should be conducted in an overt manner unless there is an overriding interest justifying the use of covert means to collect personal data;
- cameras should be installed only in places where there is a high security risk;
- surveillance at toilets, showers, bathrooms and changing rooms should be prohibited;
- the storage, security and use of the personal data collected through surveillance should be in accordance with the data protection principles stated in the Personal Data (Privacy) Ordinance.

Covert video surveillance in the workplace

7.75 As a matter of principle, covert surveillance by hidden cameras should be prohibited unless there is a suspicion of illegal activity. The Commonwealth Privacy Commissioner of Australia has drawn up Guidelines on the application of information privacy principles to the conduct of covert optical surveillance by Commonwealth agencies.⁷² The Guidelines do not apply to security agencies who use covert surveillance for law enforcement purposes. With respect to the decision to undertake covert surveillance, the Guidelines provide:

“1.1 Covert surveillance may only be undertaken for a lawful purpose which is related to the function and activity of the agency.”

⁶⁸ The Privacy Committee of NSW, Appendix 1, *Guidelines on Overt Video Surveillance in the Workplace*.

⁶⁹ Note also the requirements of Data Protection Principle 1 (purpose and manner of collection of personal data) in Cap 486.

⁷⁰ In *Thomas v General Electric Co*, 207 F Supp 792 (1962, DC Ky), cited in 86 ALR3d 374 at 382, the court held that an employee's right to privacy was not violated when the employer monitored its employees by a camera for the purposes of increasing the efficiency of the employee's operation and promoting the safety of its employees.

⁷¹ To protect itself from possible liability, an employer may either notify its employees before they accept the contract of employment that snooping may occur without their knowledge, or ask them to sign waivers permitting the employer to monitor the workplace by hidden devices. See “Is Your Boss Spying on You?” *Business Week*, 15 Jan 1990, 74-75.

⁷² Commonwealth Privacy Commissioner of Australia, *Guidelines on Covert Optical Surveillance in Commonwealth Administration* (1992).

- 1.2 *Each agency should identify the circumstances or offences for which covert surveillance may be used and the Acts which may justify the agency undertaking the practice.*
- 1.3 *Approval to conduct covert surveillance in any particular case should be made at a senior level, taking into account procedures in place for the conduct of such activities.*
- 1.4 *In deciding to conduct covert surveillance agencies should consider the following factors:*
 - (a) *That there be reasonable suspicion to believe that an offence or an unlawful activity is about to be committed, is being committed or has been committed.*
 - (b) *That other forms of investigation have been considered and have been assessed to be unsuitable, or other forms of investigation have been tried and have been found to be inconclusive or unsuitable.*
 - (c) *The benefits arising from obtaining relevant information by covert surveillance are considered to outweigh to a substantial degree the intrusion on the privacy of the surveillance subject/s.”*

7.76 In its report on workplace surveillance, the Privacy Committee of New South Wales concludes that covert video surveillance conducted by persons other than law enforcement officers can be justified only when:

- there is a specific and serious security problem;
- the employer has suspicions about the source of the unlawful activity;
- other security measures have proved ineffective; and
- the risk at stake does not justify a police investigation.⁷³

7.77 The Committee suggests that a policy which strikes an appropriate balance between the interests of employers, customers and employees should contain the following minimum requirements:⁷⁴

- “1. *Covert surveillance is introduced only when all other reasonable measures have proved ineffective in solving the problem.*
2. *Covert surveillance is conducted only for the purpose of protecting the employer against an identified risk to the security or safety of property, assets, employees, or members of the public.*
3. *Employers have substantial grounds to believe that unlawful activity is being undertaken.*

⁷³ The Privacy Committee of NSW, § 4.3.

⁷⁴ The Privacy Committee of NSW, § 4.2. The Committee recommended that covert surveillance should only be allowed with a permit issued by the Industrial Relations Court and that there should be stringent controls over its conduct. Above, §6.4.3.

4. *Covert surveillance is limited in scope, targeting only areas in which unlawful conduct is likely to be recorded.*
5. *Covert surveillance does not intrude unreasonably into the privacy of employees or customers who are not under suspicion.*
6. *Covert surveillance is conducted only for a limited time period, such as until the perpetrator of the unlawful activity is identified.*
7. *Strict controls exist over the operation of the system, including authorisation of who may receive and view tapes, secure storage and erasure of recordings.*
8. *The operators of the system are accountable for their conduct to an external agency.*
9. *Proper records are maintained of the covert surveillance operation, including documentation of the final resolution of the problem.*
10. *The employees placed under covert surveillance are informed of the conduct of surveillance after a period of time if it did not lead to any individual's apprehension. If covert surveillance was conducted in an area accessed by customers, a sign should be installed in the area informing customers of the recent conduct of covert surveillance."*

Recommendation

7.78 In the context of workplace surveillance, we have to balance the interests of employers, employees and the general public. An employee's expectation of privacy in his activities in the workplace has to be balanced against the employer's need to keep the workplace and his employees' activities under surveillance for legitimate business purposes. In determining whether an employer would be liable for the intrusion tort on the ground that he has kept his employees under surveillance, the court would have to assess whether the employee has an expectation of privacy and, if so, whether the employer has a legitimate justification for the intrusion which renders the employee's expectation unreasonable in the circumstances. This legitimate justification will usually be a business matter but it may be an external one, for example, investigation into crime which is unrelated to the business.

7.79 However, the tort of intrusion upon solitude or seclusion may not afford adequate protection to employees. The employers might justify their intrusion on the grounds that it is reasonably necessary to protect property or personal safety. Additional measures are required to address the privacy concerns of surveillance in the workplace. In view of the difficulties of balancing the interests of employers, employees and the general public, the best way to address the issue of privacy in the workplace is probably by way of a code of practice so that all interested parties know where they stand.

7.80 We note that the Privacy Commissioner in Hong Kong may approve and issue codes of practice (whether prepared by him or not) for the purpose of providing practical guidance in respect of the data protection principles set out in the Personal Data (Privacy) Ordinance.⁷⁵ It would be extremely helpful if a specific code covering all forms of surveillance in the workplace could be issued by the Privacy Commissioner in consultation with employers associations, trade unions and, perhaps, the Consumer Council. Employers may then work out their policies using the code as a reference and employees and customers may consult the code to find out whether their expectations of privacy are reasonable or not. We believe that the Guidelines issued by the International Labour Organisation, the Commonwealth Privacy Commissioner of Australia, the Privacy Committee of New South Wales, and the proposed Privacy for Consumers and Workers Act of 1993 in the United States, could serve as a useful starting point for the development of such a code.

Recommendation 2

We recommend that the Privacy Commissioner for Personal Data should give consideration to issuing a code of practice on all forms of surveillance in the workplace for the practical guidance of employers, employees and the general public.

⁷⁵

Chapter 8 - Public disclosure of private facts

The need to restrain unwanted publicity

8.1 Given that privacy is important to both individuals and society and that it underpins other fundamental rights and freedoms recognised in the Basic Law,¹ we are of the view that unauthorized disclosure of private facts should give rise to civil liability in tort. Publication of false information about an individual may give rise to a cause of action in defamation or malicious falsehood. However, the concern of the law of defamation is with damage to reputation. It protects the material interests of the victim, not his dignity or self-esteem.² The publication is actionable only if it has a tendency to injure the relationship of the plaintiff with another. Furthermore, an individual cannot bring an action in defamation or malicious falsehood if the information is true. Generally speaking, statements about a person's private life can be freely made as long as they are true. It matters not that the information is insulting or scurrilous. Brazier says that: "Newspapers are free ... to rake up a man's forgotten past, and ruin him deliberately in the process, without risk of incurring tortious liability [for defamation]."³ But truth may be more injurious than falsehood. The publication of truth about an individual can be extremely embarrassing and damaging.

8.2 Individual privacy may be invaded other than by surveillance or interception of communications. The disclosure of the transcripts of the tapes of an alleged conversation between the Prince of Wales and Mrs Parker-Bowles illustrates that publication of personal data is often more objectionable than the use of intrusive methods to collect personal data. Under existing law, the publication of true facts may be restrained on the basis that it constitutes a breach of confidence or contempt of court.⁴ But our discussion in Chapters 3 and 4 shows that such protection as is available under existing law cannot provide an adequate and effective civil remedy for the publication of true but harmful information about the private life of another.

8.3 The press has a private commercial interest in publishing the details of the private life of individuals; gossip being the stock in trade of the press industry. Warren and Brandeis were critical of the press overstepping the bounds of propriety and of decency. They stated:⁵

"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. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle."

¹ See the discussion in Chapters 1 and 2.

² See paras 4.26 - 4.27.

³ M Brazier, *Streets on Torts* (Butterworths, 9th edn, 1993), 445. Cf *Lyon v Steyn* (1931) TPD 247 in which the court held that "It cannot be in the public interest to rake up the ashes of the dead past and accuse a man of having done something thirty years ago."

⁴ It may also constitute a contravention of the use limitation principle under the Personal Data (Privacy) Ordinance (i.e. Data Protection Principle 3).

⁵ S D Warren & L D Brandeis, 196.

8.4 The above statement was made of the American press in 1890. But it is also the public perception of some sections of the press in Hong Kong today. Warren and Brandeis further expressed the view that:

“[t]he intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.”⁶

8.5 In their opinion, common law secured to each individual the right of determining to what extent his thoughts, sentiments and emotions should be communicated to others:

“Under our system of government, [an individual] can never be compelled to express [his thoughts, sentiments and emotions] (except when upon the witness-stand); and even if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them. The existence of this right does not depend upon the particular method of expression adopted. It is immaterial whether it be by word or by signs, in painting, by sculpture, or in music. Neither does the existence of the right depend upon the nature or value of the thought or emotion, nor upon the excellence of the means of expression. The same protection is accorded to a casual letter or an entry in a diary and to the most valuable poem or essay, to a botch or daub and to a masterpiece. In every such case the individual is entitled to decide whether that which is his shall be given to the public. No other has the right to publish his productions in any form, without his consent.”⁷

8.6 They concluded that the protection afforded to thoughts, sentiments and emotions by the common law right to intellectual and artistic property, was, so far as it consisted in preventing publication, merely an instance of the enforcement of the more general right of the individual to be let alone. In their opinion, the principle which protected personal productions against publication was in reality not the principle of private property, but that of “inviolable personality”.⁸

8.7 Westin describes privacy as the “claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others”.⁹ Used in that sense, privacy could be defined in terms of the degree of control an individual has over his personal information; and an individual could be said to have lost privacy if information about him is disclosed against his will for an unauthorized purpose.¹⁰

8.8 Publicising intimate information about an individual without his consent can harm his ability to maintain social relationship and pursue his career. For instance, publicising the fact that a teacher is a homosexual may make him

⁶ S D Warren & L D Brandeis, 196.

⁷ S D Warren & L D Brandeis, 198-199.

⁸ S D Warren & L D Brandeis, 205.

⁹ A F Westin, *Privacy and Freedom*, p 7.

¹⁰ Cf R Wacks, (1993), 14 - 15.

difficult to carrying out his teaching duties. In the opinion of the Human Rights Committee set up under the ICCPR, the parties to the Covenant have to take effective measures to ensure that “information concerning a person’s private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant.”¹¹ According to Manfred Nowak, the right to privacy under Article 17 of the Covenant encompasses “a right to secrecy from the public of private characteristics, actions or data”.¹²

8.9 Giving publicity to private facts is one of the four types of invasion of privacy recognised by the American courts. The *Restatement* provides:

“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 publicised is of a kind that

- (a) would be highly offensive to a reasonable person, and*
- (b) is not of legitimate concern to the public.”¹³*

8.10 The Law Reform Commission of Australia recommended that a right of action for publication of “sensitive private facts” should be created. The Calcutt Committee was also satisfied that it would be possible to define a statutory tort of infringement of privacy which relates specifically to the publication of personal information. In the paper on *Privacy and Media Intrusion*, the UK Government suggested that the legislation might provide for a statutory “right to privacy of personal information, communications and documents”. We agree that there is a strong case for creating a tort of unauthorized disclosure of facts relating to the private life of an individual. Apart from providing a remedy for the unauthorized publication of intimate or sensitive personal information in the press or in a broadcasting programme, this tort could also form the basis for suit where such information has been posted on a newsgroup or public bulletin board on the Internet.

Private facts

8.11 If liability is to be attached to disclosure of true facts because they relate to an individual’s private life, we need to distinguish between facts which are private and those which are not. The following discussion will focus on the basis on which facts about an individual could be regarded as truly private. Whether disclosure of private facts can be justified in the public interest is a separate issue discussed in Chapter 11.

8.12 Clause 19(1) of the draft Unfair Publication Bill in Australia provided that:

“a person publishes sensitive private facts concerning an individual where the person publishes matter relating or purporting to relate to the health, private behaviour, home life or personal or family relationships of the individual in circumstances in which the publication is likely to cause distress, annoyance or embarrassment to an individual in the position of the first-mentioned individual.”¹⁴

¹¹ UN Human Rights Committee, General Comment 16/32 of 23 March 1988, para 10.

¹² M Nowak, (1993), 296.

¹³ *Restatement 2d, Torts*, § 652D.

¹⁴ Mr Browne’s Bill, cl 7; Lord Mancroft’s Bill, cl 1.

8.13 The Calcutt Committee proposed that if the privacy tort relating to the publication of personal information were to be created, “personal information” should be defined “in terms of an individual’s personal life, that is to say, those aspects of life which reasonable members of society would respect as being such that an individual is ordinarily entitled to keep them to himself, whether or not they relate to his mind or body, to his home, to his family, to other personal relationships, or to his correspondence or documents.”¹⁵

8.14 The UK Government suggested to define “personal information” as:

“any information about an individual’s private life or personal behaviour, including, in particular, information about:

- (a) health or medical treatment,*
- (b) marriage, family life or personal relationships,*
- (c) sexual orientation or behaviour,*
- (d) political or religious beliefs, or*
- (e) personal legal or financial affairs;*

and references to personal information, in relation to an individual, include any visual image or sound recording of that person.”¹⁶

8.15 The test for determining whether information about an individual is private or not may be based on the location at which the information is revealed or the nature of the personal information in question.

Location at which personal information is revealed

8.16 Since secrecy is an element of privacy, we think that the law of privacy should afford protection to facts that are truly “private, secluded or secret” but not information that is already public.¹⁷ Personal information revealed by an individual in public places is by definition not private. No liability should be imposed for giving publicity to facts about a person which are open to public view.¹⁸ We agree with what is said in the *American Restatement*:

“[the plaintiff] normally cannot complain when his photograph is taken while he is walking down the public street and is published in the defendant’s newspaper. Nor is his privacy invaded when the defendant gives publicity to a business or activity in which the plaintiff is engaged in dealing with the public. On the other hand, when a photograph is taken without the plaintiff’s consent in a private place, or one already made is stolen from his home, the plaintiff’s appearance that is made public when the picture appears in a newspaper is still a private matter, and his privacy is invaded.”¹⁹

Nature of personal information disclosed

¹⁵ Para 12.17. The Committee recommended that business, professional and official material be specifically excluded: para 12.18.

¹⁶ The UK Consultation Paper, Annex B, para 2(iv).

¹⁷ 57 ALR3d 16 § 3; 62A Am Jur 2d §§100-101.

¹⁸ Cf *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415.

¹⁹ *Restatement 2d, Torts, § 652D, Comment b.*

8.17 Thomas Emerson suggests that there is an element of intimacy in the zone of privacy. He argues that protection would be extended only to matters relating to the intimate details of an individual's life, namely: "those activities, ideas or emotions which one does not share with others or shares only with those who are closest." This would include "sexual relations, the performance of bodily functions, family relations, and the like."²⁰ In the opinion of Nowak, personal data the publication of which would be "embarrassing or awkward for the person concerned for reasons of morals" should enjoy legal protection. He gives the examples of "the publication of secretly acquired nude photos or personal writings (diaries, letters, etc.) or of revelations of a person's sex life, so-called anomalies, perversions or other (true or fabricated) peculiarities that would subject the person concerned to public ridicule."²¹

8.18 The way the disclosure tort is developed in the United States suggests that private facts comprise intimate details of an individual's life:

*"Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget. When these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of privacy, unless the matter is one of legitimate public interest."*²²

8.19 Warren and Brandeis did not require that the information published be of an intimate nature. What they had in mind were "matters which [a person] may properly prefer to keep private".²³ It is difficult to maintain that the disclosure of any personal information which a person would prefer to keep private constitutes an invasion of privacy. An individual's expectation of privacy must also be reasonable in the circumstances. Wacks therefore suggests that any definition of "personal information" must refer both to the quality of the information and to the reasonable expectations of the individual concerning its use. He proposes that "personal information" be defined as consisting of:

*"those facts, communications, or opinions which relate to the individual and which it would be reasonable to expect him to regard as intimate or sensitive and therefore to want to withhold or at least to restrict their collection, use, or circulation."*²⁴

²⁰ T I Emerson, at 343.

²¹ M Nowak, 296.

²² *Restatement* 2d, Torts, § 652D, Comment b.

²³ Warren and Brandeis, 214-5.

²⁴ R Wacks, (1993), 26. This definition contains an objective test which operates to limit personal information to what is both descriptively and normatively acceptable to society. Such a test is lacking in the definition of "personal data" in the Personal Data (Privacy) Ordinance. All recorded data which relate directly or indirectly to a living individual are covered by the Ordinance; personal data which are not regarded as intimate or sensitive are not excluded from its ambit. There are mainly two reasons why the protection under the Ordinance is not limited to sensitive or intimate data: (a) Decisions affecting the individual may be made on the basis of data lacking these qualities. For instance, terrorists have been known to locate targets through address listings in telephone directories. (b) Data are cumulative. The

8.20 Insofar as individuals have a reasonable expectation of privacy in information about an individual's private communications, home life, personal and family relationships, private behaviour, health and personal financial affairs, the law should protect such information from being made public against their will.

Present private life of former public figures

8.21 In a German case, a newspaper article entitled "How Women Can Protect Themselves" referred to an individual who had been convicted of rape. The court held that it was not necessary to identify the individual by mentioning his name, age, residence and occupation. The right of the criminal to be left alone gained increasing importance after the legitimate interest of the public in receiving information had been satisfied.²⁵ In the American case of *Melvin v Reid*,²⁶ the defendant made a film depicting the plaintiff as a prostitute who had been involved in a murder case. The scandalous behaviour shown in the film took place many years before it was made, but at the time when the film was released, the plaintiff had become entirely rehabilitated. The court held that the defendant had violated the plaintiff's right to privacy by using her real name in the film. The decision may be explained on the grounds that the disclosure of the identity and whereabouts of the plaintiff were not part of the revived "news", or that the revelation of a former offender's past when she was trying to lead a respectable life could not pass the "mores" test.²⁷ The facts of this case would not give rise to a right of action in defamation because truth is a complete defence.²⁸

8.22 Those who stress the importance of the press in educating or informing the public as to past history may ask for a different approach. They argue that revealing past events and present whereabouts of former public figures can properly be a matter of present public interest. In *Sidis v F-R Publishing Corp*,²⁹ a magazine published an article about a child prodigy who had been well known to the public as talented in mathematics but had retired into a life of seclusion as an insignificant clerk at the time of the article. Although the article was based on true facts, it publicised the intimate details of the plaintiff's life concerning the period after he had decided to live a life of privacy. The court held that since the plaintiff had acquired the status of a public figure, his interest in privacy must give way to the public interest in news. Lorenz queries whether a person who had decided not to continue as a distinguished scholar 20 years ago should still be categorized as a public figure. He reasons that: "If it is right and just not to disturb the process of social reintegration of former offenders by indecent publicity of previous convictions, the former 'child prodigy' who, for whatever reasons, had not lived up to the expectations of the public, should not be socially disintegrated by giving improper publicity to his private life which had taken such an unexpected turn."³⁰

8.23 We think that the publication of the existing whereabouts and other aspects of the private life of a former public figure cannot be justified if it is merely

accumulation of trivial data can result in the compilation of profiles which contain meaningful information. See HKLRC, *Report on Reform of the Law Relating to the Protection of Personal Data* (Topic 27, 1994), paras 8.14 - 8.18.

²⁵ See Lorenz, "Privacy and the Press - A German Experience" in *Butterworth Lectures 1989-90* (London: Butterworths, 1990), 79 at 112.

²⁶ 112 Cal App 285 (Dist Ct App 1931).

²⁷ W L Prosser, "Privacy" (1960) 48:3 *California Law Review* 383 at 419.

²⁸ But see *Rehabilitation of Offenders Ordinance* (Cap 297).

²⁹ 113 F2d 806 (2d Cir, 1940).

³⁰ Lorenz, at 113.

the past event which is a matter of present public concern.³¹ While the past event about a former public figure might be dredged up by the press on the ground that it is a matter of public record or public knowledge, his private life *after* he has decided to retire into a life of seclusion should not be exposed unless it has become a matter of present legitimate concern to the public or his identity has been concealed in the reports.

Disclosure of information obtained by unlawful means

8.24 Any tort of invasion of privacy by public disclosure may be limited to information obtained by means of surveillance or interception of communications. The Calcutt Committee was of the opinion that a civil remedy for victims of invasion of privacy would afford protection against imminent or actual publication of material obtained by means of physical intrusion which would be rendered unlawful under its proposals.³² The Irish Law Reform Commission also recommends that disclosure or publication of information obtained by means of surveillance should be actionable. They point out that:

“disclosure or publication of [information obtained by means of surveillance] often constitutes a greater invasion of the privacy of an individual than the act of surveillance itself in that the individual’s control of the information has been lost not only to another person but to a number, and in some cases an unlimited number, of other persons.”³³

8.25 The Younger Committee thought that the damaging use or disclosure of information acquired by means of any unlawful act, with knowledge of how it was acquired, was an objectionable practice against which the law should afford protection. They recommended that it should be a civil wrong to use or disclose information which the discloser knew or ought to have known had been obtained by illegal means. The English Law Commission followed up this issue in their report on breach of confidence.³⁴ The Commission thought that where a device was clearly designed for the surreptitious surveillance of persons, their activities, communications or property, then anyone who had obtained information by using it should be subject to an obligation of confidence in respect of the information so obtained. In other words, information obtained by telephone tapping or other means of surveillance would be subject to an obligation of confidence and anyone who acted in breach of that obligation would be liable. The English Law Commission summarised their views on the use of surveillance devices as follows:

“We think that an obligation of confidence should cover information obtained by the use of any surveillance device, provided that such information would not have been acquired without the use of that device. However, in the case of devices which, though not designed or adapted primarily for surreptitious surveillance, enable information to be obtained which would not otherwise have been acquired, liability

³¹ The relevance of the status of being a public figure to a public interest defence will be discussed in Chapter 11.

³² They recommended that “anyone having a sufficient interest” should be able to seek civil remedy in respect of the publication of private material or photographs obtained by committing any of the proposed criminal offences: Calcutt Report, para 6.38.

³³ Law Reform Commission of Ireland, para 9.31.

³⁴ The Law Commission, *Breach of Confidence* (Law Com. No. 110) (London: HMSO, Cmnd. 8388, 1981), paras 6.35 - 6.38.

*for the subsequent disclosure or use of that information should arise only if the person from whom the information has been obtained was not or ought not reasonably to have been aware of the use of the device, and ought not reasonably to have taken precautions to prevent the information from being acquired in the way in question.*³⁵

8.26 The Law Reform Commission of Hong Kong will revisit the question of unauthorized disclosure of information obtained by illegal means when it examines the law on breach of confidence in a separate report.³⁶ Suffice it to say that restricting civil remedies to the disclosure of personal information obtained by illegal means would be an inadequate response to the problems of invasion of privacy. Obtaining personal information by intrusion and the eventual disclosure of personal information give rise to separate privacy concerns. Liability for publication of private facts should not depend on whether the means used to obtain the information is lawful or not. A person who has exposed another's sensitive or intimate private facts without justification should not be allowed to avoid liability merely because such facts were obtained by lawful means.³⁷ A new tort along the lines suggested by the Younger Committee would not be a sufficient remedy to repair the damage caused by an invasion of privacy by unwanted publicity.

Public disclosure

8.27 The disclosure tort in the United States requires that the disclosure of private facts be a public disclosure and not a private one. The requirement of public disclosure connotes publicity in the sense of communication to the public in general or to a large number of persons, as distinguished from one individual or a few. While the simple disclosure of personal information to a single person or to a small group of persons is not sufficient to support a claim, any publication in a newspaper or magazine or statement made in an address to a large audience would suffice.³⁸

8.28 Under the law of defamation, a defamatory statement is actionable irrespective of the extent of publication. Should liability for invasion of privacy based on disclosure of private facts depend upon the extent of publication? Bloustein thinks that it should be:

“The reason is simply that defamation is founded on loss of reputation while the invasion of privacy is founded on an insult to individuality. A person's reputation may be damaged in the minds of one man or many. Unless there is a breach of a confidential relationship, however, the indignity and outrage involved in disclosure of details of

³⁵ The Law Commission, *Breach of Confidence*, para 6.38. The United Kingdom Government has accepted the Commission Report on Breach of Confidence and has agreed to implement the proposals subject to Parliamentary time being available.

³⁶ This issue is also discussed in the Annexure to this report.

³⁷ R Wacks, (1993), 259-261; R Wacks (1995), 133-143.

³⁸ *Restatement 2d, Torts*, § 652D, Comment a. *American Jurisprudence* observes that: “While an actionable disclosure is generally one made only to a large number of people, it cannot be said that disclosure of embarrassing private facts to a comparatively small number of people will automatically be insufficient to constitute a public disclosure. There is no magic formula or ‘body count’ that can be given to permit counsel to determine with certainty whether the number of persons to whom private facts have been disclosed will be sufficient in any particular case to satisfy the public disclosure requirement. The concept of public disclosure is not subject to precise or rigid formulae but is flexible, and the facts and circumstances of a particular case must be taken into consideration in determining whether the disclosure was sufficiently public so as to be actionable.” See 62A Am Jur 2d, Privacy, § 95.

a private life, only arise when there is a massive disclosure, only when there is truly a disclosure to the public. ...

The gravamen of a defamation action is engendering a false opinion about a person, whether in the mind of one other person or many people. The gravamen in the public disclosure cases is degrading a person by laying his life open to public view. In defamation a man is robbed of his reputation; in the public disclosure cases it is his individuality which is lost.”³⁹

8.29 Gossiping about private affairs of others is as old as human history. It is said to be “a basic form of information exchange that teaches about other lifestyles and attitudes, and through which community values are changed or reinforced.”⁴⁰ The effect of gossip is trivial and limited because it is usually confined to friends and relatives. A person’s peace and comfort would only be slightly affected if at all. But gossip among friends and relatives is entirely different from the publication of the same information in the press. It is very likely that the individual concerned would know what exactly has been said or shown about him. Private gossip does not have this effect although we all know that our friends talk about us behind our back. The institutionalization of mass publicity and the prevalence of “gossip columns” in the newspapers have become “a significant and everyday threat to personal dignity and individuality realized.”⁴¹

8.30 Privacy enables sheltered experimentation and testing of ideas without fear of ridicule or penalty. It also provides for an opportunity to alter opinions before they are made public.⁴² As pointed out by Knight Bruce V-C in *Prince Albert v Strange*: “A man may employ himself in private in a manner very harmless, but which, disclosed in society, may destroy the comfort of his life or even his success in it.”⁴³ Warren and Brandeis said that although gossip is “apparently harmless, when widely and persistently circulated, is potent for evil”. They observed that “[if] casual and unimportant statements in a letter, if handiwork, however inartistic and valueless, if possessions of all sorts are protected not only against reproduction, but against description and enumeration, how much more should the acts and sayings of a man in his social and domestic relations be guarded from ruthless publicity.”⁴⁴

8.31 It will be recalled that secrecy and anonymity are essential elements of privacy.⁴⁵ Giving publicity to private affairs threatens the development and maintenance of interpersonal relationship. Individuals who are grief-stricken and public figures who have suffered a set back are particularly vulnerable to mental distress caused by unwanted publicity. We believe that the law should protect the private affairs of individuals from being dragged into unwanted publicity unless the community has a legitimate concern over such affairs.

8.32 Unwanted publicity is objectionable even though the individual is portrayed in a favourable light and the public takes a sympathetic view of the private facts disclosed. We agree with the views expressed by Bloustein below:

³⁹ E J Bloustein, at 981.

⁴⁰ D L Zimmerman, “Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort”, (1983) 68 Cornell LR 291, 334.

⁴¹ E J Bloustein, at 983-984.

⁴² A F Westin, 34.

⁴³ (1849) 2 De G & Sm 652, 64 ER 293.

⁴⁴ S D Warren and L D Brandeis, at 213 - 214.

⁴⁵ See Chapter 1.

“What the [individuals in the public disclosure cases] complain of is not that the public has been led to adopt a certain attitude or opinion concerning them - whether true or false, hostile or friendly - but rather that some aspect of their life has been held up to public scrutiny at all. In this sense, the gravamen of the complaint here is just like that in the intrusion cases; in effect, the publicity constitutes a form of intrusion, it is as if 100,000 people were suddenly peering in, as through window, on one’s private life.

When a newspaper publishes a picture of a newborn deformed child, its parents are not disturbed about any possible loss of reputation as a result. They are rather mortified and insulted that the world should be witness to their private tragedy. The hospital and the newspaper have no right to intrude in this manner upon a private life. Similarly, when an author does a sympathetic but intimately detailed sketch of someone, who up to that time had only been a face in the crowd, the cause for complaint is not loss of reputation but that a reputation was established at all. The wrong is in replacing personal anonymity by notoriety, in turning a private life into a public spectacle.”⁴⁶

8.33 We agree that the mischief against which the law of privacy should provide a remedy is the “public disclosure” of private facts, not gossiping among relatives and friends or disclosure of information to a single individual or a few.⁴⁷ Giving publicity to private facts is much more likely to harm the individual than gossiping. As long as private facts are disclosed to the public in general or to a large number of persons and the disclosure is not in the public interest, the aggrieved individual should have a remedy against the discloser whether or not the disclosure portrays the individual in a favourable light.

Offensiveness to a reasonable person

8.34 We think that to be actionable for invasion of privacy, the disclosure in extent and content must be of a kind that would be seriously offensive and objectionable to a reasonable person of ordinary sensibilities. Distress, humiliation and embarrassment are key elements of the action. It is only when the publicity given to the plaintiff is such that a reasonable person would feel justified in feeling substantially hurt that he should have a cause of action. Qualifying the tort by the notion of offensiveness would check frivolous or blackmailing actions.

8.35 The publication of photographs of individuals in emotional distress or in an embarrassing pose may be regarded as offensive. It has been held in the United States that a newspaper was liable for publishing a photograph of a woman with her skirt blown up while she was standing over the air vent in a fun house.⁴⁸ Giving undue or unreasonable publicity to private debts⁴⁹ or a person’s transsexuality may also be actionable.

8.36 As with the intrusion tort recommended in the last chapter, a person should not be liable for giving publicity to private facts unless he has published the

⁴⁶ E J Bloustein, at 979, citing *Bazemore v Savannah Hosp*, 171 Ga 257 (1930) and *Cason v Baskin*, 155 Fla 198 (1944) as authorities.

⁴⁷ For a discussion of the common law “multiple publication” rule and the more modern “single publication” rule, see 62A Am Jur 2d, Privacy, § 244.

⁴⁸ *Daily Times Democrat v Graham* (1964) 162 So (2d) 474.

⁴⁹ J L Litwin, “Public Disclosure of Person’s Indebtedness as Invasion of Privacy” 33 ALR3d 154.

facts either with knowledge that they are seriously offensive or with reckless disregard of whether or not they are so.

Personal Data (Privacy) Ordinance

8.37 The Personal Data (Privacy) Ordinance (Cap 486) protects an individual against unauthorized disclosure of personal data. In order to find out the extent to which the Ordinance protects an individual against public disclosure of matters concerning the private life of another, we have compared in general terms the protection against unauthorized disclosure under the Ordinance with the tort of invasion of privacy based on public disclosure of private facts in the United States.

	Personal Data (Privacy) Ordinance	Tort of “public disclosure of private facts” in the United States
1	The Ordinance protects “personal data” which basically means recorded data relating to a living individual. It regulates the collection and use of personal data. It does not protect individuals from invasion of privacy as such.	The action protects individuals from invasion of privacy based on the public disclosure of facts which are personal to an individual. Though it invariably relates to personal data, it does not cover personal data which is open to public inspection.
2	A disclosure of personal data is lawful if (a) the data user has consented to the disclosure or (b) the disclosure is for the purpose for which the data were to be used at the time of the collection. This purpose must be directly related to a function or activity of the data user who is to use the data.	The key elements of the tort are emotional distress and embarrassment. The defendant would be liable as long as there is a publication of private facts which are highly offensive to a reasonable person. The purpose of a disclosure is relevant only for the purposes of determining whether the defendant may rely on the defence of publishing a matter of legitimate public concern.
3	There is no requirement that the disclosure be to the public. Unauthorized disclosure to a single individual would suffice.	The disclosure must be to the public in general or to a large number of persons.
4	The Ordinance regulates the matching of personal data for the purpose of producing or verifying data that may be used for the purpose of taking adverse action against the data subjects.	The matching of personal data as defined in the Ordinance does not normally give rise to a cause of action for public disclosure of private facts. The matching procedure is an internal exercise and may not be treated as a public disclosure.

5	<p>The Ordinance does not prohibit the transfer of personal data to a place outside Hong Kong if that place has legislation protecting personal data or the user has exercised all due diligence to ensure that the data will not, in that place, be used in any manner which, if that place were Hong Kong, would be a contravention of a requirement under the Ordinance.</p>	<p>Whether or not the private facts are disclosed to a place which has a data protection regime is not a relevant consideration in deciding whether or not the defendant is liable for the disclosure tort. Disclosure of personal data to a branch office or subsidiary of the data user in a place outside the US would not normally be actionable because there may not be a <i>public</i> disclosure of private facts. But if the defendant has given publicity to private facts in a place outside the US and such publicity is offensive to a reasonable person, he would be liable whether or not that place has legislation protecting personal data.</p>
6	<p>Where the personal data are exempt from a provision of the Ordinance by virtue of Part VIII of the Ordinance, that provision will not impose any requirement on the data user nor confer any right on the data subject. It is up to the complainant, the Privacy Commissioner or the plaintiff, as the case may be, to argue that none of the specified exemptions applies.</p>	<p>The defendant is liable for invasion of privacy as long as he has given publicity to private facts about the plaintiff. The burden is on the defendant, not the plaintiff, to argue that one of the recognised defences applies.</p>
7	<p>It is a defence in civil proceedings brought pursuant to section 66 for the defendant to show that "he had taken such care as in all the circumstances was reasonably required to avoid the contravention concerned".</p>	<p>There is no defence of due diligence.</p>
8	<p>Personal data held by an individual only for recreational purposes or which are concerned only with the management of his personal, family or household affairs are exempt from the data protection principles.</p>	<p>Such personal data may be private facts the collection of which would be actionable.</p>
9	<p>Disclosure of data to the media is exempt from the use limitation principle if the data user has reasonable grounds to believe that the publication of the data is in the "public interest". This exemption does not apply to the publication of such data by the media to the general public. The media has to fall back on one of the prescribed exemptions.</p>	<p>The defendant is not liable for publishing anything which is "newsworthy".</p>

10	Disclosure of data for the following purposes are exempt from the use limitation principle: (a) the prevention or detection of crime; (b) the apprehension of offenders; (c) the prevention or remedying of unlawful or seriously improper conduct; (d) the prevention of significant financial loss arising from any imprudent business practices; (e) protection of health; (f) safeguarding security, defence or international relations in respect of Hong Kong.	The tort does not prohibit the publication of information which would be of "legitimate concern to the public".
11	Disclosure of data that are in the public domain is not exempt from regulation. Such data must still be disclosed for an authorized purpose.	There is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public.
12	<p>(a) An individual may complain to the Privacy Commissioner if a data user is contravening or has contravened the use limitation principle. The Commissioner may serve on the data user an enforcement notice directing him to remedy a contravention.</p> <p>(b) An individual has no right to lodge a complaint if the act, which if done would constitute a contravention, has yet to be done by the data user. Further, no enforcement notice can be served if the contravention has terminated and the circumstances of that contravention make it unlikely that the contravention will continue or be repeated.</p> <p>(c) An individual who suffers damage by reason of a contravention of a requirement of the Ordinance is entitled to claim compensation from the data user if he brings an action under section 66(1).</p>	<p>(a) Apart from damages for the loss of reputation or community status resulting from the publicity, the plaintiff may also recover special damages, i.e. demonstrable direct, economic losses resulting from the invasion of privacy.</p> <p>(b) Injunctive relief may also be available in cases where the award of damages is not an adequate remedy.</p>

Conclusion

8.38 Everyone has a right to a private life. The publication of facts about an individual's private life should not be allowed unless it can be justified in the public interest. An individual should have control over what, when and how information about himself should be disclosed to another. Civil remedies for public disclosure, as against the case of limited disclosure, should be provided for by law. Legal proceedings for public disclosure will not involve a traumatic abandonment of privacy because the public disclosure would have already stripped it of any. A person subjected to media intrusion will often become aware of it. Furthermore, the courts are experienced in resolving the competing interests arising in this area. They already discharge a similar role in breach of confidence and defamation cases.

8.39 We have seen in Chapter 3 that the Personal Data (Privacy) Ordinance does not always provide a remedy for individuals whose private lives have been publicised against their will. In order to provide effective remedies to victims of invasion of privacy and to strengthen the protection under the Personal Data (Privacy) Ordinance, a new tort should be created by statute to protect individuals from unwanted publicity which is seriously offensive and objectionable to a reasonable person.⁵⁰ Creating a tort restraining the publication of personal information which is seriously offensive and objectionable to a reasonable person is proportional and appropriate to the legitimate aim of protecting the private life of individuals from unlawful or arbitrary interference. As the protection afforded by this tort would have an impact on the freedom of speech, safeguards should be built into the law of privacy to protect the legitimate concerns of free speech. The nature of defences to the disclosure tort will be discussed in Chapter 11.

Recommendation 3

We recommend that any person who gives publicity to a matter concerning the private life of another should be liable for a statutory tort of invasion of privacy provided that the disclosure in extent and content is of a kind that would be seriously offensive and objectionable to a reasonable person of ordinary sensibilities and he knows or ought to know that such disclosure is seriously offensive and objectionable to such a person.

Recommendation 4

We recommend that for the purposes of the statutory tort of invasion of privacy based on public disclosure of private facts recommended above, matters concerning the private life of another should include information about an individual's private communications, home life, personal or family relationships, private behaviour, health or personal financial affairs.

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The limited disclosure (as opposed to public disclosure) of personal data will continue to be governed by existing laws such as the Personal Data (Privacy) Ordinance and the law relating to breach of confidence.

Chapter 9 - Appropriation of a person's name or likeness

9.1 We consider in this chapter whether the appropriation of a person's name or likeness is a privacy concern and, if so, whether the law ought to protect such concern.

Unauthorized use of a person's personality at common law

9.2 In *Dockrell v Dougall*,¹ the plaintiff argued that a person had a property in his own name *per se*. The court rejected this contention and held that an injunction to prevent unauthorized use of his name could not be granted unless he could show that the defendant had done something more than make unauthorized use of his name, such as an interference with his right of property, business or profession by a wrongful user of his name which had caused him pecuniary loss. In *Tolley v J S Fry and Sons Ltd*, a famous amateur golfer sued the defendant for producing a caricature of him on chocolate wrappers. Greer LJ said:

*"I have no hesitation in saying that in my judgment the defendants in publishing the advertisement in question, without first obtaining Mr Tolley's consent, acted in a manner inconsistent with the decencies of life, and in so doing they were guilty of an act for which there ought to be a legal remedy. But unless a man's photograph, caricature, or name be published in such a context that the publication can be said to be defamatory within the law of libel, it cannot be made the subject-matter of complaint by action at law".*²

The common law therefore does not recognise any property in a person's personality *per se*, and no injunction will lie for the appropriation of personality unless the circumstances give rise to defamation or to injury to property, business or profession.³

9.3 Unauthorized use of a person's name or likeness may give rise to an action in defamation if the defendant depicts a person's personal appearance or manners in a ridiculous light⁴ or places the name of a well-known novelist as the author of an inferior work.⁵ However, there may be appropriation without any injury to a person's reputation. This may be the case if an individual's name or likeness is used in promoting an article in an advertisement. The result is that individuals appearing in advertisements are left with no remedy even though their names or likenesses are used in the public realm against their will. Before we examine the pros and cons of classifying appropriation as a form of actionable invasion of privacy, we

¹ (1899) 80 LT 556.

² [1930] 1 KB 467, at 478.

³ T Frazer, "Appropriation of Personality - A New Tort?" (1983) 99 LQR 281.

⁴ *Dunlop Rubber Co v Dunlop* [1921] 1 AC 367.

⁵ *Ridge v The English Illustrated Magazine* (1913) 29 TLR 592.

briefly review how France, Germany, Canada and the United States approach the subject.⁶

Other jurisdictions

France

9.4 Since the French courts held that the unauthorized use of a person's name, image or voice is a "fault" under article 1382 of the Civil Code, any person who has used the name, image or voice of another without authority is liable to compensate the other for any harm caused by such use.

Germany

9.5 Section 22f of the Act on Copyright in Artistic Creations 1907 creates a right to one's portrait. The First Civil Division of the Supreme Court held that:

*"The unauthorized publication of a portrait constitutes ... an attack on the freedom of self-determination and the free expression of the personality. The reason why a third party's arbitrary publication of a portrait is not allowed is that the person portrayed is thereby deprived of his freedom to dispose by his own decision of this interest in his individual sphere."*⁷

9.6 Article 12 of the German Civil Code also provides that a person whose name is used by another without permission may demand the cessation of such use. The person affected could also claim damages from any person who wrongfully uses his name for any loss he suffers.

Canada

9.7 The courts in Canada ruled that there is a tort of "appropriation of personality" at common law.⁸ Rainaldi explains that the tort protects two distinct interests: the right of a person not to be the object of publicity for another's ends without consent; and secondly, "the right of publicity" which is "an exclusive right in the celebrity to the publicity value of his persona".⁹ In contrast to the approach taken by the courts in the United States, the Canadian courts held that "appropriation of personality" was the proper cause of action in both situations even though one may argue that the right of publicity is more a proprietary than a privacy interest.¹⁰

⁶ Clause 23 of the Unfair Publication Bill drafted by the Australian Law Reform Commission would create a right of action in favour of a person whose name, identity or likeness is appropriated by another. A person would be liable under this clause "if he, with intent to exploit for his own benefit, the name, identity, reputation or likeness of that other person and without the consent of that other person, publishes matter containing the name, identity or likeness of that other person- (a) in advertising or promoting the sale, leasing or use of property or the supply of services; or (b) for the purpose of supporting candidature for office." See Law Reform Commission of Australia (1979), para 250.

⁷ Quoted in Law Reform Commission of Ireland, para 9.65.

⁸ This tort is actionable where "the defendant has appropriated some feature of the plaintiff's life or personality, such as his face, his name or his reputation, and made use of it improperly, ie, without permission, for the purpose of advancing the defendant's own economic interests." See G H L Fridman, 194 - 197.

⁹ L D Rainaldi, vol 3, p 24-14. See also R Howell, "The Common Law Appropriation of Personality Tort" (1986) 2 IPJ 149 at 160.

¹⁰ *Athans v Canadian Adventure Camps Ltd* (1977) 17 OR (2d) 425, 80 DLR (3d) 583.

9.8 Appropriation cases in British Columbia, Manitoba, Newfoundland and Saskatchewan are actionable under the respective privacy legislation. For instance, the Manitoba Act provides that privacy may be invaded by:

*“the unauthorized use of the name or likeness or voice of that person for the purposes of advertising or promoting the sale of, or any other trading in, any property or services, or for any other purposes of gain to the user if, in the course of the use, that person is identified or identifiable and the user intended to exploit the name or likeness or voice of that person”.*¹¹

9.9 Similar provisions can be found in the Newfoundland and Saskatchewan statutes. British Columbia makes the use of the plaintiff's name or portrait without consent a distinct tort which is actionable without proof of damage.¹²

United States

9.10 The *Restatement* provides that “one who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”¹³ To establish a prima facie claim for invasion of appropriation privacy, the plaintiff has to prove that the defendant has made some commercial or other use of the plaintiff's identity or persona without permission and that the defendant's use has caused some damage to the plaintiff's peace of mind and dignity.¹⁴ He must also show that the defendant has appropriated to his own use or benefit “the reputation, prestige, social or commercial standing, public interest or other values of the plaintiff's name or likeness”.

United Kingdom

9.11 The draft bill appended to the JUSTICE Report defined “right of privacy” as including freedom from appropriation of personality. The Private Members' Bills introduced by Brian Walden and William Cash also covered unauthorized appropriation of a person's name, identity or likeness for another's gain. However, the Calcutt Committee did not find a pressing social need to provide an additional remedy for those, such as politicians or actors, whose images or voices were appropriated without their consent for advertising or promotional purposes. They thought that the law of defamation may avail such a complainant if he could establish an innuendo.¹⁵

Is appropriation of a person's name or likeness a privacy concern?

¹¹ Section 3(c).

¹² British Columbia Act, section 3.

¹³ *Restatement* 2d, Torts, § 652C. See “Invasion of Privacy by Use of Plaintiff's Name or Likeness for Nonadvertising Purposes” 30 ALR3d 203; “Invasion of Privacy by use of Plaintiff's Name or Likeness in Advertising” 23 ALR3d 865.

¹⁴ Apart from statutes in some states, the tort is not limited to commercial appropriation. The defendant may be liable even though the use is not a commercial one and the benefit sought to be obtained is not a pecuniary benefit.

¹⁵ Para 12.8.

9.12 Some writers treat appropriation of personality as a privacy matter. Beane, for instance, defines privacy as including the freedom of an individual to determine the extent to which another individual may obtain or make use of his name, likeness, or other indicia of identity.¹⁶ Westin defines privacy as the “claim of individuals to determine for themselves when, how and to what extent information about them is communicated to others”.¹⁷ We note that appropriation of a person’s name or likeness does not necessarily communicate information *about* a person. It does not necessarily involve disclosure of private facts or falsity in the sense of defamation.

9.13 Other writers have argued that the interests protected by an appropriation tort are not privacy interests; the right to the commercial use of one’s name or likeness is a proprietary right and the person whose identity has been appropriated should look to the laws of passing off and unjust enrichment for remedies.¹⁸ Harry Kalven, for example, notes that the rationale for the protection afforded by the tort “is the straight-forward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get for free some aspect of the plaintiff that would have market value and for which he would normally pay.”¹⁹ Raymond Wacks also holds the view that the tort is essentially a proprietary wrong at the heart of which lies the unjust enrichment which the defendant obtains by his gratuitous use of the plaintiff’s identity.²⁰ Even the American *Restatement* admits that the right created by the appropriation tort is “in the nature of a property right, for the exercise of which an exclusive licence may be given to a third person, which will entitle the licensee to maintain an action to protect it.”²¹

9.14 However, Edward Bloustein expresses the view that everyone has a right to prevent the commercial exploitation of his personality only because it is an affront to human dignity:

“No man wants to be ‘used’ by another against his will, and it is for this reason that commercial use of a personal photograph is obnoxious. Use of a photograph for trade purposes turns a man into a commodity and makes him serve the economic needs and interest of others. In a community at all sensitive to the commercialization of

¹⁶ Beane, “The Right to Privacy and American Law” (1966) 31 Law & Contemp Probs 253, 254.

¹⁷ A F Westin, *Privacy and Freedom* (London: Bodley Head, 1967), p 7.

¹⁸ In *Erven Warnick v Townend* [1979] FSR 397, Lord Diplock defined the necessary elements of a passing off action as follows: “(1) a misrepresentation (2) made by a trader in the course of trade, (3) to prospective customers of his or ultimate consumers of goods or services supplied by him, (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence) and (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a *quia timet* action) will probably do so.” A strict approach to the last two elements would include within the category of “trader” only those persons who have a business in the licensing of their personality for business purposes: Frazer, “Appropriation of Personality - A New Tort?” (1983) 99 LQR 281 at 287. An action in passing off was dismissed in *McCulloch v May* [1947] 2 All ER 845 on the grounds that there was no common field of activity between the plaintiff and the defendant. Cf *Henderson v Radio Corporation* [1969] RPC 218. See also *Wilson Development Co v Pro Taifong Co Ltd* [1991] 1 HKC 1.

¹⁹ H Kalven, “Privacy in tort law - Were Warren and Brandeis wrong?” (1966) 31 Law & Contemp Prob 326, 331.

²⁰ R Wacks, *The Protection of Privacy* (London: Sweet & Maxwell, 1980), p 18.

²¹ *Restatement* 2d, Torts, § 652C, Comment a.

*human values, it is degrading to thus make a man part of commerce against his will.*²²

9.15 Tim Frazer also supports the view that appropriation is an aspect of privacy:

“Privacy includes the interest a person has in determining the use to which his or her personality will be put; it is an aspect of a person’s interest in determining the social sphere or context in which he or she wishes to appear.

*The injury caused by appropriation of personality - humiliation, bruised dignity, annoyance, shame, etc., can be satisfactorily explained on the basis of an invasion of privacy, as defined above. What is complained of is that the person’s control over the position he or she takes in relation to others has been removed. An uncontrolled change in position occurs when the person becomes more ‘public’, and therefore less ‘private’. ... [All cases of appropriation of personality] involve loss of control over the degree of ‘publicity’ enjoyed or endured by the individuals”.*²³

9.16 Frazer therefore argues that the concept of privacy may be used to explain the injury suffered by an ordinary individual when a photograph of him sunbathing on a public beach was published without his consent in an advertisement. However, the injury suffered by a well-known person requires different considerations. Frazer explains that “Privacy is not relevant to a person who seeks to enter into, and to remain prominent in, the public sphere *in so far as* the use made of the personality is consistent with the nature of the sphere chosen by the person concerned.” Thus, privacy is not relevant when the photograph of a famous sportsman appears without his consent on an advertisement for sportswear. The complaint here is not explicable on the basis of loss of control over entry into the public sphere. The complaint is that he has lost control over the timing and nature of the advertisement or the identity of the products associated with his name. The injury is not hurt feelings or bruised dignity but “the loss of the fee he would normally be able to command for such use of his image and any diminution in his future earning capacity by reason of such unauthorized use.”²⁴ The situation is different if a photograph of the sportsman is used in an advertisement for pharmaceuticals. The publicity may cause him as much injury to his feelings and dignity as other ordinary individuals. Even a public figure should be protected from such publicity.

9.17 In the United States, the distinction between appropriations involving injured feelings and those involving economic interest is expressed as the difference between a right of privacy and a right of publicity. Most American courts now recognise the distinction between the traditional human dignity interest protected by the appropriation type of privacy and the commercial property interest in human identity protected by the right of publicity.²⁵ Thomas McCarthy points out that the

²² E J Bloustein, at 988.

²³ T Frazer, 296 - 297.

²⁴ Above.

²⁵ See J T McCarthy, *The Rights of Publicity and Privacy* (Clark Boardman Callaghan, 1994), sections 1.6 - 1.11. T L Yang also makes a distinction between these two forms of appropriation: “One form of appropriation is responsible for the mental distress at seeing the exhibition of one’s name or picture to the gain of some strangers; the other form of appropriation is objected to because of the pecuniary loss of the plaintiff, usually a ‘celebrity’ in the entertainment world, as a result of the unauthorized exploitation of his name or likeness.

former is founded upon psychic damage but the latter upon traditional notions of theft of commercial property:

“Invasion of the right of privacy by commercial appropriation is triggered by an injury to human feelings. Mental trauma from loss of self-esteem forms the basis for this tort. ... Commercial use of some aspect of a person’s identity without permission is in effect an involuntary placing of a person on exhibition for someone else’s financial benefit. ... On the other hand, infringement of the Right of Publicity by commercial appropriation is triggered by an injury to a commercial proprietary interest. Plaintiff’s claim is not founded upon emotive or reputational damage but upon the unauthorized taking of a valuable commercial property right which defendant has benefited from without compensation to the owner.”²⁶

“The appropriation branch of the Right of Privacy gives control over another’s commercial use of one’s identity only insofar as one can establish some bruised feelings. The interest protected is purely one of freedom from a particular kind of infliction of mental distress. The Right of Publicity takes the next logical step and makes the right of control over commercial use of one’s identity complete by giving to each person a complete right to control all unpermitted uses of one’s personality, that is, the right to prevent commercial use regardless of the infliction of mental distress.”²⁷

In summary, the appropriation form of privacy protects an individual who does not desire publicity in any form but the right of publicity protects the individual’s claim to exploit himself the publicity value of his name or likeness.

9.18 The Irish Law Reform Commission acknowledges that actions for unauthorized use of name or likeness have a dual character:

“where the person does not consent to such use of the photograph, she or he may feel offended or embarrassed simply because they dislike publicity or because they dislike being associated with the product. In such cases, the protected interest is not necessarily proprietary or commercial. It is human dignity. ... It seems to us therefore that, in some cases, the interest protected by these causes of action is indeed privacy. In other cases, however, perhaps the majority of cases, the interest is essentially commercial.”²⁸

9.19 We agree that using a person’s name or likeness for commercial gain without permission is objectionable. Recently, an athlete won a gold medal for Hong Kong in the Olympic Games. Many companies presented her with gifts in recognition of her achievement at the Olympic Games. Some of the pictures taken at the presentation ceremonies were later used in advertisements without her permission. The pictures implied that the article promoted in the advertisement had her full blessing. By publishing the photographs in the advertisements, the

The former relates to emotional distress and therefore may truthfully be called an invasion of privacy. The latter relates to a ‘pocket-book sensitivity’ and on analysis is an invasion of one’s right to publicity.” T L Yang, “Privacy: A Comparative Study of English and American Law” (1966) 15 ICLQ 175, at 178.

²⁶ J T McCarthy, § 5.8[C], p 5-69.

²⁷ J T McCarthy, § 5.8[F], p 5-76.

²⁸ Paras 9.69 - 9.70.

companies had taken unfair advantage of her fame for their own advantage. Yet she had no legal remedies under existing law unless she could establish that the publications were defamatory or the companies had breached the use limitation principle under the Personal Data (Privacy) Ordinance. A more recent example concerns a Mr Or who succeeded in “driving over” the Yellow River in China in a motor vehicle. Mr Or alleged that the company which manufactured the vehicle used by him had used his name in its advertisement without his consent. It was reported that Mr Or was aggrieved by what the vehicle company had done.²⁹

9.20 The American *Restatement* seeks to illustrate the appropriation tort by the following examples:

- (a) A is the President of the United States. B forms and operates a corporation, engaged in the business of insurance, under the name of A Insurance Company. This is an invasion of privacy.
- (b) A, a private detective, seeking to obtain information as to the relations of B's wife with C, impersonates B, and so induces others to disclose to him confidential information that they would not otherwise have disclosed. A has invaded B's privacy.
- (c) A, who has been B's mistress, poses as his common law wife, calling herself Mrs. B. A has invaded the privacy of B, and also of his wife, Mrs. B.
- (d) Without the consent of A, B signs A's name to a telegram that he sends to the governor of the state, urging the governor to veto a bill that B finds objectionable. This is an invasion of A's privacy.
- (e) Without the consent of A, B files suit in the name of A as plaintiff, seeking a judgment advantageous to B. This is an invasion of A's privacy.

9.21 Although we agree that appropriation without permission is objectionable, we are not satisfied that the examples given in the *Restatement* illustrate that such wrongful conduct falls under the rubric of privacy:

- (i) Example (a) is not a privacy issue. Any confusion which might arise from the use of a person's name as the name of a company should be dealt with by company law.
- (ii) Example (b) is not a privacy issue either. The unauthorized disclosure of information imparted in confidence should be governed by the law of breach of confidence.
- (iii) As regards example (c), B's privacy was not invaded. A person may call himself whatever he likes unless doing so constitutes an offence of personation.
- (iv) Example (d) involves fraud and false representation.

²⁹

Ming Pao, 23 July 1997.

- (v) In example (e), filing a suit in another's name in order to obtain a judgment to his advantage is a case of obtaining property or a pecuniary advantage by deception which is punishable under the Theft Ordinance.

9.22 Appropriation may be for a political or commercial purpose. As for the use of a person's name to support candidature for public office, the Corrupt and Illegal Practices Ordinance (Cap 288) already makes it an offence to use or publish the name of a person without his prior consent so as to infer that he supports a candidate of an election.³⁰ As regards appropriation for commercial gain, it normally involves a portrayal of a well-known figure in an advertisement suggesting that he commends the product promoted therein to the whole world. A picture showing a public figure using a particular brand of furniture conveys a message that he is satisfied with the quality of the furniture and that he is pleased to commend it to others. However the truth might be that he does not have a high opinion of the furniture, or that even if he is satisfied with its quality, he does not want his opinion publicised.

9.23 We agree that unauthorized use of a person's name for commercial gain is immoral and should be condemned. It damages a person's public image as well as his commercial interest. But an appropriation tort does not require the invasion of something secret, secluded or private pertaining to the individual. Besides, the protection of commercial interests is something outside the remit of our Privacy reference. We believe that the problems associated with appropriation should be addressed by the law of contract or advertising law, perhaps supplemented by self-regulatory measures adopted by the advertising industry.

Use of personal data in advertisements

9.24 At present neither the Television Ordinance (Cap 52)³¹ nor the Codes of Practice on Advertising Standards issued under the Broadcasting Authority Ordinance (Cap 391) contain any provisions on privacy matters. The Codes issued by the Broadcasting Authority simply state the general principle that all television advertising should be "legal, clean, honest and truthful". As for the print media, except for certain exceptions,³² there are no specific controls over the advertising content appearing in newspapers and magazines.

9.25 Print and cinema advertising in the United Kingdom are regulated by the British Codes of Advertising and Sales Promotion.³³ The Codes are industry codes and apply to all non-broadcast advertising and sales promotion in the United Kingdom. Complaints about breaches are investigated and adjudicated by the Advertising Standards Authority.³⁴ Rule 13 of the British Codes provides:

³⁰ Section 17.

³¹ See the Television (Advertising) Regulation (Cap 52).

³² Eg Undesirable Medical Advertisements Ordinance (Cap 231).

³³ The index to the Codes can be found at <<http://www.asa.org.uk/bcasp/>>.

³⁴ The Advertising Standards Authority is independent of the Government and the advertising business and was established to monitor the self-regulatory system set up by the industry. Para 68.36 of the Codes explains the sanctions for breaches: "Under the Control of Misleading Advertisements Regulations 1988, if a misleading advertisement or promotion continues to appear after the [ASA] Council has ruled against it, the ASA can refer the matter to the Director General of Fair Trading who can seek an undertaking from anyone responsible for commissioning, preparing or disseminating it that it will be discontinued. If this is not given or is not honoured, the OFT can seek an injunction from the court to prevent its further appearance."

“Advertising Code - Protection of privacy

- 13.1 *Advertisers are urged to obtain written permission in advance if they portray or refer to individuals or their identifiable possessions in any advertisement. Exceptions include most crowd scenes, portraying anyone who is the subject of the book or film being advertised and depicting property in general outdoor locations.*
- 13.2 *Advertisers who have not obtained prior permission from entertainers, politicians, sportsmen and others whose work gives them a high public profile should ensure that they are not portrayed in an offensive or adverse way. Advertisements should not claim or imply an endorsement where none exists.*
- 13.3 *Prior permission may not be needed when the advertisement contains nothing that is inconsistent with the position or views of the person featured. ...”*

9.26 As for the broadcasting media in the United Kingdom, the Code of Advertising Standards and Practice issued by the Independent Television Commission³⁵ contains a separate paragraph on the unauthorized portrayal of individuals in advertisements. Rule 15 of the Code reads:

“Protection of Privacy and Exploitation of the Individual

“Individual living persons must not be portrayed or referred to in advertisements without their permission except in circumstances approved by the Commission. A general exception is in advertisements for books, films, and particular editions of radio or television programmes, newspapers, magazines, etc, which feature the person referred to in the advertisement, provided the reference or portrayal is neither offensive nor defamatory. In the case of generic advertising for news media, licensees may also waive the requirement for prior permission if it seems to them reasonable to expect that the individual concerned would not have reason to object. Such generic advertising must, however, be withdrawn immediately if individuals portrayed without their permission do object.”

9.27 We note that the Code of Advertising Standards issued by the Association of Accredited Advertising Agents of Hong Kong imposes restrictions on the use of pictures of individuals in advertisements which suggest that the

³⁵ (Autumn 1995), at <<http://ourworld.compuserve.com/homepages/almad/itccode.htm>>. The Code gives effect to the requirements relating to television advertising in the EC Directive on Television Broadcasting (85/552/EEC) and the 1989 Council of Europe Convention on Transfrontier Television. See also The Control of Misleading Advertisements Regulations 1988 (UK) (SI 1988/915) which seeks to implement the Council Directive 84/450/EEC (the misleading advertising directive). Members of the EEC were required by the directive to provide arrangements enabling any person, regarded under national law as having a legitimate interest in prohibiting misleading advertising, to initiate legal proceedings against such advertising or to bring it before an administrative authority.

individuals endorse the products or services advertised.³⁶ Any member of the Association which is in breach of the Code may be disciplined in accordance with the Rules of the Association. Although such self-regulatory measures are commendable, it would be preferable if similar provisions could be incorporated into the Codes of Practice on Advertising Standards issued under the Broadcasting Authority Ordinance.

9.28 Since the Broadcasting Authority does not have jurisdiction over the print media, the Privacy Commissioner may wish to issue a Code of Practice on the use of personal data in advertisements using the relevant provisions in the British Codes of Advertising and Sales Promotion as a starting point. Any code issued by the Privacy Commissioner would apply to both the print and broadcasting media.

Recommendation 5

We recommend that the Broadcasting Authority should give consideration to adopting in their Codes of Practice on Advertising Standards provisions governing the use of personal data in advertisements broadcast by the licensed television and sound broadcasters in Hong Kong.

Recommendation 6

We recommend that the Privacy Commissioner for Personal Data should give consideration to issuing a code of practice on the use of personal data in advertising materials for the practical guidance of advertisers, advertising agents and the general public.

Conclusion

9.29 We conclude that there is no real privacy issue in an unauthorized use of a person's name or likeness whether for commercial gain or not. Even if there is, what is left unprotected is a narrow band of privacy concerns. The aggrieved individual may also seek compensation under the Personal Data (Privacy) Ordinance if his likeness was recorded and then used for an unauthorized purpose.

³⁶ The Code can be found in: The Association of Accredited Advertising Agents of Hong Kong, *Standards of Practice* (February, 1997). Principle (B)(i) of the Code provides: "No advertisement shall contain any descriptions, claims, or illustrations which directly or by implication mislead about the product or service advertised" particularly with regard to, *inter alia*, the "approval by any person or conformity with a type approved by any person". Principle (D)(ii) further provides: "Where an identifiable picture of a person is used in conjunction with a quotation commending an advertised product, the person shown should be the person whose words are quoted."

Furthermore, existing law may be relied upon to protect the privacy concerns arising from appropriation. For instance, the law of contract might be relied upon to show that the use is governed by an implied contract between the parties. Where the wrongdoer has made a gain acquired by a tort or breach of contract, the plaintiff may seek restitutionary remedies pursuant to the law of restitution on the basis of unjust enrichment. The individual may also look to the laws of breach of confidence, infringement of copyright, defamation or passing off for remedies in appropriate circumstances. Although we agree that the law should provide a remedy for unauthorized use of name or likeness, the mischief is only of marginal relevance to the privacy interests with which we are most concerned. We are of the opinion that any privacy interest which may exist in appropriation cases is not of such significance as to merit the creation of a new privacy tort.

Recommendation 7

We conclude that it is not necessary to create a statutory tort of invasion of privacy by appropriation of a person's name or likeness.

Chapter 10 - Publicity placing an individual in a false light

Introduction

10.1 The Nordic Conference on the Right of Privacy resolved that the publication of words or views falsely ascribed to a person or the publication of his words, views, name or likeness in a context which places him in a false light should be actionable. The false light tort requires that the representation about the individual be false. A person may visit a venereal disease clinic twice every week. But giving publicity to this fact in the newspapers without further explaining that he is also a part-time counsellor at the clinic would lead the readers to infer that he is receiving treatment for venereal disease. Publicity of this kind would put him in a false light.

10.2 Publicity placing someone in a false light is one of the four torts of privacy in the United States. The *Restatement* provides:

“One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

- (a) the false light in which the other was placed would be highly offensive to a reasonable person, and*
- (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicised matter and the false light in which the other would be placed.”¹*

10.3 The four elements of the false light privacy tort in the United States are:²

- falseness of the representation;
- giving publicity to the false matter complained of;
- a high degree of offensiveness in the matter disseminated, judged by a “reasonable person” standard; and
- “actual malice”, i.e. knowledge of, or reckless disregard for, falsity.

10.4 In order to bring an action based on the American false light tort, the publicity must involve the private affairs of the plaintiff, and cannot relate to any matter which is inherently “public” or “of legitimate interest to the public”. Giving publicity to unimportant false statements is not actionable even when they are made deliberately. It is only when there is such a major misrepresentation of his private affairs that serious offence may reasonably be expected to be taken by a reasonable

¹ *Restatement 2d, Torts, § 652E.* See R G Donaldson, “False Light Invasion of Privacy - Cognizability and Elements” 57 ALR4th 22.

² 62A Am Jur 2d, Privacy, § 124.

person in his position that there is a cause of action for invasion of privacy.³ The interest protected by this tort is the interest of the individual in not being made to appear before the public in an objectionable false light or in other words, otherwise than as he is.⁴

10.5 Although many American courts recognise an action for false light invasion of privacy as a matter of judicially created common law, some jurisdictions in the United States refuse to recognise this cause of action on the grounds that the interests protected under the false light category are adequately served by actions in defamation and that such interests are not worth protecting at the expense of freedom of speech and of the press.

Distinction between false light tort and defamation

10.6 *American Jurisprudence* identifies the following similarities and differences between defamation and the false light privacy tort:⁵

(a) Similarities

- i) The matter publicised must be in fact false.
- ii) The matter must be “published” or communicated to third parties.
- iii) The publication must be made with some degree of fault on the part of the originating party.

b) Differences

- i) The false light cause of action is not limited to publication of defamatory statements, but may be brought for any “highly offensive” false portrayal before the public.
- ii) Any publication of the subject matter to a third party may give rise to a defamation action, while the subject matter of an actionable false light privacy invasion usually is required to come to the notice of at least a substantial portion of the general public.
- iii) Unlike the law of defamation which seeks to provide relief for injury to public reputation, the emphasis of the false light action, is on the subjective mental and emotional suffering, embarrassment, and outrage of the subject of depiction. For a false light invasion of privacy to be actionable, it must involve the private affairs of the subject, and cannot relate to any matter which is inherently public or of legitimate interest to the public. So a false statement about an individual might, if highly offensive to a reasonable person, be actionable as a false light invasion of privacy, even if it could not be said to be defamatory.

³ *Restatement 2d, Torts*, § 652E, p 396.

⁴ *Restatement 2d, Torts*, § 652E, p 395.

⁵ 62A Am Jur 2d, Privacy, § 122.

Is publicity placing someone in a false light a privacy concern?

10.7 The problem we have to address is whether disclosure of false information about an individual amounts to an invasion of privacy. One argument is that the individual concerned has suffered a loss of privacy because people now believe that they know more about him. If the information attracts the interest of the public, he would lose his anonymity and become the subject of other people's attention.

10.8 The UK Consultation Paper agreed that the publication of inaccurate or misleading personal information should constitute an infringement of privacy if anonymity is a part of privacy.⁶ Nonetheless the Consultation Paper doubted whether false light cases were a sufficiently distinct category of infringements to justify an express reference in legislation. It suggested that it should not be the function of the civil law to provide a means for correcting mere errors.⁷

10.9 Harry Kalven points out that there is a great deal of overlapping of defamation in false light cases. He says that the overlap with defamation might have been thought substantial enough to make an approach via privacy superfluous. He poses the following questions in response to the argument that a false light action is not limited to defamatory statements:

"If the statement is not offensive enough to the reasonable man to be defamatory, how does it become offensive enough to the reasonable man to be an invasion of privacy? Or is the point again that plaintiff's name has been used without his consent? And if the desire is to relax somewhat the criteria of what is defamatory, would it not be more rational to do that openly and directly?"⁸

10.10 The Younger Committee considered that placing someone in a false light is an aspect of defamation rather than of privacy:

"We do not support the view of those who argue that the publication of an untruth about a person should be treated by the law as an invasion of privacy rather than under the heading of defamation. In this connection we commend the warning by Professor Harry Kalven about the way in which the 'false light' aspect of privacy has been used in the United States to extend the scope for actions of a defamation nature. He says that any extensions of the law of defamation should be made openly as such, but he suggests also that the restrictions on the application of the law of defamation may reflect a wise caution about permitting its extension to the mollification of outraged dignity. ... To our mind there could be a real threat to freedom of speech if the safeguards for it that have been built into the law of defamation were to be put in jeopardy by the process of subsuming defamation into a wider tort which is implied by the doctrine of 'false light'. We believe that the concepts of defamation

⁶ "[If] it is accepted that another aspect of privacy is anonymity, which is lost when attention is paid to an individual, excessive publicity about a person, even where the statement is untrue, may therefore amount to an infringement of privacy." Above, para 5.29.

⁷ Above, para 5.30. It acknowledged that the Data Protection Act 1984 is not so limited.

⁸ H Kalven, "Privacy in tort law - Were Warren and Brandeis wrong?" (1966) 31 Law & Contemp Prob 326, 340.

*and of intrusion into privacy should be kept distinct from one another.*⁹

10.11 Wacks shares the same view as the Younger Committee.¹⁰ He argues that many of the issues characterised as questions of false light may be resolved by the law of defamation and that it requires a strong justification for its claim to independence:

*“[The] raison d’être of the law’s protection against gratuitous publicity is the laying bare of the plaintiff’s private life In the case of false light, however, this is usually not the plaintiff’s complaint at all. He complains not about the mere fact of unwanted publicity nor about the disclosure of intimate facts, but about the fact that the world has received a misleading impression of him. This is the domain of defamation.”*¹¹

10.12 We have considered the following illustrations given in the American Restatement:¹²

- (a) A is a taxi driver in the city of Washington. B Newspaper publishes an article on the practices of Washington taxi drivers in cheating the public on fares, and makes use of A’s photograph to illustrate the article, with the implication that he is one of the drivers who engages in these practices. A never has done so. B is subject to liability to A for both libel and invasion of privacy.
- (b) A is a renowned poet. B publishes in his magazine a spurious inferior poem, signed with A’s name. Regardless of whether the poem is so bad as to subject B to liability for libel, B is subject to liability to A for invasion of privacy.
- (c) A is a Democrat. B induces him to sign a petition nominating C for office. A discovers that C is a Republican and demands that B remove his name from the petition. B refuses to do so and continues public circulation of the petition, bearing A’s name. B is subject to liability to A for invasion of privacy.
- (d) A is a war hero, distinguished for bravery in a famous battle. B makes and exhibits a motion picture concerning A’s life, in which he inserts a detailed narrative of a fictitious private life attributed to A, including a non-existent romance with a girl. B knows this matter to be false. Although A is not defamed by the motion picture, B is subject to liability to him for invasion of privacy.

10.13 We think that the remedy of the taxi driver and the renowned poet in examples (a) and (b) should be in defamation. It is difficult to imagine how the privacy of the driver or the poet has been invaded by the publication. In example (c), the democrat has himself to blame in making the nomination without first checking the political affiliation of the candidate. A person who makes or uses a “false instrument” would be prosecuted for forgery under the Crimes Ordinance.

⁹ Younger Report, paras 70 - 71.

¹⁰ R Wacks, “The Poverty of ‘Privacy’” (1980) 96 LQR 73, 84.

¹¹ R Wacks, *The Protection of Privacy* (London: Sweet & Maxwell, 1980), p 171.

¹² *Restatement 2d, Torts*, § 652E, 395 - 396.

10.14 A person who finds himself in the same position as the “renowned poet” in (b) may also be protected by the “moral rights” under the Copyright Ordinance (Cap 528). By virtue of sections 92 and 96 of the Ordinance, he has a right not to have his work subjected to derogatory treatment, and not to have a work falsely attributed to him as an author. An infringement of moral right is actionable as a breach of statutory duty.¹³

10.15 As regards (d), it is essential to find out what the motion picture purported to be. If it purported to be a documentary, the audience would expect that the story narrated in the film represented the real life of the hero. But if the film made it abundantly clear that the picture bore no relation to reality, no one should have cause to complain if it gave a fictional account of the hero’s life. Where the film purported to be a documentary but turned out to be a fictional account of his life, the hero may have a cause of action in defamation if the film injures his reputation.

10.16 If placing someone in a false light tort is actionable as an invasion of privacy, the making of false statements about the private life of an individual would be actionable even though the maker is not liable in defamation. This would expand the scope of the law of defamation. The law of copyright already provides a remedy where an individual’s work is subjected to derogatory treatment or where a work is falsely attributed to him as an author. The tort of malicious falsehood might also be relevant in appropriate circumstances if the plaintiff has suffered special damage.¹⁴ We are doubtful that publicity placing someone in a false light is a problem of such significance as to merit the creation of a statutory tort. The freedom of speech might be unduly restricted if liability for the making of false statements is extended.

Recommendation 8

We conclude that it is not necessary to create a statutory tort of giving publicity to a matter concerning an individual that places him before the public in a false light.

¹³ Section 114. Where the plaintiff’s work is subjected to derogatory treatment, the court may grant an injunction prohibiting the doing of any act unless a disclaimer is made dissociating the author from the treatment: section 114(2).

¹⁴ An action for malicious falsehood lies in cases where a person has maliciously made a false statement to a third party respecting the plaintiff or his property as a result of which the third party is deceived and induced to act to the plaintiff’s detriment. Proof of special damage is not necessary only if the words are calculated to cause pecuniary damage to the plaintiff: see Defamation Ordinance (Cap 21), section 24.

Chapter 11 - Defences

11.1 Where an actionable invasion of privacy is made out, the court would have to consider whether the defendant has a defence.

Consent

11.2 The right to privacy may be lost by consent or by a course of conduct which estops him from asserting it. Thus, a person has no cause for complaint if he reveals intimate information in an interview, knowing that such information would be published in a newspaper. Likewise, a plaintiff should be precluded from seeking relief if it can be shown that he has waived his right of privacy with respect to the intrusion or the facts disclosed. This would be the case if the plaintiff is a public figure and the facts disclosed by a newspaper relate to his public activities. In the context of media intrusion, the Court of Appeal in *Oriental Press Group Ltd v Apple Daily Ltd*¹ has observed that although it is legitimate to take photographs of public figures on *public* occasions, as when emerging from limousines on first nights, the taking of photographs of public figures on *private* occasions without their consent is quite another matter.

Recommendation 9

We recommend that it should be a defence to an action for invasion of privacy if the plaintiff expressly or by implication authorized or consented to the act, conduct or publication constituting the invasion.

Consent to intrusion

11.3 A journalist sometimes uses a hidden device to record what is heard or seen by him while he is posing as a client at the subject's premises in an attempt to expose malpractices or unlawful activities suspected to have been carried out by the subject. The American court in *Dietemann v Time*² held that the surreptitious use of a camera and microphone by two employees of a magazine who posed as patients investigating an individual alleged to have been practising medicine without a licence constituted an invasion of privacy by intrusion. The court was reported as concluding that:

“clandestine photography of the plaintiff in his den and the recordation and transmission of his conversation without his consent resulting in his emotional distress warranted recovery for invasion of privacy in California. ... [E]ven though the plaintiff invited the reporters to the den, and even though one who invites another to his home or office

¹ [1997] 2 HKC 525.

² (1971, CA9 Cal) 449 F2d 245; 1 Media LR 2417 (applying California law).

*takes a risk that the visitor may not be what he seems, and despite the fact that the visitor may repeat all he hears and observes when he leaves, the plaintiff did not, and should not be required to, take the risk that what was heard and seen would be transmitted by photograph or recording, to the public at large or to any segment of it that the visitor might select. A different rule ... could have a most pernicious effect upon the dignity of man and would surely lead to guarded conversations and conduct where candor is most valued, for example, in the case of doctors and lawyers.*³

11.4 We examine below whether the following acts or conduct would constitute an invasion of privacy by intrusion:

- (a) interception of communications with the consent of one of the parties to the communication but without the knowledge of the other party or parties. It covers two types of interceptions:
 - (i) interception by one of the parties to the communication; and
 - (ii) interception by a third party with the consent of one of the parties to the communication;
- (b) surreptitious collection of visual data with the assistance of a hidden device carried by a person who is lawfully present on the premises in which the data are located, in circumstances where the data are not in full view of everyone but are visible to the naked eye of the collector.

(a) *Interception of communications by a party to the communication*

11.5 The Law Reform Commission of Hong Kong recommends in its report on interception of communications that a person should not be guilty of the proposed interception offence if one of the parties to the communication consented to the interception. Consensual interception occurs when a party to a communication uses a device either to record the communication or to transmit the communication to a third party without the knowledge of the other party to the communication. The Commission concludes that consensual interception should not be regulated by law after noting the following arguments against regulation:⁴

- (i) Many people record their conversations in order to protect their legitimate interests. Imposing restrictions on the use of recording devices would fail to reflect contemporary practices. Indeed, the use of speaker-phones has reduced the privacy expectation which a person would have had when engaging in telephone conversations.
- (ii) The consent given by one of the parties to the conversation may be seen as no more than an extension of the powers of recollection of that party.
- (iii) The person who divulges any confidence in a conversation always runs the risk that his interlocutor will betray the confidence. The risk

³ 69 ALR 4th 1059, 1078.

⁴ HKLRC, *Report on Privacy: Regulating the Interception of Communications* (1996), paras 4.67 - 4.86.

that an interlocutor will divulge one's words and the risk that he will make a permanent electronic record of them are of the same order of magnitude.

- (iv) Consensual interception is less offensive than third party interception because the party giving the consent hears nothing that the other party did not wish him to hear.
- (v) The recording device is used merely to obtain the most reliable evidence possible of a conversation in which the party giving the consent was a participant.

11.6 We consider that a person who intercepts or records a conversation to which he is a party does not invade the privacy of the other party to the conversation because he has neither intruded upon the seclusion of another nor has he intruded into the private affairs or concerns of another. A person in his position does not secretly listen to a conversation addressed to the ears of another.⁵

(b) *Interception of communications by a third party with the consent of a party to the communication*

11.7 A person who is not a party to a conversation is in a different position. He intrudes into the private affairs of a party to that conversation if he listens to the conversation without his consent. The fact that the intruder may have obtained the consent of the other party to the conversation does not alter the fact that the conversation is private to the interlocutor whose consent is lacking. Nevertheless, we consider that if a third party has obtained the consent of one of the parties to that conversation, he should not be liable for invasion of privacy under our proposals.

11.8 Where a party to a telephone conversation is not asked by the other party to keep the information revealed in the conversation to himself, the former party is generally free to pass the tape containing a record of that conversation to a third party without seeking the consent of the other party, just as a person communicating by electronic mail is generally free to forward any message received by him to a third party in the absence of a request from the sender asking him not to do so. The act of passing the tape or forwarding the message to a third party in these circumstances is no different from a party allowing a third party to intercept a telephone or electronic communication without giving notice to the other party. Hence, a person who uses an extension telephone with the consent of a party to the conversation but without notice to the other party should not be liable for invasion of privacy. As stated by the court in *Rathbun v United States*:⁶

“Common experience tells us that a call to a particular telephone number may cause the bell to ring in more than one ordinarily used instrument. Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain.”

⁵ *Chaplin v National Broadcasting Co* (1953, DC NY) 15 FRD 134; cited in 11 ALR3d 1296 at 1305.

⁶ 355 US 107 (1957); cited in 11 ALR3d 1296 at 1300.

11.9 In line with the views expressed in the Interception Report, we consider that a person who reads, listens to or records a communication to which he is not a party should not be liable for the intrusion tort as long as one of the parties to that communication authorizes or consents to his doing so.

Recommendation 10

We recommend that it should be a defence to an action for invasion of privacy by intrusion upon another's solitude or seclusion if the act or conduct constituting the invasion was in the nature of an interception of a communication to which the defendant was not a party and such act or conduct was authorized or consented to by one of the parties to that communication.

(c) *Interception of oral conversations*

11.10 The above observations apply to oral conversations as well as telephone or other electronic communications. A journalist who has used a hidden aural device to record an oral conversation between himself and an interviewee would be able to rely on the defence of one-party consent in a privacy action brought by the interviewee.

11.11 We note that some people find surreptitious recording of *oral* conversations more objectionable than surreptitious recording of *telephone* conversations. They argue that although the use of speaker-phones, recording machines and extension telephones is not uncommon in Hong Kong, an interlocutor does not normally expect the other party to record an oral conversation by covert means. Whereas an interlocutor should take the risk that the other party on the telephone line is using a speaker-phone or has an extension telephone or a recording machine, he does not reasonably expect that the person he is talking to in a face-to-face conversation has a hidden microphone with him.

11.12 Although we agree that surreptitious recording of oral conversations is objectionable, the fact remains that there is no intrusion such as would render such recording an invasion of privacy. We think that broadly speaking, the arguments set out in paragraph 11.5 above apply to oral conversations as well as telephone conversations. No distinction is therefore made between oral conversations and other types of communications when we recommend that one-party consent should be a defence to intrusion by third party interception.

11.13 It must, however, be borne in mind that disclosure of private information revealed in a conversation (whether oral, telephone or otherwise) is an entirely different matter. Although a person who has a hidden microphone with him during an oral conversation would not be liable for invasion of privacy by intrusion, he would nevertheless be liable for invasion of privacy based on public disclosure of private facts⁷ if he has given publicity to the private information revealed in the conversation without the other party's consent. We welcome any views as to whether the approach adopted in the above paragraphs is appropriate.

⁷ Or breach of confidence in appropriate circumstances.

(d) *Visual electronic surveillance by a person who is lawfully present on the premises*

11.14 A person who uses, without consent, a hidden camera which is placed or installed in premises (e.g. a guest room, conference room or changing room) for the purposes of transmitting or recording visual data relating to an individual present on the premises (“the data subject”) would generally be liable for intrusion if the data subject is in a state of solitude or seclusion. Likewise, a person who uses a hidden camera carried on his person to collect visual data within his eyesight would also be liable for intrusion if his presence on the premises is unlawful and the visual data collected by the camera is not in full view of everyone. Although liability can easily be established in these cases, the surreptitious use of a camera to record visual data (or to transmit the same to a third party) by a person whose presence in the premises is otherwise lawful and is known to the data subject raises different concerns.

11.15 In our opinion, the collection of visual data in the latter case is no less an invasion of the data subject’s privacy. We think that anyone in a public bathroom or changing room who uses a hidden device to take a photograph of another taking a shower or changing clothes should be subject to civil sanctions. Similarly, a person who is invited into another’s home or office should not be allowed to make a visual record of data which he could lawfully see, but which are screened from public view, while he is staying inside the home or office.

11.16 We consider that the surreptitious use of a visual device in such circumstances is offensive and objectionable whether or not the data are eventually disclosed. The permission for a person to enter and stay at a particular place rarely extends to the collection of visual data by means of a hidden device. Furthermore, the fact that an individual consented to being watched by another person does not necessarily mean that he also consented to that other person making a permanent record of what he saw or to his transmitting the visual images to a third party by electronic means.

11.17 Although the recording or transmission of communications by a party without notice to the other party may be acceptable in the aural context, the surreptitious collection of visual data by a licensee or invitee is of a different quality and raises greater concerns. Whilst it is arguable that the use of speaker-phones and recording machines has reduced the level of privacy expectation which an interlocutor would have when engaging in telephone conversations, the data subject whose appearance or property is not in public view has a reasonable expectation that visual data relating to him or his property would not be recorded or transmitted by the data collector to a third party without his consent. Such is the case even though the presence of the data collector on the premises is lawful and the data are within his eyesight. A picture taken by a hidden device may contain all the minute details of an individual’s appearance and property which would not otherwise be captured by means of a fleeting glance. The risk of disclosing such data to a third party or to the general public is all the greater if a permanent record is made of such data.

11.18 Most individuals therefore find surreptitious recording or transmission of visual data by a person who is otherwise lawfully present on the premises more offensive and objectionable than consensual interception of communications. To address such concerns, a distinction should be drawn between aural surveillance by

one of the parties to the communication, and visual electronic surveillance by a person who is lawfully present on the premises in which the data are located. There is no implied consent to surreptitious recording or transmission of visual data by a person whose presence on the premises is otherwise lawful. While consensual interception may be acceptable on the grounds set out above, visual electronic surveillance should be permissible only if the individual concerned expressly consents to it.

11.19 However, we still need to resolve the problem of whether surreptitious collection of visual data with the assistance of a device carried by a person who is lawfully present on the premises (“the data collector”) constitutes an intrusion in the first place. The following observations tend to suggest that such collection does not constitute an intrusion:

- (i) In a typical case, the presence of the data collector on the premises is otherwise lawful.
- (ii) The data subject has notice of the presence of the data collector and is therefore in a position to take the necessary precautions to keep any data from the data collector’s view.
- (iii) The data subject expressly or impliedly consents to the data collector watching him or his property which are not removed from the data collector’s eyesight.
- (iv) The data collector does not see anything which the data subject does not wish him to see.
- (v) The data subject is not in a state of solitude or seclusion when visual data about him are collected by the data collector.
- (vi) Since any visual data that may be collected by the data collector with the assistance of the hidden device are visible to his naked eye, he has not intruded into the private affairs or concerns of the data subject.

11.20 If surreptitious collection of visual data by a person who is lawfully present on the premises does not constitute an intrusion even though it is done with the assistance of a device, the data subject would have no remedy against the collector under our proposals. The implication is that anyone in the public bathroom or changing room may surreptitiously record what he could lawfully see without attracting civil liability for invasion of privacy; and any visitor may take pictures by means of a hidden camera while he is staying inside the premises which he may lawfully visit.

11.21 We think that it is unsatisfactory if the intrusion tort could not provide a remedy in such circumstances only because the scope of the concept of “intrusion” is not wide enough to catch the activities of that collector. In order to overcome this difficulty and to ensure that the data subject may seek relief against the person who has surreptitiously collected his data in circumstances where he has a reasonable expectation of privacy, the surreptitious use of a device to collect visual data about an individual which are not open to public view should be deemed to be an intrusion for the purposes of the intrusion tort even though the person using the device is

lawfully present on the premises in which the data are located and the data are visible to his naked eye.

Recommendation 11

We recommend that for the purposes of the tort of invasion of privacy by intrusion, the surreptitious use of a device to collect visual data relating to an individual (“the data subject”) by a person who is otherwise lawfully present on the premises in which the data are located (“the data collector”) in circumstances where the data are visible to the naked eye of the data collector but are not open to public view should be deemed to be an intrusion upon the seclusion of the data subject or an intrusion into the private affairs or concerns of that data subject.

Consent to public disclosure

11.22 The defendant in an action for unwanted publicity should not be liable if the plaintiff has waived or consented to the publicity. One who engages in public affairs and public life to an extent which draws public interest upon him may be deemed to have implicitly consented to the publication of his picture.⁸

11.23 It has frequently been suggested that artistes cannot complain about invasions of privacy if it is they who seek the media’s attention. Public figures and the news media often take advantage of each other. While reporters rely on public figures for news to report, public figures rely on reporters for more publicity. To Yiu-ming was reported as saying that public figures should not urge reporters to publicise their positive sides only and accuse them if they expose their negative sides as well.⁹ The following passage in an article in *Oriental Daily News* is typical of this view:¹⁰

“... entertainers cannot make themselves accessible to the reporters selectively. ... It is absolutely unacceptable for an entertainer to hold a press conference after receiving an award from an overseas film show, hoping that press photographers from all over the world would take photographs of her happily holding the award high up in the air, but treat the reporters as evils after she has stepped down from the stage. Reporters are not domestic servants of entertainers who could be called upon or released at their whim. Reporters are not instruments who could be taken advantage of by public figures at their discretion for the purpose of increasing their fame.”

11.24 Other reporters claim that the public have a right to know the truth about their idols. They say that it would be unfair to the public if the media is only permitted to report the “purified” public image of artistes but not their real image in real life.¹¹ We shall address these arguments in greater detail when we discuss the

⁸ 62A Am Jur 2d, Privacy, § 227.

⁹ *Sing Tao Daily*, 1 September 1997.

¹⁰ 22 September 1997.

¹¹ *Hong Kong Economic Journal*, 8 September 1997.

public interest defence below. In the meantime, it would suffice to point out that the media is under no obligation to report the “positive sides” or the “purified” images of public figures if it finds that it is unfair or immoral to do so. The editorial of *The Sunday Telegraph* observed:

“[T]here is the argument that, because people in the public eye consent to the publication of items which relate to their private lives, they cannot complain if journalists publish details to whose publication they have not consented. ... When Diana gave her interview to Panorama, [Lord Wakeham, the Chairman of the Press Complaints Commission,] wrote that ‘privacy can be compromised if we voluntarily bring our private life into the public domain. Those who do that may place themselves beyond the [Press Complaints Commission’s] protection.’ By that reasoning, if a woman has ever had consensual sex with a man, she cannot then complain if, on another occasion, he rapes her.”¹²

11.25 We agree with the following observations made in *American Jurisprudence*:

“the existence of such a waiver carries with it the right to invade the privacy of the individual only to the extent legitimately necessary and proper in dealing with the matter which gave rise to the waiver. ... [By] engaging in an activity of legitimate public interest, one’s entire private life and past history do not necessarily become fair game for news media exploitation. There must be at least a rational, and arguably a close, relationship between the facts revealed and the activity to be explained, and the media should not be entitled to a no-holds-barred rummaging through the private life of an individual engaged in an activity of public interest under the pretense of elucidating that activity or the person’s participation in it. ... Even in the case of a public officer or candidate for public office, the waiver of the right of privacy does not extend to those matters and transactions of private life which are wholly foreign to, and can throw no light upon, the question of his or her competency for the office, or the propriety of having it bestowed upon him or her.”¹³

11.26 In summary, the right to privacy may be “waived for one purpose, and still asserted for another; it may be waived on behalf of one class, and retained as against another class; it may be waived as to one individual, and retained as against all other persons.”¹⁴

11.27 Once a person has achieved fame or notoriety, the mere lapse of time does not of itself reinstate his prior right of privacy. Nonetheless, the length of time that has elapsed is one of the factors in determining whether further publicity can be justified in the public interest.¹⁵ The media may publicise his past activities if such activities can still be regarded as in the public domain or are matters of legitimate concern to the public.¹⁶

¹² *The Sunday Telegraph*, 14 September 1997.

¹³ 62A Am Jur 2d, Privacy, § 197.

¹⁴ *Pavesich v New England Life Insurance Co*, 50 SE 68.

¹⁵ 62A Am Jur 2d, Privacy, § 203.

¹⁶ See below.

Lawful authority

11.28 The defence of lawful authority is generally available in the law of torts. Where a statute or the common law authorizes an act to be done which would otherwise be actionable in tort, no person should be able to maintain an action for the doing of that act.

Recommendation 12

We recommend that it should be a defence to an action for invasion of privacy if the act, conduct or publication constituting the invasion was authorized by or under any enactment or rule of law.

11.29 This defence would cover a police officer who is acting in the course of his duty to prevent, detect or investigate crime or to apprehend the perpetrators of crime. The individual's right to preserve his seclusion must give way to the needs of the law enforcement authorities to fight crime.

Protection of person or property

11.30 We agree that there should be a defence to protect property and legitimate business interests. The JUSTICE Report stated:

"We can envisage situations where conduct might technically be held to be an infringement of privacy which is obviously necessary for the protection of one's person, one's property or one's legitimate business or other interests. An example is the installation of closed-circuit television circuits in a department store, together with warning notices, to deter and detect shoplifters. Another may be the employment of a reputable inquiry agent in certain circumstances."¹⁷

Recommendation 13

We recommend that it should be a defence to an action for invasion of privacy if the act, conduct or publication constituting the invasion was reasonably necessary for the protection of the person or property of the defendant or another.

11.31 This defence would avail the journalist who has taken some footage of a doctor unlawfully selling prohibited drugs to him while he was posing as a patient inside the doctor's consultation room. The defendant has invaded the

¹⁷ Para 142(vi). Cf *Davis v McArthur* (1971) 17 DLR(3D) 760.

doctor's privacy because he has intruded upon the doctor's seclusion by taking photographs in a secluded area without the doctor's consent. However, he would not be held liable for the intrusion tort if he succeeds in arguing that the use of a hidden camera is reasonably necessary for the protection of the person or property of the patients. The defence would also assist the television company in an action for public disclosure of private facts if it subsequently broadcasts the footage in a television programme.

Absolute or qualified privilege

11.32 According to Warren and Brandeis, the right to privacy does not prohibit the communication of any private information when the publication is made under circumstances which would render it a privileged communication according to the law of defamation.¹⁸ They thought that the action for invasion of privacy must be subject to any privilege which would justify the publication of a defamatory statement, reasoning that if there is a privilege to publish matter which is both false and defamatory, there must necessarily be the same privilege to publish what is not defamatory, or true. The American *Restatement* provides that the rules on absolute privilege and conditional privilege to publish defamatory matter apply to the publication of any matter that is an invasion of privacy.¹⁹ In other words, publication of a private matter does not violate the right of privacy when the publication would be a privileged communication under the law of defamation.

11.33 In Hong Kong, statements which are absolutely privileged such that no action will lie for them even though they are false and defamatory include the following:

- a) any statement made in the course of and with reference to judicial proceedings by any judge, jurymen, party, witness, or advocate;
- b) fair, accurate, and contemporaneous reports of public judicial proceedings published in a newspaper;²⁰
- c) any statement made in the Legislative Council by a member of the Council;²¹
- d) certain statements made by one officer of State to another in the course of official duty; and
- e) communications between husband and wife.

11.34 Qualified privilege attaches to the following statements if they are made honestly and without malice:

- a) statements made in performance of any legal or moral duty imposed upon the person making it;²²

¹⁸ At p 216.

¹⁹ *Restatement* 2d, Torts, §§ 652F and 652G; 14 ALR2d 750 §6.

²⁰ Defamation Ordinance (Cap 21), section 13.

²¹ See Legislative Council (Powers and Privileges) Ordinance (Cap 382), sections 3 & 4. The privileges and immunities conferred on members of the Legislative Council by section 3 (freedom of speech and debate) and section 4 (immunity from civil and criminal proceedings) are extended to public officers designated for the purpose of attending sittings of the Council or any committee while so designated and attending such sitting: Cap 382, section 8A.

²² The person to whom such a statement is made must have a corresponding interest or duty to receive it.

- b) statements made in the protection of a lawful interest of the person making it;²³
- c) reports of parliamentary and certain other public proceedings;²⁴ and
- d) professional communications between solicitor and client.

Recommendation 14

We recommend that it should be a defence to an action for invasion of privacy based on public disclosure of private facts if the public disclosure would have been privileged in accordance with the rules of law relating to defamation.²⁵

Information in the public domain

11.35 We think that the law should not recognise a right of privacy where the information publicised is already public. An individual has no privacy in his personal information which is public knowledge. Hence, “private facts” which have been disclosed to the whole world are “public” even though they relate to the private life of an individual. The mischief is the unwarranted publicity given to *private* affairs and concerns, not matters which are already in the public domain. The Calcutt Committee proposed that the defendant should not be liable if “the publication was done at a time when the personal information in question had already come into the public domain through no act or default of the defendant”.²⁶ A defence drafted along this line would apply to information in public records and evidence given in open court. It would also cover publication of acts done in public.

11.36 In *Woodward v Hutchins*,²⁷ the plaintiffs obtained an interim injunction restraining their press agent and the *Daily Mirror* from disclosing any confidential information about their private lives or personal affairs acquired during the course of employment with them. The injunction was discharged on appeal. Lord Denning MR stated:²⁸

“[The injunction] speaks of ‘confidential information’. But what is confidential? ... Mr. Hutchins, as a press agent, might attend a dance which many others attended. Any incident which took place at the dance would be known to all present. The information would be in the public domain. There could be no objection to the incidents being made known generally. It would not be confidential information. So in this case the incident on this Jumbo Jet was in the public domain. It was known to all the passengers on the flight.”

²³ An example is a statement made in defence of his own property. There must be an interest to be protected on the one side and a duty to protect it on the other.

²⁴ Defamation Ordinance (Cap 21), section 14.

²⁵ The UK Consultation Paper warned at para 5.49 that care had to be taken in drafting this defence: “to say that there is to be a defence if there would have been had the proceedings been brought for defamation suggests that if for some reason they could not have been brought in defamation (the obvious example being that the statement in question was true, which it probably would be under a new civil wrong) the defences will not be available.”

²⁶ Para 12.19.

²⁷ [1977] 2 All ER 751.

²⁸ [1977] 2 All ER 751, 755.

11.37 We consider that information about public activities and incidents which took place in a public place is, by definition, in the public domain

Public records

11.38 We agree that there should generally be no restrictions on the publication of private facts which are readily accessible to the general public through a public library or a public registry. The publication of facts which are readily ascertainable from publicly available records should not be actionable under the disclosure tort.

11.39 In the American case of *Cox Broadcasting Corp v Cohn*,²⁹ the court held that the press was not liable for giving further publicity to information contained in public records. It recognised a presumption that including information contained in public records served the public interest. The court said that “[p]ublic records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media.”³⁰

11.40 A question arises as to whether private facts would still be regarded as readily accessible to the public if the record in which such facts are contained states that the data are to be used only for a specified purpose. Data which are readily accessible to the public may be publicised for an unlawful purpose in contravention of the use limitation principle. Is it right that the publication of personal data for an unlawful purpose would not be treated as an invasion of privacy under the new tort merely because the data are readily accessible to the public? Should the public domain defence be qualified by a requirement that the public disclosure be for a lawful purpose? Or should the defence be restricted to defendants sued under the intrusion tort and not those sued under the disclosure tort?

11.41 While agreeing that privacy should not attach to information which is required to be made publicly available, the UK Government notes that personal information could in some circumstances retain its private nature even after publication. The draft in its Response therefore does not include a specific defence that the information was in the public domain. In order to safeguard personal information against improper or unlawful disclosure, the draft provides that the right to privacy-

*“does not extend to material required by law to be registered, recorded or otherwise available for public inspection; but, subject to that includes the right where material has been disclosed to a particular person or for a particular purpose not to have it further disclosed to other persons or for other purposes.”*³¹

11.42 In Hong Kong, the registers at the Electoral Office, the Marriage Registry, the Transport Department, the Land Registry and the Companies Registry

²⁹ 420 US 469 (1972).

³⁰ At 495.

³¹ Department of National Heritage, *Privacy and Media Intrusion* (London: HMSO, Cm 2918, 1995), Annex B, paras 2(ii).

are open to public inspection. However, apart from the electoral registers,³² none of these registries specify the purposes for which the data may be used. Whereas the use of data contained in an electoral register for a non-specified purpose is subject to criminal sanctions,³³ there are no controls over the use of information contained in other registries, except those prescribed in the Personal Data (Privacy) Ordinance in relation to the use and disclosure of personal data. Under that Ordinance, all public registries should have specified the purposes for which data in the public records may be used.

11.43 We think that whether the matter publicised was in the public domain is a question of fact for the court to decide. The mere fact that the record in question was open to public inspection is not conclusive in showing that the information in the record was in the public domain. However, public records that are “readily accessible” should be treated as in the public domain. Once data are included in a public register which is readily accessible to the public, the data are in the public domain even though they may only be used for a specified purpose. The fact that the information had been disclosed by the defendant for an unlawful purpose does not alter the fact that the information was in the public domain. Nonetheless, we agree that breach of the use limitation principle under the Personal Data (Privacy) Ordinance *may be* a relevant factor in determining the extent to which the data are readily accessible to the public.

11.44 We would add that although the defendant in a privacy action may avoid liability by relying on the public domain defence, he might be held liable under the Personal Data (Privacy) Ordinance if the disclosure had contravened a data protection principle. It is not uncommon that the same act or conduct may give rise to more than one cause of action. For instance, an unauthorized disclosure may give rise to both an action for breach of confidence and an action for breach of the use limitation principle under the Personal Data (Privacy) Ordinance.

Publication of private facts previously made known

11.45 The publication of private facts which have previously been published or made known otherwise than in a public registry gives rise to different considerations. The French courts used to apply a subjective test to deal with this issue.³⁴ In determining whether a “redisclosure” amounted to a breach of the right to respect for private life under Article 9 of the Civil Code, they took into account such matters as the circumstances of publication, the motive of the defendant in publishing and the public interest in the publication. The effect was that once a private fact has been made known publicly, the person who redisclosed that fact would not be liable for a breach of Article 9 unless he intended to harm the plaintiff

³² Eg, section 41 of the Electoral Affairs Commission (Registration) (Electors for Functional Constituencies) (Voters for Subsectors) (Members of Election Committee) (Legislative Council) Regulation (LN 534 of 1997) provides that an extract from the functional constituencies register, subsector register or Election Committee final register must be used for a purpose related to the election for which it may be used.

³³ Eg, under section 42(3) of the Electoral Affairs Commission (Registration) (Electors for Functional Constituencies) (Voters for Subsectors) (Members of Election Committee) (Legislative Council) Regulation, any person who uses any information relating to a person contained in a register or an extract from such a register for a purpose other than a purpose related to an election commits an offence.

³⁴ R Redmond-Cooper, “The Press and the Law of Privacy” (1985) 34 ICLQ 769.

by the redisclosure. Redmond-Cooper explains that the application of a subjective test could be justified on the following grounds:³⁵

- The previous authorization to publish private facts should not be presumed to last for ever; the individual should have a right to repent.
- The subsequent publication may reach a different readership and therefore be capable of causing real harm.
- The context and form of presentation of private facts will be important, and newspapers and magazines should not simply use sensational extracts out of context.

In 1980, the Supreme Court of France substituted an objective test of invasion of privacy in redisclosure cases. The court held that once an event had been made known, that event then ceased to form part of the individual's private life and could be freely recounted.³⁶

11.46 The position in the United States as summarized by the *Restatement* is as follows:

“The fact that there has been a lapse of time, even of considerable length, since the event that has made the plaintiff a public figure, does not of itself defeat the authority to give him publicity or to renew publicity when it has formerly been given. Past events and activities may still be of legitimate interest to the public, and a narrative reviving recollection of what has happened even many years ago may be both interesting and valuable for purposes of information and education. Such a lapse of time is, however, a factor to be considered, with other facts, in determining whether the publicity goes to unreasonable lengths in revealing facts about one who has resumed the private, lawful and unexciting life led by the great bulk of the community. This may be true, for example, when there is a disclosure of the present name and identity of a reformed criminal and his new life is utterly ruined by revelation of a past that he has put behind him. Again the question is to be determined upon the basis of community standards and mores. Although lapse of time may not impair the authority to give publicity to a public record, the pointing out of the present location and identity of the individual raises a quite different problem.”³⁷

11.47 The English Law Commission noted in the context of breach of confidence that the public domain principle was inappropriate where personal information was in issue:

“Much information which is technically available to the public is not generally known and may in fact be known only to a handful of people. For example, the back files of a local newspaper may, if properly and assiduously searched, yield a good deal of information not generally known about a person who spent his early life in the area - his family and educational background, his business

³⁵ R Redmond-Cooper, at 777.

³⁶ See R Redmond-Cooper, at 777-778.

³⁷ *Restatement* 2d, Torts, § 652D, Comment k.

connections, his political beliefs and his personal and social problems. Perhaps they show that he was at the centre of an unfortunate affair at his school, that he attempted to take his own life, that he took part in a political demonstration in favour of an unpopular cause, that he associated in his business or private life with someone later convicted of grave crimes against society or even that he 'helped the police' with their inquiries into an offence with which he was never charged. These facts will, of course, be known to and remembered by those who were directly involved, but if the publication took place a long time ago it is quite possible that nobody now knows or remembers them solely by reason of the publication in the local newspaper."³⁸

11.48 The English Law Commission was of the opinion that a person who disclosed in breach of his duty of confidence facts which could be found in the backfiles of a local newspaper should not be allowed to avoid liability by arguing that the facts were technically accessible to the public. In its Working Paper on Breach of Confidence, the Commission proposed that personal information, as opposed to commercially exploitable information, should not be regarded as being in the public domain unless.³⁹

- "(i) the information can be ascertained by recourse to any register kept in pursuance of any Act of Parliament which is open to inspection by the public or to any other document which is required by the law of any part of the United Kingdom to be open to inspection by the public; or*
- (ii) the information was disclosed in the course of any proceedings, judicial or otherwise, which the public were by the law of any part of the United Kingdom entitled to attend."*

11.49 In its final report on Breach of Confidence, the English Law Commission expresses the view that "the fact that such information can be extracted from the back files of a newspaper which are available for reference at a public library will not mean that the information which a search of these files might produce is itself to be regarded as in the public domain if such a search would involve a significant expenditure of labour, skill or money."⁴⁰

11.50 We agree that if a significant amount of labour, skill or money is required to make it reasonably possible to gain access to the private facts, the facts should not be treated as in the public domain even though they are technically accessible to the public. As far as personal data on the Internet are concerned, since Internet service is made available at a modest cost to anyone with a computer terminal and the cost of performing a search on the Internet is negligible, the plaintiff in a privacy action would not be able to argue that personal data on the Internet is not in the public domain by relying on this ground.

11.51 The law of breach of confidence regards confidential information as having reached the public domain if there has already been considerable coverage in the newspaper or on television. In the information age, sensitive personal data

³⁸ The Law Commission, *Breach of Confidence - Working Paper No 58* (London: HMSO, 1974), para 102.

³⁹ Para 103.

⁴⁰ The Law Commission, *Breach of Confidence* (LAW COM No 110) (London: HMSO, cmdnd 8388, 1981), para 6.69, n 679.

may be posted on a public “newsgroup” on the Internet by a subscriber outside Hong Kong without the individual’s consent. A journalist who discovers the data by performing a search on the Internet might publish them in a newspaper. The data may have never been viewed or retrieved by anyone in Hong Kong. But if the data are held by the court to be in the public domain once they are posted on the Internet, anyone in Hong Kong, including the newspapers and broadcasters, may republish it without being held liable for infringing the privacy of the individual even though the publication does not serve any public interest.

11.52 The mere fact that someone in other parts of the world knows the private facts in question does not necessarily mean that the facts are in the public domain. In *Franchi v Franchi*,⁴¹ Cross J referred to an American case in which the court held that the fact that a German and a Dutch firm had complete knowledge of the process which one of the defendants had disclosed to the other defendant was no bar to a claim for unauthorized disclosure of trade secrets. But in *Attorney General v Guardian Newspapers Ltd (No 2)*,⁴² Scott J, noting that the information in respect of which an injunction was sought was already available in countries outside the United Kingdom, observed that “a duty of confidence that operates to keep away from the mass of the people information which is freely available to the more sophisticated or better off is not, I think, a duty that a court of equity would be likely to construct.”⁴³ His observation could equally be applied to personal information available only to “the more sophisticated or better off” who have access to a computer terminal with connections to the Internet.

11.53 We think that whether the private facts in question are in the public domain is a matter of degree depending on the circumstances of the case. In determining whether a certain piece of information is in the public domain, the court would have to take into account the extent to which it was generally known or was readily accessible to the public. Where the information has been made available to some in Hong Kong, the plaintiff would have to demonstrate that he has a privacy interest within the jurisdiction of Hong Kong that ought to be protected by law. We conclude that where private facts concerning past events have been publicised, the publisher should not be held liable if it could show that the facts could be found in a public record which was readily accessible to the public, or otherwise had come into the public domain through no fault of his own.

Recommendation 15

We recommend that it should be a defence to an action for invasion of privacy based on public disclosure of private facts if the matter publicised could be found in a public record which was readily accessible to the public, or otherwise had come into the public domain through no fault of the defendant.

Privacy of offenders

⁴¹ *Franchi v Franchi* [1967] RPC 149, 152-153.

⁴² [1988] 2 WLR 805.

⁴³ At 862.

11.54 Although certain aspects of the private life of offenders may be exposed in court process, it would be contrary to the principle of open justice if the press were not allowed to report the identities of offenders.⁴⁴ The right to privacy has to give way to the principle that every court is open for citizens to see that justice is being done. The details of a public trial are “necessarily and legitimately made public and being public property may be republished”.⁴⁵

11.55 Two years ago, the press and the general public were told that they did not have a right to request access to charge sheets and indictments kept at the magistrates’ court and the Supreme Court. The Judiciary explained that these court documents were treated as “privileged information” in order to protect the privacy of defendants. Only “interested parties” such as lawyers and defendants were permitted to see the documents in full. The press feared that the trial of senior government officials and other politically sensitive figures would escape public attention if the charge sheets were withheld from public scrutiny. Eventually, the Privacy Commissioner advised that the names and addresses of defendants and the charges they face are matters of public record. He considered it reasonable to disclose the defendant’s name, age, address, profession and charges for the purposes of open justice.⁴⁶ As it is in the public interest that justice is seen to be done, the public has a right to know the identity of defendant and the nature of the alleged offence once a charge is laid. We may mention in passing that the court may, in practice, request the reporters not to report certain details of the case before it where serious allegations which are groundless have been made against an individual in court.

Anonymity of victims of sexual offences

11.56 Sections 156 and 157 of the Crimes Ordinance (Cap 200) make it an offence to publish any matter which is likely to identify any person as the complainant of a “specified sexual offence”. The judge may direct that the prohibition does not apply in relation to the complainant if the direction is required for the purpose of inducing persons to come forward as witnesses and the conduct of the defence is likely to be substantially prejudiced if the direction is not given.⁴⁷ “Specified sexual offence” is defined as meaning any of the following:⁴⁸

“rape, non-consensual buggery, indecent assault, an attempt to commit any of those offences, aiding, abetting, counselling or procuring the commission or attempted commission of any of those offences and incitement to commit any of those offences”.

11.57 This definition does not cover all the sexual offences. We are concerned that the following sexual offences under the Crimes Ordinance are omitted from the definition:

⁴⁴ Other advantages of free reporting of identities are: (a) the public can be certain of the identity of an accused or convicted offender; (b) they can be certain when he is discharged; (c) innocent people would not be affected by rumours; and (d) the prospect of publicity can act as an effective deterrent to potential offenders: Younger Report (1972), para 174.

⁴⁵ *Richardson v Wilson* (1879) 7 R 237. However, the identity of defendants may be suppressed on other public interest grounds, eg to protect the interests of juvenile offenders.

⁴⁶ *South China Morning Post*, 25 Oct 1996. Only the defendants’ identity card numbers should be withheld.

⁴⁷ Section 156(2); see also subsections (3A) and (4).

⁴⁸ Cap 200, section 117.

- incest (sections 47 and 48);
- assault with intent to commit buggery (section 118B);
- buggery with a defective or a person under the age of 21 (sections 118C, 118D and 118E);
- gross indecency with a male defective or a man under the age of 21 (sections 118H and 118I);
- procurement of unlawful sex by threats or false pretences (sections 119 and 120);
- administering drugs to obtain or facilitate unlawful sex (section 121);
- unlawful intercourse with a defective or a girl under the age of 16 (sections 123, 124 and 125); and
- gross indecency with a child under the age of 16 (section 146).

11.58 As far as juveniles are concerned, although section 20A(1) of the Juvenile Offenders Ordinance (Cap 226) restrains the press from revealing the name and address of any juvenile concerned in the proceedings in a juvenile court, or any particulars which are calculated to lead to the identification of any such juvenile, only juvenile offenders and witnesses appearing before the juvenile court are protected.⁴⁹ Juvenile victims who do not fall within the scope of section 156 of the Crimes Ordinance and section 20A(1) of the Juvenile Offenders Ordinance are protected from unwanted publicity only if the court before which the offender is tried makes a direction pursuant to section 20A(3) of the Juvenile Offenders Ordinance that the name and address of the juvenile or any particulars which are likely to identify him could not be reported. Since the power under section 20A(3) is discretionary, these juvenile victims have no right to anonymity.

11.59 We think that it is an anomaly that a victim's privacy is protected where she is raped or indecently assaulted but not when the offence of incest or assault with intent to commit buggery is committed against her or him.⁵⁰ The right to anonymity under section 156 of the Crimes Ordinance should generally be extended to victims of other sexual offences.

Recommendation 16

We recommend that consideration should be given to extending the statutory prohibition on identifying victims of rape, non-consensual buggery and indecent assault under section 156 of the Crimes Ordinance (Cap 200) to cover victims of other sexual offences.

Anonymity of victims of non-sexual crime⁵¹

11.60 Newspaper reports containing the names and addresses of victims can cause embarrassment or grief to them and their family members. This is particularly the case when the plight of the victims is publicised only to satisfy the

⁴⁹ Section 20A(1).

⁵⁰ See B S Markesinis, "Our Patchy Law of Privacy - Time to do Something about It" (1990) 53 MLR 802, 805-6.

⁵¹ See also HKLRC Privacy sub-committee, *Consultation Paper on The Regulation of Media Intrusion* (1999), ch 2.

public's thirst for gossip and sensational journalism. The offenders might also commit further offences against the victims if the victim's whereabouts is exposed. There is therefore a case to argue that the statutory prohibition under section 156 of the Crimes Ordinance should be extended to all victims of crime. The Calcutt Committee recommended that the criminal courts should have the power to make an order prohibiting the publication of anything likely to lead to the identification of a victim of an offence, provided that this is reasonably necessary to protect the mental or physical health, personal security or security of the home of the victim.⁵²

11.61 Paragraph 9 of the Victim's Charter promulgated by the Hong Kong Special Administrative Region Government provides:

"All those involved in the criminal justice system, from police officer to judiciary staff, shall respect the victims' right to privacy and confidentiality. Consideration shall be given in appropriate cases to asking the court to accept a written note of the victim's address when giving evidence, rather than providing this orally in court. ... In cases where victims are justifiably apprehensive as to what may happen to them or their family or friends if they give evidence in open court, or in respect of offences of sexual abuse, an application can be made to the judge hearing the case for the victim to testify from outside the court by way of a video link."

11.62 A court has a wide inherent jurisdiction to control the proceedings before it. It has power to make anonymity orders for the purpose of protecting the due administration of justice.⁵³ Hence, in exercise of control over the conduct of proceedings, a court may decide to sit wholly or partly in camera, or direct that a witness be referred to by letter or number to conceal his identity.⁵⁴ But a person who makes public that which has been concealed in court does not necessarily commit a contempt of court. Lord Diplock stated in *Attorney-General v Leveller Magazine Ltd*:⁵⁵

"[A] 'ruling' [or 'order'] by the court as to the conduct of proceedings can have binding effect as such within the courtroom only, so that breach of it is not ipso facto a contempt of court unless it is committed there. Nevertheless where (1) the reason for a ruling which involves departing in some measure from the general principle of open justice within the courtroom is that the departure is necessary in the interests of the due administration of justice and (2) it would be apparent to anyone who was aware of the ruling that the result which the ruling is designed to achieve would be frustrated by a particular kind of act done outside the courtroom, the doing of such an act with knowledge of the ruling and of its purpose may constitute a contempt of court, not because it is a breach of the ruling but because it interferes with the due administration of justice."

11.63 Although the court has a common law power to make an order directing that the identity of a victim should not be publicised, that power is

⁵² Calcutt Report (1990), para 10.15.

⁵³ The Court of Appeal of New Zealand in *Taylor v Attorney-General* [1975] 2 NZLR 675 held that a court may make an order which was binding on the public *ipso jure* as to what might lawfully be published outside the courtroom in relation to proceedings held before it.

⁵⁴ The court is likely to make such a direction in blackmail or official secrets cases.

⁵⁵ *Attorney-General v Leveller Magazine* [1979] AC 440, 451-2 (HL).

exercisable only if it is necessary in the interests of the due administration of justice, and not for the purpose of protecting the victims' privacy. There are therefore cases where the victim's private lives have to undergo public scrutiny notwithstanding that he has already been unfortunate enough to suffer at the hands of the accused.

11.64 We are of the opinion that a victim's privacy should be protected in so far as it would not prejudice the interests of justice. Article 10 of the Hong Kong Bill of Rights expressly provides that the press and the public may be excluded from all or part of a trial "when the interest of the private lives of the parties so requires".⁵⁶ We agree that it is desirable to have specific provisions protecting the privacy of victims of non-sexual offences. There are cases where the identity of victims ought to be protected from publicity even though the offence with which the defendant is charged is not a sexual offence. For example, the victim may have contracted AIDS or have become impotent as a result of the defendant's unlawful act. The privacy interests of victims in such cases are analogous to those of victims of sexual offences. We think that protecting the privacy interests of the former is consistent with the principle underlying the protection of victims of sexual offences. Without derogating from the common law power to make an anonymity order to protect the due administration of justice, the court should have the power to direct that the identity of a victim of crime should not be publicised outside the courtroom.

Recommendation 17

We recommend that consideration should be given to providing the court in criminal proceedings with a statutory power to make an order prohibiting the publication of any matter which is likely to lead to the identification of the person against whom an offence is alleged to have been committed until the conclusion of the proceedings or until such time as may be ordered by the court, provided that the making of such an order or any extension thereof is in the interest of the private life of that person and would not prejudice the interests of justice.

Anonymity of former offenders⁵⁷

11.65 We think that criminal convictions are public records the publication of which should not be restrained on the ground that that publication is a breach of privacy. But some commentators have argued that persons who have been convicted of minor offences should have a right to have their criminal records

⁵⁶ I.e. Article 14(1) of the ICCPR.

⁵⁷ See also paras 8.21 - 8.23.

forgotten. They contend that public knowledge and increased awareness of a particular crime may be gained by discussing past records without revealing the identities of the offenders. Divulging such records would shatter the newly found respectability of former offenders and may ruin their future and cause their friends and relatives to shun them.

11.66 Existing law recognises that rehabilitation of offenders can be just as important as truth in reporting materials available in the public domain. Section 2 of the Rehabilitation of Offenders Ordinance (Cap 297) authorises the expiry of a first conviction if it is an offence in respect of which the offender was not sentenced to imprisonment exceeding 3 months or to a fine exceeding \$10,000. Three years must elapse before the conviction becomes “spent”. Once a conviction has become “spent”, no evidence is admissible in any proceedings which tends to show that the offender was so convicted. The effect is that a person who discloses another person’s previous conviction which falls within the scope of the Ordinance would be liable to that person in defamation.

11.67 The United States court in *Briscoe v Reader’s Digest Association Inc*⁵⁸ attempted to balance the right to know and the interest of an individual to have others not knowing that he has been convicted of a crime. It held that free speech does not require total abrogation of the right of privacy. In striking the right balance between the two conflicting interests, the trier of fact has to take the following factors into account:

- (a) whether the plaintiff had become a rehabilitated member of society;
- (b) whether identifying him as a former offender would be highly offensive and injurious to a reasonable man;
- (c) whether the defendant published this fact with a reckless disregard for its offensiveness, and
- (d) whether any independent justification for printing the plaintiff’s identity existed.

11.68 In the German case of *Lebach*,⁵⁹ the person who was depicted in a documentary play of a television station had been convicted as an accessory to an armed robbery. He was soon to be released from prison because his rehabilitation had made good progress. The German court held that the report would seriously endanger his rehabilitation. The interest of the community in restoring his social position outweighed the need to re-open discussion of the crime. Basil Markesinis explains the position in Germany in the following terms:⁶⁰

“The Constitutional Court ... noted the wider interest of ‘reintegrating the criminal into society’. The time and purpose of the publication is another factor⁶¹ (which, arguably, is included in the fourth factor given

⁵⁸ 4 Cal. 3d 529, 483 P. 2d 34 (1971).

⁵⁹ *Bundesverfassungsgericht*, 5 June 1973, BVerfGE 35, 202; referred to in Lorenz, “Privacy and the Press - A German Experience” in *Butterworth Lectures 1989-90* (London: Butterworths, 1990), 79, at 111-112.

⁶⁰ B S Markesinis, “The Right to be Let Alone Versus Freedom of Speech” [1986] *Public Law* 67, 77-78. Guideline 13.2 of the German Press Code (1994) provides, *inter alia*: “As a matter of principle, it is not permissible to publish names and photographs of relatives or other affected persons who have nothing to do with a crime. In the interests of resocialization, names and photographs must not appear in reports published after the conclusion of criminal proceedings.”

⁶¹ Footnote 37 to the article writes: “It must be noted that in German law the balancing of the competing interests of freedom of information and anonymity depends on the stage of the proceedings. Thus, greater anonymity is guaranteed during the preliminary investigations

by Briscoe) and this, too, must be taken very carefully into account. A sensational, one-sided or inaccurate account ... is likely to receive less protection than one which is clearly aimed at satisfying the legitimate desire of the public to be informed and educated."

11.69 The difficult question is whether the law should permit the publication of forgotten criminal records in the absence of any legitimate public interest. We agree that publicizing a person's criminal records for no good reason constitutes an interference with his "private life". However, the publication of criminal records raises issues which go beyond the "privacy" of former offenders in such records. In the opinion of Raymond Wacks, the statutory right not to have divulged a "spent conviction" protect reputation rather than privacy:

"The [Rehabilitation of Offenders Act's] main objective is to mitigate the difficulties encountered by a convicted offender when he returns to society and, in particular, seeks employment. The prejudice against such a person, even though he may have 'gone straight' has required the law to permit him, after the passage of a specified number of years, to deny that he was ever convicted. Moreover, should his conviction be disclosed, thereby diminishing the esteem in which he is held by right thinking members of society, he may sue for defamation and, provided the publisher acted with malice, recover damages for this truthful account. Strictly speaking, therefore, the protection of 'privacy' is not involved. It is also arguable that the commission of an offence and the subsequent trial and conviction (or acquittal) of the defendant are anyway matters of public record and public interest. Thus not only does the question of rehabilitation of offenders relate to protecting the reputation of the victim of the disclosure, but the disclosure is of a public rather than a 'private' fact."⁶²

11.70 We think that a person who has published the previous conviction of a former offender should not be liable for invasion of privacy. Judgments rendered in open court are information in the public domain. The fact that they are matters of public record prevents such convictions from being private. Besides, the aim of the Rehabilitation of Offenders Ordinance is to rehabilitate offenders, not to protect the privacy of offenders. If a person publicises a person's previous conviction which has already been "spent" under the Ordinance, the former offender may seek relief against the publisher in defamation. We have therefore decided not to examine the protection available under the Ordinance any further.

Public interest⁶³

(unless the identification of the accused is necessary for his arrest or the prevention of further crimes). Anonymity is respected even during the trial, with the accused's name and image not being published at this stage either. The publication of the judgment of the trial is a turning point in the sense that from that stage onwards the accused's right to remain anonymous takes second place. Once the interest in current information has been satisfied, the right of the convicted person to be left alone regains the ascendancy and eventually this means that in principle he must no longer be associated with the crime."

⁶² R Wacks, "The Poverty of 'Privacy'" (1980) 96 LQR 73, note 89.

⁶³ The Report on Protection of Personal Data published by the Law Reform Commission of Hong Kong acknowledged that restricting the use of personal data which reveals illegality and impropriety would inhibit the dissemination of information of public importance. The Report therefore recommended that personal data the publication of which is in the public interest should be exempted from the Use Limitation Principle. However, the public interest exemption under section 61 of the Personal Data (Privacy) Ordinance (Cap 486) only covers the disclosure of data to the news media. The news media may publish or broadcast personal

11.71 Despite the many benefits which privacy can provide to individuals and society, the right to privacy is not absolute. A right to privacy which does not accommodate other legitimate public concerns would create dangers to a society.

11.72 The right to claim relief for an invasion of privacy based on disclosure of private facts has to be reconciled with the Basic Law concerns of free speech and press freedom. A balance has to be struck between the interest in protecting individual privacy and the interest in the dissemination of information which are matters of “public interest”. There are three possible meanings of “public interest”:⁶⁴

- it may be descriptive of the fact that the public are interested in the matter;
- it may indicate that the public have a legitimate interest in the matter; or
- it may involve the actual promotion of the good of the common weal.

11.73 If the first meaning were adopted, the right to privacy would be devoid of all meaning, for the media only publishes matters which interest its readers or viewers. But publication which is “in the public interest” is different from that which is merely “of public interest”. Expression which falls into the former category should receive the protection of Article 27 of the Basic Law and Article 19 of the ICCPR because they involve matters of genuine concern to the public. By contrast, newspaper articles which describe the private lives of ordinary individuals are not protected by such provisions if they merely satisfy public curiosity and do not contribute to the formation of public opinion.

11.74 When confronted with the suggestion that the press often intrudes into the private affairs of another to increase circulation, some reporters put the blame on the general public. They argue that without the public’s insatiable demand for intimate details of the private lives of public figures, the media would not have engaged in privacy-invasive activities and publicise such matters in the press. We attempt to address those arguments by asking the following questions: Should drug traffickers be exculpated from criminal liability if there is a huge demand from drug addicts for dangerous drugs? Should publishers be exempt from liability for surreptitiously taking photographs of people taking a shower, and then publishing the photographs in magazines merely because there is a market for pornography? The answers to these questions are clearly in the negative. The fact that the public may be interested in the private life of others does not of itself give anyone, including media proprietors and reporters, a licence to intrude into the private affairs of an individual or to publish details of his private life. A careful balance should be struck between the interests of expression and the interests of privacy where the details of private life are at issue. As Stephenson LJ put it:⁶⁵

“The public are interested in many private matters which are no real concern of theirs and which the public have no pressing need to know. ... [The] media have a private interest of their own in publishing what appeals to the public and may increase their circulation or the numbers of their viewers or listeners; and ... ‘they are peculiarly

data for an unauthorized purpose only if it could rely on one of the exemptions prescribed in Part VIII of the Ordinance.

⁶⁴ See G D S Taylor, “Privacy and the Public” (1971) 34 MLR 288, at 297 - 230.

⁶⁵ *Lion Laboratories v Evans* [1985] QB 526 per Stephenson LJ.

*vulnerable to the error of confusing the public interest with their own interest*⁶⁶.”

11.75 There is nothing improper in publishing or broadcasting matters which are not of legitimate public interest but are nevertheless interesting to the public. But the means of acquiring such materials must not be intrusive nor should the publication of such interfere with an individual's private life.

11.76 Treating “public interest” as the promotion of the common good is also unacceptable. It would involve the courts in carrying out an inquiry as to what is good for the public to know. We believe that the second meaning would strike the right balance in meeting the legitimate demands of both individuals and society.

11.77 The public interest defence may be formulated in general terms. For example, Brian Walden's Privacy Bill provided that a defendant who had infringed another's right of privacy by the publication of any words or visual images should not be held liable if “there were reasonable grounds for the belief that such publication was in the public interest”.⁶⁷ But framing the defence in general terms such as “the publication was in the public interest” could create problems in practice. The Australian Law Reform Commission stated:

*“The court would be judging, with the benefit of hindsight, whether it had been in the public interest to publish the particular material, the content of the material being only one matter to be considered. This would hardly be fair to publishers, who need to judge the justification of publication in advance. Secondly the phrase ‘public interest’, without more, would cause uncertainty until the courts had built up some new law indicating content to be given to the expression in this new field. Specific provision should be made for the most important topics of public interest. If publishers have material covered by that category they will be relieved of doubt as to the existence of a defence.”*⁶⁸

11.78 The Calcutt Report also had reservations about a general defence merely labelled “public interest”. It concluded that “public interest” in these bald terms is not helpful in determining whether an intrusion is or is not justified. The term means different things to different people. A defence to cover the justified disclosure of personal information would have to be “tightly drawn and specific”.⁶⁹

Newsworthiness

11.79 The publication of “newsworthy” information is held by the American courts to be privileged under the First Amendment to the Constitution.⁷⁰ Some courts have adopted a three-part test to determine newsworthiness: (a) the social value of the facts published; (b) the depth of the intrusion into ostensibly private affairs; and (c) the extent to which the party voluntarily acceded to a position of

⁶⁶ Quoted from the judgment of Sir John Donaldson MR in *Francome v Mirror Group Newspaper Ltd* [1984] 2 All ER 408 at 413.

⁶⁷ Cl 3(c).

⁶⁸ Law Reform Commission of Australia (1979), para 247.

⁶⁹ Paras 3.22 & 12.22.

⁷⁰ *Restatement 2d, Torts*, § 652D, Comment g; 62A Am Jur 2d, Privacy, §§ 186-189. The Supreme Court of the United States in *Cox Broadcasting v Cohn* 420 US 469 (1975) held that an action for invasion of privacy cannot be maintained when the subject matter of the publicity is a matter of “legitimate concern to the public”.

public notoriety.⁷¹ The social value of the facts is the most important factor in determining newsworthiness.

11.80 We consider that a test of newsworthiness would be difficult to apply. It is not easy to distinguish news which is “newsworthy” and that which is not. Anything that is published in the press is by definition “newsworthy”. All information is potentially useful in one way or another in forming attitudes and values. Such a test would therefore give exclusive weight to press freedom and fail to give sufficient guidance to the news media and the courts. Diane Zimmerman observes that the privilege in some jurisdictions has had the practical effect of demolishing the disclosure tort because “[m]any [American] courts, despairing of their ability to make such determinations in a principled way, have ultimately deferred to the media’s judgment of what is and is not newsworthy.”⁷² In *Gertz v Robert Welch Inc*, Powell J commented that the use of a newsworthiness test “would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of ‘general or public interest’ and which do not - to determine ... ‘what information is relevant to self-government.’ ... We doubt the wisdom of committing this task to the conscience of judges.”⁷³

Public figures

11.81 Some journalists justify their privacy-invasive actions by reference to the status of their target. They argue that targets who are treated as public figures have either less privacy or have forfeited their right to privacy by entering the public arena. Should a person receive more or less privacy protection because he is a public figure? If a public figure is entitled to less protection, to what extent may his private life be legitimately exposed?

11.82 In a survey carried out by the Social Sciences Research Centre of the University of Hong Kong,⁷⁴ 91.6% of the respondents thought that public figures and celebrities should enjoy the same level of privacy as ordinary citizens. When asked whether the privacy of celebrities or the public’s right to know is more important, 40.4% responded that the two were of equal importance. Another 28.3% said the privacy of celebrities was more important. Only 21.7% said the public’s right to know was more important.

11.83 The Nordic Conference on the Right to Privacy acknowledges that the line of demarcation between the interest protected by freedom of expression and the interest protected by the right to privacy is very difficult to draw where public figures are involved.⁷⁵

⁷¹ 62A Am Jur 2d, Privacy, § 187. Information and facts which have been determined by the American courts to be newsworthy include “homicide and other crimes, arrests, police raids, suicides, marriages and divorces, accidents, fires, catastrophes of nature, a death from the use of narcotics, a rare disease, the birth of a child to a twelve-year-old girl, the reappearance of one supposed to have been murdered years ago, a report to the police concerning the escape of a wild animal and many other similar matters of genuine, even if more or less deplorable, popular appeal.”

⁷² D L Zimmerman, 302.

⁷³ 418 US 323, 346 (1974).

⁷⁴ *Pop Express*, No 13, September 1997.

⁷⁵ Declaration of the Nordic Conference of Jurists on the Rights to Respect for Privacy (1967), para 10; quoted in JUSTICE, Appendix B.

“Certainly it cannot be drawn in the simple terms of the axiom that where public life begins, private life must end. The private life of public figures is entitled to immunity save where it can be shown to impinge upon a course of public events. Even less acceptable is the axiom that ‘being in the news’ of itself justifies intrusion on private life. It would be undesirable and indeed impossible to provide for all cases by legislation; but it may be insufficient to rely exclusively upon the self-discipline of the Press and other mass media or upon rules of conduct laid down by the professional organisations concerned.”

11.84 We agree that the legislation should give some guidance in this area. The reasonableness of publishing the same set of private facts may depend on the subject matter under discussion and the status of the person concerning whom the facts are published. Thus, some private facts relating to a person who is active in public life may be published without liability even though the same may not be true as regards an ordinary individual. Warren and Brandeis explained:

“Peculiarities of manner and person, which in the ordinary individual should be free from comment, may acquire a public importance, if found in a candidate for political office. Some further discrimination is necessary, therefore, than to class facts or deeds as public or private according to a standard to be applied to the fact or deed per se. To publish of a modest and retiring individual that he suffers from an impediment in his speech or that he cannot spell correctly, is an unwarranted, if not an unexampled, infringement of his rights, while to state and comment on the same characteristics found in a would-be congressman could not be regarded as beyond the pale of propriety.”⁷⁶

“In general, then, the matters of which the publication should be repressed may be described as those which concern the private life, habits, acts, and relations of an individual, and have no legitimate connection with his fitness for a public office which he seeks or for which he is suggested, or for any public or quasi public position which he seeks or for which he is suggested, and have no legitimate relation to or bearing upon any act done by him in a public or quasi public capacity.”⁷⁷

Voluntary public figures

11.85 In *Gatley on Libel and Slander*, the authors state that the private character and conduct of a person who fills a public office or takes part in public affairs may be the subject for fair comment for the purposes of the tort of defamation “in so far as it has reference to or tends to throw light on his fitness to occupy the office or perform the duties thereof, but not otherwise.”⁷⁸ An Australian court held that “[t]he mere fact that a man is a politician or is engaged in some occupation which brings him into public notice is not of itself enough to make his private life a matter of public interest so as to justify the kind of defamatory comment to which, so

⁷⁶ Warren & Brandeis, 215. Whereas disclosing the fact that a cabinet minister has had a relationship with a prostitute may well be a legitimate disclosure in the public interest, it might not be so if a pop star has had a similar relationship. See R Wacks (1980), 102.

⁷⁷ Warren & Brandeis, 216.

⁷⁸ *Gatley on Libel and Slander*, (8th edn, 1981), para 732.

far as his public activities are concerned, he must submit as one of the incidents of his position.”⁷⁹ We think that the same remarks should also apply to disclosures of private facts which are true and not defamatory. In respect of disclosures concerning the private life of a public figure, the question posed is: how far are the disclosures relevant to his public role?

11.86 We agree with the views expressed in *American Jurisprudence* that those who expressly or impliedly submit themselves to public attention or criticism must accept that they have less privacy than others, at least as to legitimate reporting of facts concerning their public activities:

“A person who by his or her accomplishments, fame, or mode of life, or by adopting a profession or calling which gives the public a legitimate interest in his or her doings, affairs, and character, may be said to have become a public personage, thereby relinquishing at least a part of his or her right of privacy. ... [A]ny person who engages in a pursuit or occupation which calls for the approval or patronage of the public submits his or her private life to examination by those to whom he or she addresses his or her call, to the extent that may be necessary to determine whether it is wise and proper to accord him or her the approval or patronage which he or she seeks.”⁸⁰ (emphasis added)

11.87 The American *Restatement* makes a similar observation:

“One who voluntarily places himself in the public eye, by engaging in public activities, or by assuming a prominent role in institutions or activities having general economic, cultural, social or similar public interest, or by submitting himself or his work for public judgment, cannot complain when he is given publicity that he has sought, even though it may be unfavourable to him. So far as his public appearances and activities themselves are concerned, such an individual has, properly speaking, no right of privacy, since these are no longer his private affairs.”⁸¹ (emphasis added)

11.88 We are of the opinion that the publication of private facts concerning an individual which are wholly unconnected with his fitness for a public office or profession or his ability to discharge public or professional duties should generally be suppressed. The mere fact that he is a public figure should not deprive him of protection if the press gives publicity to his private activities or behaviour which has no relevance to his public or professional role.

Involuntary public figures

⁷⁹ *Mutch v Sleeman* (1928) 29 NSWSR at 137.

⁸⁰ 62A Am Jur 2d, Privacy, §193. “One who undertakes to fill a public office offers himself to public attack and criticism, and it is now admitted and recognised that the public interest requires that a man’s public conduct shall be open to the most searching criticism.” *Manitoba Press Co v Martin* (1892) 8 Manitoba R at 70, per Bain J.

⁸¹ *Restatement* 2d, Torts, section 652D, Comment e. See D Bedingfield, “Privacy or publicity? The enduring confusion surrounding the American tort of invasion of privacy” 55 MLR 111 at 112. *American Jurisprudence* elaborates that “any individual who voluntarily seeks public attention will be deemed a public personage who is subject to fair comment and criticism.” See 62A Am Jur 2d, Privacy, § 193.

11.89 There are also individuals who have not sought publicity or consented to it, but through their own conduct or by force of circumstances, have become part of an event of public concern. The privacy rights of such persons are forfeited but only with respect to that event. Hence, those who have committed crime and those who are unfortunate enough to be victims of crime or accidents may become a legitimate subject of public interest.⁸² Nonetheless, it should always be borne in mind that the media should not exceed the bounds of reasonableness and infringe upon the privacy of victims of crime or accidents in the absence of an overriding public interest.

The “mores test”

11.90 Although it is generally true that people are curious as to their leaders, villains, victims and celebrities, the fact that a person is in the public eye, whether voluntarily or not, does not provide a *carte blanche* to expose all the intimate details of his private life before the whole world. The *Restatement* suggests that a “mores test” should be adopted to determine whether the matter publicised is a matter of legitimate public concern:

“There may be some intimate details of her life, such as sexual relations, which even the actress is entitled to keep to herself. In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern. The limitations, in other words, are those of common decency, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure.”⁸³

11.91 We agree that the fact that the publication is lurid or indecent, or is primarily designed to appeal to prurient interest or sensationalism, is a factor in determining whether it can be justified as a matter of public interest.

Matters of legitimate concern to the public

11.92 In determining whether public disclosure of private facts could be justified on the grounds of public interest, we should look to the nature of the subject matter as well as to the status of the individual in relation to whom the private facts are disclosed. The mere fact that the individual is a public figure is not conclusive. We need to go further and examine whether the publicised matter concerning that particular public figure is a matter of genuine public concern. We believe that the public interests in privacy and free speech can be harmonized by providing a defence to an action based on public disclosure of private facts where the matter publicised is of legitimate concern to the public. Requiring that the interest be a matter of “legitimate public concern” would avoid any ambiguity that would arise from using the term “public interest”. The right of privacy must give way when it is

⁸² *Restatement 2d, Torts, § 652D, Comment f.*

⁸³ *Restatement 2d, Torts, § 652D, Comment h.*

necessary to ensure the “uninhibited, robust, and wide-open” discussion of legitimate public issues.⁸⁴ This defence is not relevant to an action for invasion of privacy by intrusion into the privacy of the plaintiff’s life where no publication is involved. The rationales for the free speech principle which justify disclosure of private facts do not apply to intrusion which interferes with an individual’s private life.⁸⁵

Recommendation 18

We recommend that it should be a defence to an action for invasion of privacy based on public disclosure of private facts if the matter publicised was a matter of legitimate concern to the public.

11.93 In order to address the concern that a widely phrased defence of public interest would create uncertainty and would give insufficient guidance to the courts and the public,⁸⁶ we agree that the most important matters of public concern should be stated in the legislation. In forming our views on the legitimate public concerns which would justify an invasion of privacy based on public disclosure, we have made reference to the case law on disclosure in the public interest at common law.⁸⁷

11.94 In actions for breach of confidence, the defendants may argue that the disclosure in question is in the public interest by claiming that he has “just cause or excuse” for doing so.⁸⁸ In the opinion of Ungood-Thomas J, this defence does not extend beyond misdeeds that are clearly recognisable as being of a serious nature and importance to the country. He said that the defence of public interest covers “disclosure ... of matters carried out or contemplated, in breach of the country’s security, or in breach of law, including statutory duty, fraud, or otherwise destructive of the country or its people, including matters medically dangerous to the public and doubtless other misdeeds of similar gravity.”⁸⁹

Crime and fraud

11.95 In *Gartside v Outram*, the court held that there was no confidence as to the disclosure of “iniquity”.⁹⁰ Conduct which has been regarded as iniquitous has generally been limited to matters of crime and fraud.⁹¹ In *Khashoggi v Smith*,⁹² the Court of Appeal held that there could be no right of confidence where the information was to be used for the purposes of an investigation into the commission of an offence. Although the confidential information in that case concerned the private life of the plaintiff, “both matters are so closely interwoven ... [that] it becomes very

⁸⁴ 62A Am Jur 2d § 185.

⁸⁵ See Chapter 2.

⁸⁶ See the arguments against the creation of a general tort of privacy in Chapter 6.

⁸⁷ See generally, Y Cripps, *The Legal Implications of Disclosure in the Public Interest* (London: Sweet & Maxwell, 2nd, 1994), chapters 1 and 2.

⁸⁸ *Fraser v Evans* [1969] 1 QB 349; *Malone v MPC* [1979] 2 WLR 700 at 716 *per* Megarry VC.

⁸⁹ *Beloff v Pressdram Ltd* [1973] 1 All ER 241 at 260.

⁹⁰ (1856) 26 LJ Ch 113 at 114.

⁹¹ We note that the Law Reform Commission of Hong Kong has recommended that a substantive offence of fraud be created by statute.

⁹² (1980) 124 SJ 148.

difficult to see where the line can be drawn between investigations of that matter and investigation of other matters allegedly affecting her character and maybe her credibility, which are, to my mind, linked with the matters which the [newspaper] wish to investigate.”⁹³

Seriously improper conduct

11.96 Browne-Wilkinson VC in *Stephens v Avery* stated that the law of confidence and copyright would not protect “matters which have a grossly immoral tendency”.⁹⁴ Disclosure of immoral information may be protected under the *ex turpi causa non oritur actio* principle⁹⁵ or under the equitable maxim that “he who comes to equity must come with clean hands”.⁹⁶ In *Initial Services Ltd v Putterill*, the defendant handed to the *Daily Mail* documents about a price-fixing agreement and the plaintiffs’ allegedly misleading circular. The defendant claimed that the agreement should have been made available to the public by virtue of registration under the Restrictive Trade Practices Act 1956. Lord Denning MR stated:

*“I do not think that an employer can say to a servant: ‘I know we are issuing misleading circulars but you are to keep quiet about it, and if you disclose it, I shall sue you for damages.’ The servant may well be justified in replying: ‘I cannot stand such conduct. I will leave and let the public know about it, so as to protect them.’”*⁹⁷

In his judgment, the exception to an obligation of confidence extended to any misconduct which is of such a nature that it ought in the public interest to be disclosed to others. This should extend to “crimes, frauds and misdeeds, both those actually committed as well as those in contemplation”.⁹⁸

11.97 The Personal Data (Privacy) Ordinance exempts data relating to the prevention, preclusion or remedying of “seriously improper conduct” for the purposes of the use limitation principle.⁹⁹ “Seriously improper conduct” is defined in the Ordinance as including:¹⁰⁰

- (i) conduct whereby a person ceases or would cease to be a fit and proper person for any office, profession or occupation which is required by law to be held, engaged in or carried on by a fit and proper person; and
- (ii) conduct whereby a person has or could become a disqualified or suspended person under the Rules of Racing and Instructions by the Stewards of the Hong Kong Jockey Club.

11.98 We believe that defendants in privacy actions for publication of private facts should not be held liable if the facts reveal seriously improper conduct on the part of the individual to which the facts relate. Mark Berthold and Raymond

⁹³ (1980) 124 SJ 148, *per* Lord Roskill LJ.

⁹⁴ [1988] 2 WLR 1280 at 1284.

⁹⁵ I.e. out of a base [illegal or immoral] consideration, an action does [can] not arise. Eg *Attorney-General v Guardian Newspapers (No 2)* [1988] 3 WLR 776, at 818.

⁹⁶ *Hubbard v Vosper* [1972] 2 QB 84 at 101.

⁹⁷ [1968] 1 QB 396 at 406.

⁹⁸ [1968] 1 QB 396 at 405. Cited with approval by Megarry VC in *Malone v MPC* [1979] 2 WLR 700 at 716.

⁹⁹ Cap 486, section 58(1)(d) and (e).

¹⁰⁰ Cap 486, sections 2(9), (10) and (13).

Wacks suggest that the reference to “seriously improper conduct” in the Ordinance embraces a broad range of regulatory activity focusing on behaviour which is not unlawful as such, including “the enforcement of regulatory codes of conduct, disciplinary proceedings, and the regulation of other behaviour that may have escaped formal inclusion in codes or disciplinary rules but is nevertheless such that it is not tolerated by the community generally or the professional sector concerned”.¹⁰¹ We think that this statement serves as a good pointer to what constitutes “seriously improper conduct”.

“Public dishonesty” and serious malpractice

11.99 Although most individuals prefer to keep private their dishonest behaviour and wrongdoing, “the cohesiveness and durability of any social organization depends upon the ability of its members to evaluate each other accurately and to use their observations to exert, modify, or develop social controls.”¹⁰² Zimmerman therefore argues that a person who reveals the truth about another’s character helps to preserve the foundations of the society.¹⁰³ Some even go so far as to argue that privacy laws would only protect those who have something to hide. Richard Posner observes that many people seek privacy because they want to conceal discreditable information about themselves, thereby misleading those with whom they have dealings; and that even if the information is not discreditable, they may wish to keep it secret in order to exploit any misapprehensions which others may have about their them. He therefore contends that legal protection should not be accorded to discreditable information about an individual and personal information which, if revealed, would correct misapprehensions that the individual is trying to exploit. Restricting the disclosure of this information “is no better than that for permitting fraud in the sale of goods”.¹⁰⁴ He says:

“We think it wrong (and inefficient) that the law should permit a seller in hawking his wares to make false or incomplete representations as to their quality. But people ‘sell’ themselves as well as their goods. They profess high standards of behavior in order to induce others to engage in social or business dealings with them from which they derive an advantage but at the same time they conceal some of the facts that these acquaintances would find useful in forming an accurate picture of their character. ... [E]veryone should be allowed to protect himself from disadvantageous transactions by ferreting out concealed facts about individuals which are material to the representations (implicit or explicit) that those individuals make concerning their moral qualities.”¹⁰⁵

¹⁰¹ M Berthold & R Wacks, *Data Privacy Law in Hong Kong* (Hong Kong: FT Law & Tax Asia Pacific, 1997), 218.

¹⁰² D L Zimmerman, 327. Under Roman law, one of the two grounds for depriving an infamous individual of the rights and privileges enjoyed by citizens in good standing was *infamia facti*. *Infamia facti* occurred when the individual repeatedly engaged in legal but “morally reprehensible” activity. D L Zimmerman, 328, referring to J Goebel, *Felony and Misdemeanor: A Study in the History of Criminal Law* (1976), 70-71.

¹⁰³ D L Zimmerman, 329.

¹⁰⁴ R A Posner, “The Right of Privacy” (1978) 12 *Georgia Law Review* 393, 401. Nevertheless, Posner agrees that the law should generally restrain intrusion on private communications. The means by which a person obtains personal information about another requires different considerations: above, at 401-3. See also E J Bloustein, “Privacy Is Dear at Any Price: A Response to Professor Posner’s Economic Theory” (1978) 12 *Georgia Law Review* 429.

¹⁰⁵ R A Posner, 399-400.

11.100 We believe that those who hold the view that privacy law would protect the wrongful behaviour of scoundrels and fraudsters are misguided. Thomas Cooley, the person who coined the famous phrase “the right to be let alone”, wrote:

“The law has never conferred upon any one the right to be protected against the damaging effect of the truth concerning his character. If he has been enabled to put on a good outward appearance by covering himself with the mantle of hypocrisy, it is not illegal for public inquiry and contempt to tear this away. Dishonest man is not wronged when his good repute is destroyed by exposure.”¹⁰⁶

11.101 Some have argued that since politicians and senior officials possess powers which are denied to the mass populace, the public and the media should have the right to know and to monitor the actions of politicians and officials in order to prevent them from abusing their power to the prejudice of the public interest.¹⁰⁷ We agree that politicians and government officials should be subject to public scrutiny and accountable to the public. But this object ought to be achieved through the electoral process, the various representative bodies, and other monitoring bodies such as the Office of The Ombudsman and the Independent Commission Against Corruption. The task of the media is not to enforce law but to see that the law is enforced. Nevertheless, it is essential that the media should be free to publicise any dishonest or seriously improper conduct on the part of any public figures if a matter of public interest is at stake.

11.102 In our opinion, the law of privacy should not restrain the disclosure of “public dishonesty”, that is, dishonest behaviour which amounts to a fraud on the public. “Dishonesty” is a very wide word. It may cover lies told by a husband to his wife that he had worked overtime in the office but in fact had spent the whole evening with his mistress in a hotel. Another example is a lie told by a clerical officer to his employer that he is in good health when in fact he has heart disease. Although the employer might have a claim against the clerical officer in contract, the lie is not a matter of public concern. Only hypocrisies which have a public element in them should be allowed to be exposed in the public eye. If a person who is seeking or holding public office misleads the public by telling them a lie about his private life which is relevant to his public role, the press should be free to report the truth in the newspaper. Hence, if a candidate for political office stands for family values and advocates the sanctity of marriage, the press should not be held liable for disclosing the fact that he keeps a mistress. The protection of privacy should not be abused by an individual who is guilty of double standards by suggesting to the public that he is a pillar of virtue and rectitude when the truth reveals that he is a person of dubious character.

11.103 A good example can be found in Germany. A report in a magazine gave a detailed account of the adulterous affairs of a publisher of a local newspaper who was depicted as a man of low morals. The Federal Supreme Court held that the action against the magazine failed because the publisher had held himself out as a moralist by repeatedly publishing in his own newspaper articles blaming political opponents for their moral indecency. Lorenz summarizes the *ratio* of the case by saying that “he who starts public discussions of this kind must not be surprised if the press puts his own private life to a public test. In doing so the press even fulfils an

¹⁰⁶ T Cooley, at 32.

¹⁰⁷ *Oriental Daily News*, 2 September 1997.

important political function because it contributes to the proper formation of public opinion on a matter of public concern.”¹⁰⁸

11.104 In *Woodward v Hutchins*,¹⁰⁹ the court held that there was a public interest in the publication of articles about the private life of the singer Tom Jones. Lord Denning MR stated:

*“If a group of this kind seek publicity which is to their advantage, it seems to me that they cannot complain if a servant or employee of theirs afterwards discloses the truth about them. If the image which they fostered was not a true image, it is in the public interest that it should be corrected. ... As there should be ‘truth in advertising’, so there should be truth in publicity. The public should not be misled.”*¹¹⁰

11.105 It is tempting to treat the *Woodward* case as authority for the proposition that it is in the public interest to reveal the truth about celebrities by virtue only of the fact that they sought publicity for their own advantage. Wacks comments that:

*“While there may well be a public interest in the truth being told about a fraudulent or dishonest businessman, the same can hardly be said for the private proclivities of pop singers. Moreover, the extravagant or hyperbolic claims made in public relations literature (by no means restricted to entertainers) ought not to operate to destroy the claims of such public figures to maintain the confidentiality of those aspects of their lives upon which such publicity has little or no bearing.”*¹¹¹

11.106 We think that the proper approach is to draw a line between deceit and exaggerations in entertainers’ publicity statements.¹¹² Mere exaggerations in publicity should not justify public disclosure of private facts. As rightly pointed out by Megarry VC, the term “public interest” should not be used “in the sense of something which catches the interest of the public out of curiosity or amusement or astonishment, but in the sense of something which is of serious concern and benefit to the public.”¹¹³ Exaggerations in entertainers’ publicity statements are not matters of public concern.

11.107 We believe that “public dishonesty” and serious malpractice are matters of serious public concern, the exposure of which are of benefit to society. Publication of private facts which reveal such matters should be exempt from liability for invasion of privacy.

Conduct of officers in public bodies and public companies

11.108 Organisations which are accountable to the public because they perform a public function or they seek public funds or membership from the general public fall within the public interest category. In *British Steel Corporation v Granada*

¹⁰⁸ Lorenz, 109-110.

¹⁰⁹ [1977] 1 WLR 760. See also *Lennon v News Group Newspaper Ltd and Twist* [1978] FSR 573.

¹¹⁰ [1977] 1 WLR 760, at 763 and 764.

¹¹¹ R Wacks (1995), 99-100. See too R Wacks, “Pop Goes Privacy” (1978) 31 MLR 68, and paras 11.22 - 11.27 above.

¹¹² F Gurry, *Breach of Confidence* (Oxford: Clarendon Press, 1984), 339.

¹¹³ *British Steel Corporation v Granada Television Ltd* [1980] 3 WLR 780 at 790. See also Y Cripps, 105-107.

Television Ltd, the unauthorized disclosure revealed that the British Steel Corporation was losing huge sums of money. The Corporation was a public body and the conduct of its affairs was regulated by statute. Lord Wilberforce said:¹¹⁴

“The legitimate interest of the public in knowing about its affairs is given effect to through information which [there] is a statutory duty to publish and through reports to the Secretary of State who is responsible to Parliament. That some of the internal activities of B.S.C. at particular times are of interest to the public there can be no doubt.”

11.109 As regards the conduct of government affairs, Mason J stated:

*“It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize Government action. ... The court will not prevent the publication of information which merely throws light on the past workings of government, even if it be not public property, so long as it does not prejudice the community in other respects. Then disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs.”*¹¹⁵

11.110 In the context of individual privacy, we believe that private facts which relate to the ability of a person to discharge his public or professional duties and the fitness of a person for any public office or profession held or carried on by him are matters of legitimate public concern. “Public office” includes any office held by a Government official or a director or senior manager of a quasi-governmental body or a public company.

Matters dangerous to public health or safety

11.111 Sir Robert Megarry VC held that public interest was not confined to “misconduct or misdeeds”.¹¹⁶ He expressed the view that the law should protect the disclosure of “confidential information [which] relate[s] to some apprehension of an impending chemical or other disaster, arising without misconduct, of which the authorities are not aware, but which ought in the public interest to be disclosed to them.”¹¹⁷

11.112 Personal information obtained in the course of doctor and client relationship may be disclosed if this is justified in the public interest. In *Hubbard v Vosper*, the court held that medical quackery which may be dangerous if practised behind closed doors were matters that ought in the public interest to be disclosed to the public even though the defendant was subject to an obligation of confidence.¹¹⁸

11.113 We believe that matters dangerous to public health or safety should be brought to the attention of the public even though this would constitute an invasion of privacy. It is recognised that in rare circumstances a matter dangerous to public health or safety may not be a matter of public concern. Such would be the

¹¹⁴ [1980] 3 WLR 780 at 821.

¹¹⁵ *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 32 ALR 485 at 493.

¹¹⁶ *Malone v Metropolitan Police Commissioner* [1979] 2 WLR 700 at 716.

¹¹⁷ [1979] 2 WLR 700 at 716.

¹¹⁸ [1972] 2 QB 84 at 95 and 96.

case if but only if the danger has completely passed and cannot give rise to any risk of harm in the future.

Matters of legitimate concern “to the public”

11.114 It is important to choose an appropriate recipient if the disclosure were to be protected by the public interest defence. In certain circumstances, the public interest is “best served by an informer giving the confidential information not to the press but to the police or some other responsible body”.¹¹⁹

11.115 In *Francome v Mirror Group Newspaper Ltd*, the court refused to lift an injunction which prohibited the defendant from revealing in a national newspaper that the plaintiff had breached the Jockey Club rules. It held that “it is impossible to see what public interest would be served by publishing the contents of the tapes which would not equally be served by giving them to the police or the Jockey Club.”¹²⁰ Likewise, Scott J in another case held that an employee’s “undoubted obligation of confidence does not extend so as to bar the disclosures to [the Financial Investment and Management Brokers’ Regulatory Authority] and the Inland Revenue of matters that it is the province of those authorities to investigate”.¹²¹ In *W v Egdell*,¹²² the disclosure by a psychiatrist to the medical director of the hospital in which the patient was being treated was both in the public interest and in accordance with the professional code of conduct. Although the court held that the disclosure was protected by a public interest defence, it warned that he could not lawfully sell the contents of his report to a newspaper nor could he discuss the matter in a learned article unless he took appropriate steps to conceal the identity of the patient.¹²³

11.116 Different considerations would apply if the police or other appropriate body is an interested party. In *Lion Laboratories Ltd v Evans*, one of the documents passed to the *Daily Express* revealed that the head of the plaintiff company’s calibration department expressed doubt whether the devices used by the police to measure the level of intoxication of motorists complied with the Home Office requirements. Griffiths LJ said that it was not an answer to say that the *Daily Express* should have had gone to the Home Office in the first instance rather than publish. “The Home Office is an interested and committed party.”¹²⁴

Recommendation 19

Without limiting the generality of Recommendation 18 above, we recommend that information or facts which relate to any of the following matters should be deemed to be a matter of legitimate concern to the public for the purposes of the statutory tort of invasion of privacy based on public disclosure of private facts:

a) the prevention, detection or investigation of crime;

¹¹⁹ *Lion Laboratories v Evans* [1985] QB 526 per Stephenson LJ.

¹²⁰ [1984] 1 WLR 892, per Sir John Donaldson MR.

¹²¹ *Re a Company’s Application* [1989] 3 WLR 265. See Eva Lomnicka, “The Employee Whistleblower and his Duty of Confidentiality”, (1990) 106 LQR 42.

¹²² [1990] 2 WLR 471.

¹²³ [1990] 2 WLR 471, at 488. See also *Attorney-General v Guardian Newspapers Ltd (No 2)* [1988] 3 WLR 776, 794.

¹²⁴ [1984] 3 WLR 539 at 561. The same observation could apply to disclosure to the police.

- b) the prevention or preclusion of unlawful or seriously improper conduct, public dishonesty or serious malpractice;
- c) the ability of a person to discharge his public or professional duties;
- d) the fitness of a person for any public office or profession held or carried on by him, or which he seeks to hold or carry on;
- e) the protection of public health or safety; and
- f) the protection of national security and security in respect of the Hong Kong Special Administrative Region.

11.117 The *Sunday Times* warned that privacy legislation would “enable well-heeled crooks to continue with their activities unimpeded” and “enable other scoundrels to have even greater protection from rightful exposure”.¹²⁵ They stated that any wide-ranging law of privacy would be “a meal ticket for every overpaid lawyer” and “there is little guarantee that politicians would not seek to use it to protect their own kind”. We tested their concerns against our proposals stated in the above paragraph. We are satisfied that the proposals would neither impinge on the legitimate functions of the press nor infringe the public’s right to know matters of genuine public concern. By allowing the publication of legitimate public concerns, “well-heeled crooks”, scoundrels, politicians and other public figures would not be able to escape from public scrutiny by relying on the disclosure tort. Contrary to the misguided and unfounded suggestions that any privacy legislation would undermine the freedom of the press and the public’s right to know, our proposals would safeguard and give due recognition to such rights and freedoms by providing for a public interest defence to the disclosure tort.

Relevance of legality of acquisition to liability for disclosure

11.118 We consider that in assessing the public interest in the public disclosure of private facts, the courts should not take into account the manner in which the private facts were acquired. Whether the means employed to collect private facts is lawful or not is a separate issue and should not be a factor in considering whether the defendant has a public interest defence to publication of facts collected by such means. In *Liberty Lobby Inc v Pearson*,¹²⁶ the plaintiff sought an injunction to prevent the defendant from publishing information which had been obtained in breach of trust. The American court held:

“The mere fact that a newspaper man obtained information in a clandestine fashion or in a surreptitious manner or because someone unguardedly and unwittingly reveals confidential information, or even

¹²⁵ *Sunday Times*, 3 August 1997.

¹²⁶ 261 F. Supp 726 (1966). See also Hill, “Defamation and Privacy under the First Amendment” 1279-80.

*through a breach of trust on the part of a trusted employee, does not give rise to an action for an injunction. The courts may not review the manner in which a newspaper man obtains his information and may not restrain the publication of news merely because the person responsible for the publication obtained it in a manner that may perhaps be illegal or immoral. It would be a far-reaching limitation on the freedom of the press if courts were endowed with power to review the manner in which the press obtains its information and could restrain the publication of news that is obtained in a way that the Court does not approve. If such were the law, we would not have a free press; we would have a controlled press.*¹²⁷

Relevance of public interest disclosure to liability for intrusion

11.119 It has been suggested that any law of privacy should include the defence that the act of intrusion was committed in the course of investigations made with publication in the public interest in view. While the defence of legitimate public concern may be relevant in determining liability for the disclosure tort, the act of intrusion, as opposed to disclosure, involves different considerations. The media in the United States is protected by the First Amendment such that it may rely on the defence of newsworthiness in an action for public disclosure. But it would nevertheless be held liable for the intrusion tort if the facts disclosed have been obtained by privacy-invasive means.

11.120 In our opinion, the fact that the disclosure would be justified on one of the prescribed grounds should not preclude the court from holding the defendant liable for intrusion if he has used privacy-invasive means to collect the private facts. None of the justifications for freedom of speech discussed in Chapter 2 can be used to justify intrusions upon privacy.¹²⁸ Just as an ordinary citizen cannot search a person or break into a house in order to obtain information the publication of which may be justified in the public interest, so no journalist should be allowed to intrude upon another's solitude or seclusion merely because the publication of the information to be obtained by the intrusion could be justified in the public interest. The publication of information, and the means of obtaining the information, should always be kept separate and distinct. The means of acquiring personal information and the publication of the information acquired by such means are separate issues which should not be conflated.¹²⁹ We conclude that in determining liability for invasion of privacy by intrusion, the courts should not take into account whether the disclosure of any information obtained by means of the intrusion in question can be justified on one of the grounds prescribed in the legislation.

¹²⁷ Above. In the context of official secrets, see also *New York Times Co. v United States*, 403 US 713 (1971).

¹²⁸ See R Wacks (1995), chapter 5.

¹²⁹ This is also the approach adopted in the Personal Data (Privacy) Ordinance. The exemptions available to the media under the Ordinance relate only to the use and disclosure of personal data and the right of access to personal data. The media are not exempt from the "collection limitation principle" under Data Protection Principle 1. A reporter who adopts unlawful or unfair means to collect personal data cannot argue that the publication of the data is in the public interest.

Relevant considerations which ought to be taken into account by the courts

11.121 The courts are experienced in taking all the circumstances of the case into account in coming to a decision. A question arises as to whether statutory guidelines should be laid down to assist the courts in determining whether there has been an invasion of privacy. We consider that this would assist the litigants to assess their chances of success because they would then be able to apply the statutory criteria to the facts of the case. A useful example which covers some of the considerations which we think important is section 6(2) of the Saskatchewan Privacy Act. It provides that-

“in determining whether any act, conduct or publication constitutes a violation of the privacy of a person, regard shall be given to:

- (a) the nature, incidence and occasion of the act, conduct or publication;*
- (b) the effect of the act, conduct or publication on the health and welfare, or the social, business or financial position, of the person or his family or relatives;*
- (c) any relationship whether domestic or otherwise between the parties to the action; and*
- (d) the conduct of the person and of the defendant both before and after the act, conduct or publication, including any apology or offer of amends made by the defendant.”*

Civil remedies attached to criminal offences

11.122 The Younger Report acknowledged that the protection afforded by the creation of a criminal offence of surreptitious surveillance by means of a technical device would not suffice. It noted that in the case of overt surveillance, the victim is in a position to do something about it. In order to enable the victim to have it stopped and, where damage is suffered, to be compensated, the Report recommended the establishment of a cause of action at civil law.¹³⁰ The new tort would have the following elements:

- the use of a technical device;
- a person who is, or his possessions which are, the object of surveillance;
- a set of circumstances in which, were it not for the use of the device, that person would be justified in believing that he had protected himself or his possessions from surveillance whether by overhearing or observation;
- an intention by the user to render those circumstances ineffective as protection against overhearing or observation; and
- absence of consent by the victim.

11.123 The above elements are the same as those contained in the criminal offence of surreptitious surveillance recommended by the Younger Committee,

¹³⁰ Younger Report, para 565.

except that the act need not be surreptitious. Since the act of surveillance may be surreptitious, the civil remedies under this tort would be available as well as criminal prosecution for that offence.¹³¹

11.124 The creation of civil liability in respect of the conduct to which we recommend that criminal sanctions should attach¹³² might be adopted as an alternative to the creation of specific torts of invasion of privacy.¹³³ This option is not preferred because the proposed criminal offences only cover the more serious cases of invasions of privacy and attaching civil remedies to such offences without additional measures would leave gaps in the protection of individual privacy under the civil law. On the contrary, if our proposals on the tort of invasion of privacy by intrusion or public disclosure of private facts are adopted, it would subsume the more serious invasions proscribed by the criminal offences. On the basis of the aforementioned, we consider that it is also unnecessary to give an aggrieved individual a right to seek civil remedies in respect of the publication of material obtained by committing any of the offences to be proposed in the Commission report on Criminal Sanctions for Unlawful Surveillance.

¹³¹ The Calcutt Report also recommended at para 6.38 that “anyone having a sufficient interest” should be able to apply for relief in respect of the publication of material obtained by committing any of the proposed criminal offences in relation to physical intrusion.

¹³² See our recommendations in HKLRC Privacy Sub-committee, *Privacy: Regulating Surveillance and the Interception of Communications* (1996), ch 1.

¹³³ The power of the courts to grant relief to “aggrieved persons” in criminal proceedings is restricted to the award of compensation for personal injury or loss of or damage to property: Criminal Procedure Ordinance (Cap 221), section 73; Magistrates Ordinance (Cap 227), section 98.

Chapter 12 - Enforcing the right to privacy

Proof of damage

12.1 Remedies for invasion of privacy may include damages, injunction, an account of profits, and delivery up of articles or documents obtained in consequence of the invasion. Damages payable to the plaintiff for loss or damage he suffers by reason of an invasion of privacy may include pecuniary loss. However, such loss might be negligible in intrusion cases. The problem to be addressed is whether it is necessary for the plaintiff to prove that he has suffered actual damage comparable with personal injury or loss of or damage to property before he has the right to bring an action for invasion of privacy.

12.2 The tort of violation of privacy under the Canadian statutes is actionable without proof of damage. The JUSTICE Report said that actual damage should be assumed because it would be difficult in many cases of infringement of privacy for the plaintiff to show actual loss.¹ The Irish Law Reform Commission recommends that the plaintiff need not show that he suffered any damage. It comments that it is the affront to human dignity, not the damage which may result from the invasion of privacy, which is the essence of the wrong for which the victim should be compensated.²

Recommendation 20

We recommend that both the tort of invasion of privacy by intrusion upon another's seclusion or solitude and the tort of invasion of privacy based on public disclosure of private facts should be actionable *per se* without any proof of damage.

Damages

Compensatory damages

12.3 The primary aim of compensatory damages is to put the plaintiff into as good a position as if no tort had been committed. Since the gravamen of the cause of action for invasion of privacy is civil wrongs of a personal character which result in injury to the plaintiff's feelings, the mental and emotional suffering are proper elements of damages in privacy actions.³ Damages in an action for invasion of privacy should therefore include compensation for the mental distress, embarrassment and humiliation suffered by the plaintiff. The defendant's conduct

¹ JUSTICE, para 144.

² Para 9.32.

³ 62A Am Jur 2d, Privacy, §§ 252 and 253. Damage suffered by a data subject by reason of a breach of a Data Protection Principle under the Personal Data (Privacy) Ordinance may include injury to feelings: Cap 486, section 66(2).

after the infringement may be relevant because damages may be mitigated if the defendant has published a timely retraction or apology. Where the plaintiff suffers no material injury, he would be awarded nominal damages only.

Aggravated damages

12.4 Where the defendant acted with intent to injure or annoy the plaintiff and with full knowledge of the extent and severity of the plaintiff's injuries, the award of damages over and above compensatory damages would be justified. At present, aggravated damages may be awarded as extra compensation to the plaintiff when the motives and conduct of the defendant aggravated the injury to the plaintiff.

Exemplary damages

12.5 The purpose of exemplary or punitive damages is to punish the defendant for his wrongful conduct. They are useful in "vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal."⁴ Exemplary damages have been awarded where the defendant's conduct had been calculated to make a profit for himself which may exceed the compensation payable to the plaintiff.⁵ Where the defendant has published private facts in the newspaper with a view to increasing its circulation and profit by an amount which would exceed usual compensatory damages, he might be required by the court to pay exemplary damages to the plaintiff.

12.6 Andrew Burrows points out that there are other satisfactory means of serving the object of exemplary damages. He said that:

*"irrespective of whether criminal punishment is felt justified, the civil law ... can justifiably go beyond compensation by awarding restitutionary remedies stripping the defendant of his profits. Compensation alone does not and need not underpin tortious ... monetary remedies; restitution, occupying a mid-position between compensation and punishment, is an acceptable remedial function for a civil wrong."*⁶

12.7 However, Lord Diplock stressed that exemplary damages under this category are not merely concerned with reversing the defendant's unjust enrichment:

"to restrict the damages recoverable to the gain made by the defendant if it exceeded the loss caused to the plaintiff, would leave a defendant contemplating an unlawful act with the certainty that he had nothing to lose to balance against the chance that the plaintiff might never sue him, or if he did, might fail in the hazards of litigation. It is only if there is a prospect that the damages may exceed the

⁴ *Rookes v Barnard* [1964] 1129, at 1226.

⁵ *Cassell v Broome* [1972] AC 1027. According to Lord Hailsham, what is required is "(i) knowledge that what is proposed to be done is against the law or a reckless disregard whether what is proposed to be done is illegal or legal and (ii) a decision to carry on doing it because the prospects of material advantage outweigh the prospects of material loss." Above, at 1079.

⁶ A Burrows, *Remedies for Torts and Breach of Contract* (London: Butterworths, 2nd edn, 1994), 284.

*defendant's gain that the social purpose of this category is achieved - to teach a wrongdoer that tort does not pay.*⁷

12.8 Nonetheless, many commentators have queried whether the award of exemplary damages can be justified. Some of the arguments against the award of exemplary damages are as follows:

- a) Punishment is an extreme sanction justifiable only if a law designated as criminal has been broken.
- b) It is undesirable that punishment is imposed on the defendant without the procedural and evidential safeguards of a criminal trial.
- c) It is undesirable that the plaintiff should profit by the punishment of the defendant. The sum of money representing exemplary damages should go to public funds and not to the plaintiff.

12.9 Although both the UK Consultation Paper and the Australian Law Reform Commission recommended that damages should not include any amount as punitive or exemplary damages,⁸ we understand that the English Law Commission is now studying the subject of aggravated, exemplary and restitutionary damages.⁹ Any reform in this area can only be the subject of a separate exercise. We prefer to leave the courts to decide whether aggravated or exemplary damages should be awarded in a particular case. In other words, the existing rules on aggravated and exemplary damages should apply to the specific torts of invasion of privacy.

Injunction

12.10 The injunction to restrain publication is valuable where there is a threat to publish information obtained by an invasion of privacy by intrusion upon solitude or seclusion. It should also be available where the publication itself is actionable as an invasion of privacy, whether the information has come into the hands of the defendant by lawful or unlawful means. The harm which the plaintiff is likely to suffer in such situations would not be adequately compensated by damages if an injunction were not granted. A plaintiff is usually more concerned with the prevention or cessation of intrusion or publication rather than with the amount of damages he is likely to receive from the defendant after the invasion. Once the details of the private life of an individual are made public, the damage is done and no amount of damages may compensate him. It would therefore be unjust to the plaintiffs if the remedy of injunction is denied to them.

12.11 The courts in England and Australia have expressed different views on whether the court has jurisdiction to restrain the publication of information obtained as a result of trespass. Whereas the English court in *Kaye v Robertson*¹⁰ held that the plaintiff would not be able to obtain an injunction to prevent the publication of the pictures obtained during the course of trespass, an Australian court held that it has power under its equitable jurisdiction to grant an injunction to prevent publication of a videotape or photograph taken by a trespasser even though no confidentiality is involved, provided that the circumstances are such as to make

⁷ *Cassell v Broome*, at 1130.

⁸ UK Consultation Paper, para 6.12; Law Reform Commission of Australia (1979), para 263.

⁹ See Law Commission, *Aggravated, Exemplary and Restitutionary Damages: a Consultation Paper* (London: HMSO, 1993).

¹⁰ [1991] FSR 62.

the publication unconscionable.¹¹ In *New York Times Co v United States*,¹² the United States Supreme Court acknowledged that it had power to restrain the defendants from publishing the Pentagon Papers obtained as a result of trespass, but refused to do so only because the Government had failed to show that such a restraint on the freedom of expression was warranted.

12.12 Where the data subject complains to the Privacy Commissioner that a data user is contravening a data protection principle, the Privacy Commissioner may serve an enforcement notice on the data user directing him to “take such steps as are specified in the notice to remedy the contravention”. The Commissioner may serve such a notice notwithstanding that his investigation has not been completed. Apparently the legislature intended to provide relief in the nature of an interlocutory injunction. However, the data user is not obliged to take the required steps within 7 days of the date on which the notice was served even if it is an urgent case.¹³ Thus the contravention may last for at least another 7 days even if the complainant is able to convince the Commissioner that a person has installed a video-camera outside his property observing his activities therein, or a person has put sensitive and intimate information about him on the Internet without his consent. This is unsatisfactory. The data subject of an invasion of privacy should be entitled to have the contravention stopped as soon as it is established that there is a *prima facie* case of contravention.

12.13 The Privacy Commissioner is also powerless in cases where there is merely a threat of a contravention of a data protection principle. Under section 50 of the Personal Data (Privacy) Ordinance, the Commissioner has power to serve an enforcement notice only if he is satisfied that the data user-

- “(a) is contravening a requirement under [the] Ordinance; or
- (b) has contravened such a requirement in circumstances that make it likely that the contravention will continue or be repeated”.¹⁴

There is therefore no equivalent of the *quia timet* injunction in the Ordinance to restrain a data user from committing an *apprehended* breach of a data protection principle.¹⁵ *Quia timet* injunction is important in the context of privacy protection. Although injunction is useful if the breach has not terminated, the plaintiff would want to enjoin the defendant from committing the breach in the first place. This preventive remedy is not available in the Ordinance. If a data subject has disclosed personal data to the data user for a certain purpose but the latter has threatened to use the data for an unrelated purpose, the Privacy Commissioner cannot issue an enforcement notice unless and until the personal data has actually been used for an unauthorized purpose.

12.14 We believe that a plaintiff should be able to apply to court for injunctive relief if the defendant has infringed or threatened to infringe his right of

¹¹ *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457, at 463.

¹² (1971) 403 US 713. Cf. *Commonwealth v Wiseman* (1969) 249 NE 2d 610.

¹³ Cap 486, section 50(1) & (5). This remedy is available to the Commissioner notwithstanding that his investigation has not been completed: section 50(8).

¹⁴ A contravention of a Data Protection Principle is deemed to be a contravention of a requirement of the Ordinance: section 2(4).

¹⁵ A *quia timet* action is an action for an injunction to prevent an apprehended wrong, though none has yet been committed by the defendant at present. The plaintiff must show that it is highly probable that the apprehended wrong will be committed, and that the wrong will be committed imminently. An injunction to prevent a recurrence of wrongful acts by the defendant is not *quia timet*.

privacy. It would be unjust to the plaintiff if nothing can be done until the breach has actually occurred.

Published apology

12.15 An apology is particularly relevant if inaccurate publication or publicity placing the plaintiff in a false light forms part of the definition of invasion of privacy. In other cases, it would offer the plaintiff an opportunity to vindicate his claim that the invasion is wrongful. However, the UK Consultation Paper warned that:

“unless the form or terms of an apology were very strictly laid down, there would be a risk that in publishing it the private matters at issue would simply be exposed to public scrutiny again. Many plaintiffs would not want this. It must also be borne in mind that such a remedy might be counter-productive to the plaintiff where the private matter had not originally been made public, or had been disseminated by other means than publication.”¹⁶

12.16 We agree that the courts should have power to order the publication of an apology which is of equal prominence to the wrongful disclosure.

Account of profits

12.17 An account of profits seeks to recover the profit which the defendant has obtained by his wrongdoing. It is an equitable remedy by which the defendant is required to draw up an account of, and then to pay the amount of, the net profits he has acquired by the wrongful conduct.¹⁷ An account of profits is available for breach of confidence and torts involving infringement of intellectual property rights. The purpose of ordering an account of profits is not to inflict punishment on the defendant but to prevent an unjust enrichment of the defendant by compelling him to surrender those parts of the profits made from his wrongdoing.

12.18 Damages and an account of profits are mutually exclusive. The English Law Commission explains:

“Where both remedies are available, they are always alternative, since if both were granted the plaintiff would receive a double benefit for the same wrong; but as one remedy may be more beneficial to the plaintiff than the other, it is at the plaintiff’s option (subject to the discretion of the court in granting the equitable remedy of an account) which remedy he will take.”¹⁸

12.19 A commentator observes that the privacy laws in France have not stopped magazines publishing photographs taken by paparazzi. Substantial damages and apologies are not sufficient to deter them because the damages required to compensate the victim do not match the profit generated by the photographs. Publishers are therefore willing to risk liability and budgets for the

¹⁶ Para 6.17.

¹⁷ A Burrows, 299.

¹⁸ Law Commission, *Breach of Confidence* (London: HMSO, Cmnd 8388, 1981), para 4.86. Burrows does not agree that combining restitution and compensation for a tort is inconsistent or constitutes double recovery. He points out that one is concerned with the defendant’s gain but the other is with the plaintiff’s loss. See A Burrows, 305. Cf *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 at 32.

damages they have to pay when public figures sue.¹⁹ To deter such conduct and to prevent the wrongdoers from benefiting from their own wrong, we think that the court should have a power to make an order for an account of profits.

Delivery up²⁰

12.20 Delivery up is an equitable remedy. In actions concerning breach of confidence, the order normally requires the defendant to deliver the goods or material containing confidential information to the plaintiff. Where there has been an infringement of intellectual property rights, the court may order the defendant to deliver up to the plaintiff or the court for destruction, or himself to destroy on oath, any infringing articles. The latter remedy may be granted even though the plaintiff does not own the articles ordered to be destroyed. Another example is libel, where the court may grant an order requiring the defendant to destroy or erase the libellous material. Russell J explained the function of the remedy:

“[The plaintiff] is protected as to further manufacture of infringing articles by the injunction which he obtains, but there remains this, that so long as there is still what I might call infringing stock in the possession of the infringer, he may be subject to too serious and grave a temptation and may therefore be tempted to commit a breach of the injunction which he would otherwise not commit. Accordingly, in order to assist the plaintiff and as a relief ancillary to the injunction he has obtained, the Court may in its discretion make an order for destruction or delivery up of infringing articles.”²¹

12.21 The remedy is useful where the material contains information about the plaintiff which were obtained by the defendant in consequence of an invasion of privacy but in respect of which the remedies under the law of copyright or breach of confidence are not available.²² The order may, in such cases, direct the defendant to deliver for destruction any records of, or articles embodying, information about the plaintiff which is seriously offensive and objectionable to a reasonable person. The court should not order full destruction of the material if the rights of the plaintiff can be effectively protected by removing the information from the material.

Recommendations

Recommendation 21

¹⁹ “Why Paparazzi are Beyond the Law”, *The Times*, 3 September 1997.

²⁰ The Criminal Procedure Ordinance contains provisions for the disposal of property connected with the commission of offence. Depending on the type of property concerned, the courts have power to order the delivery up, sale, retention or destruction of property. Property which were obtained in consequence of a tort are not governed by such provisions.

²¹ *Mergenthaler Linotype Co v Intertype Co Ltd* (1926) 43 RPC 381 at 382.

²² Prescott argues that if the defendant in *Kaye v Robertson* [1991] 1 FSR 62 were liable for trespass to land, it was open to the court to make an order for delivery up for destruction of the offending negatives and copies, and an injunction restraining them from publishing or parting with possession of the same. See P Prescott, “Kaye v Robertson - A reply” (1991) 54 MLR 451.

We recommend that in an action for invasion of privacy, the court may:

- a) award damages;**
- b) grant an injunction if it shall appear just and convenient;**
- c) order the defendant to account to the plaintiff for any profits which he has made by reason or in consequence of the invasion;**
- d) order the defendant to destroy or deliver up to the plaintiff all articles or documents containing information about the plaintiff which have come into the possession of the defendant by reason or in consequence of the invasion; or**
- e) order the defendant to publish an apology which is of equal prominence to the original publication on which the action is based.**

Recommendation 22

We recommend that damages in an action for invasion of privacy should include compensation for the mental distress, embarrassment and humiliation suffered by the plaintiff.

Recommendation 23

We recommend that in awarding damages the court should have regard to all the circumstances of the case, including:

- a) the effect of the invasion on the health, welfare, social, business or financial position of the plaintiff or his family;**
- b) any distress, annoyance or embarrassment suffered by the plaintiff or his family;**
- c) the conduct of the plaintiff and the defendant both before and after the invasion, including the adequacy, publicity for and manner of any apology or offer of amends made by the defendant.**

Form of trial

Jury trial

12.22 The general rule is that all civil actions are heard before a judge without a jury. The only exceptions are actions for defamation, malicious prosecution and false imprisonment. JUSTICE thought that questions such as whether the infringement was “substantial and unreasonable” or whether one of the defences applies could best be determined by a jury. They recommended that, where a case comes to trial in the High Court, either party should have the right to ask for trial by jury.²³ Winfield also held the view that the question of offensiveness ought to be one for the jury, subject to the judge’s power to decide whether there is or is not sufficient evidence of offensiveness for a jury to decide as a matter of fact.²⁴

12.23 The UK Consultation Paper noted that although actions for defamation carry the right to opt for jury trial, the parties in actions for breach of confidence do not have such a right. It argued that jury trial should not be available in privacy actions on the following grounds:

- a) There has been some concern as to whether juries are able to handle trials involving difficult issues.
- b) The arguing of defences may involve detailed legal issues, especially in early cases, which may be best suited to trial by judge alone.
- c) The use of a jury usually increases the costs of a case, chiefly because more time is needed.
- d) It is not easy to achieve consistency between awards where they are made by juries.²⁵

12.24 We agree with the views expressed in the UK Consultation Paper and do not recommend that actions for invasion of privacy should be heard before a jury.

Hearings in camera

12.25 The JUSTICE Report recommended that the court should be given power, in its discretion, to hear actions for infringement of privacy otherwise than in open court:

“An infringement may be complete before there is any publication, and publicity is the very harm which the plaintiff may most be concerned to avoid. The certainty of a public trial could therefore easily make an action for infringement of privacy an empty remedy in many cases. The situation appears to us to be closely analogous to that of trade secrets, where a public trial could destroy the very substance of the action, and the courts therefore have power, frequently exercised, to sit in private.”²⁶

12.26 We think that it is unnecessary to provide for the hearing of a privacy action in camera because the plaintiff would be deemed to have waived his right of

²³ JUSTICE, para 147.

²⁴ P H Winfield, “Privacy” (1931) 47 LQR 23, at 41.

²⁵ Para 6.23.

²⁶ JUSTICE, para 147. Section 120 of China’s Civil Procedure Law provides that civil cases involving individual privacy may be conducted in private.

privacy in the subject matter if he prefers to seek relief by bringing legal proceedings in court.²⁷

Limitation period

12.27 An action founded on tort cannot be brought after the expiration of 6 years from the date on which the cause of action accrued.²⁸ The JUSTICE Report suggested that the following principles should be applied in determining what limitation period would be appropriate for the statutory tort of infringement of privacy:

- “(a) *Since many invasions of privacy are carried out in secret and may remain undetected for long periods, it would be wrong for a plaintiff to lose his remedy by reason of the mere passage of time, unless he was himself at fault in failing to make the discovery;*
- (b) *on the other hand, once the facts are known, we can see no reason why a plaintiff should not proceed promptly if the infringement was serious enough to merit a lawsuit;*
- (c) *lastly, since there must be finality in all litigation, we consider that there should be an absolute period after the expiry of which no action should be brought.”*

12.28 The JUSTICE Report accordingly recommended that “there should be a limitation period of three years, starting with the time when the plaintiff first became aware, or by the exercise of reasonable diligence could have become aware, of the infringement but that in any case no action should be brought more than six years after the cause of action accrued to the plaintiff.”²⁹ This recommendation was adopted in Brian Walden’s and William Cash’s Bills. John Browne’s Bill was similar except that it did not bar the taking of an action more than six years after the cause of action accrued to the plaintiff.³⁰ The UK Consultation Paper agreed that special provision should be made for actions to be brought out of time where the plaintiff was not initially aware of the infringement.

“The main harm suffered by the plaintiff in a privacy action is injury to his feelings. A person whose privacy had been invaded should take prompt action to secure redress for injury to their feelings. The standard period of 6 years for tort actions is therefore too long. On the contrary, a period of one or two years is too short because the full implications of the defendant’s conduct may not be apparent until sometime after the invasion. We believe that a limitation period of three years is appropriate.”

²⁷ But note that Article 14(1) of the ICCPR provides that the press and the public may be excluded from all or part of a trial “when the interest of the private lives of the parties so requires”.

²⁸ Limitation Ordinance (Cap 347), section 4(1).

²⁹ Para 148. The American courts apply the “rule of discovery” in actions for invasion of privacy under which the limitation period does not commence to run until the time when the act constituting the invasion of privacy was discovered, or, by the use of reasonable diligence, could have been discovered.

³⁰ Cl 5.

Recommendation 24

We recommend that no action for invasion of privacy should be brought after expiration of 3 years from the time of the occurrence of the act, conduct or publication constituting an invasion of privacy, subject to the normal rules applicable to plaintiffs who are under disability.

Parties to actions for invasion of privacy

12.29 The Law Amendment and Reform (Consolidation) Ordinance (Cap 23) in Hong Kong lays down the general rule that on the death of any person, “all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate”.³¹ There is, however, no survival of causes of action for defamation.³²

12.30 In Canada, all the privacy statutes but the Manitoba Privacy Act provide that the cause of action is extinguished by the death of the person whose privacy is alleged to have been violated.³³ The Paris Court of Appeal once held that information relating to a person’s ascendants, spouse or descendants would always be a part of his private life. This approach has been rejected by a later decision in which the Court of Appeal held that the right to forbid any form of disclosure of his private life belongs only to living persons and “the descendants of a deceased person are only entitled to defend his or her memory against an attack which contains falsehoods or errors or is published in bad faith.”³⁴

12.31 We consider that a privacy action should be available only to individuals and not legal persons. Since the right of privacy is a personal one, the plaintiff must show that his right of privacy has been infringed before he can seek recovery. In other words, a privacy action should be maintained only at the suit of the person whose privacy has been invaded. Since the mischief is the mental harm and injured feelings suffered by an individual, only living individuals should be allowed to seek relief. Where the subject of invasion is a deceased person, his personal representative should not be allowed to bring an action unless the privacy of the personal representative has also been invaded by the defendant’s act or conduct. An example is that of the publication of a family photograph of a person who has been killed in an accident. The personal representative of the deceased person should not be allowed to take an action against the newspaper unless the publication of the photograph infringes his right of privacy.

³¹ Cap 23, section 20(1).

³² Proviso to Cap 23, section 20(1). Salmond argues that defamation may cause much more harm to the next-of-kin than an assault, and it is hard to see why the death of the defamer should deprive the plaintiff of his damages: R F V Heuston & R A Buckley, *Salmond & Heuston on the Law of Torts* (Sweet & Maxwell, 19th edn, 1987), p 495.

³³ British Columbia, section 5; Newfoundland, section 11; Saskatchewan, section 10.

³⁴ See R Redmond-Cooper, “The Press and the Law of Privacy” (1985) 34 ICLQ 769, at 774-776. Redmond-Cooper expressed the view at p 776 that this approach was justified as being “necessary for the sake of freedom of information and expression and for the historian and critic, who should only be held liable if they fail to tell the truth.”

Recommendation 25

We recommend that actions for invasion of privacy should be limited to living individuals and that the person to whom any right of action should accrue is the individual whose right of privacy is threatened or has been infringed.

Recommendation 26

We recommend that on the death of the plaintiff or defendant in an action for invasion of privacy, the cause of action should survive for the benefit of the plaintiff's estate, or, as the case may be, against the defendant's estate.

Admissibility of evidence obtained through invasion of privacy

12.32 There are two conflicting views as to the admissibility of evidence obtained by an invasion of privacy. On the one hand, excluding unlawfully obtained evidence would discourage and deter the use of intrusive means to obtain personal information. It would also compel those who are responsible to respect the privacy of others. On the other hand, excluding such evidence would preclude the court from gaining access to relevant and otherwise admissible evidence. This would result in the parties not having a fair trial. On this view, all evidence which is necessary to establish liability should be admitted but those responsible for actionable invasions of privacy may be sued in another civil action. The law reflects the second view: "It matters not how you get it; even if you steal it, it would be admissible evidence."³⁵ The courts in civil proceedings have no discretion to exclude relevant and admissible evidence on the ground that it may have been obtained unlawfully.

12.33 Of the four privacy statutes in Canada, only the Manitoba Act provides that evidence obtained through a violation of privacy in respect of which an action may be brought is inadmissible in any civil proceedings.³⁶ The JUSTICE Bill and Brian Walden's Bill contained a clause banning in civil proceedings "evidence obtained by virtue or in consequence of the actionable infringement of any right of privacy" by one of the means of surveillance defined in the Bill. The JUSTICE Report said:

³⁵ *R v Leatham* (1861) 8 Cox CC 498 at 501; cited in *Kuruma v R* [1955] AC 197. The court in *R v Senat* (1968) 52 Cr App R 282 noted that "certainly in the Divorce Court, evidence is admitted daily which results from what many people would say is really outrageous conduct, in the sense of being an invasion of privacy or ungentlemanly conduct, prying through keyholes, climbing up and looking through windows, fixing speaking apparatus, recordings and so on, that is a daily incidence of the Divorce Court, ..." Above, at 286-7.

³⁶ Section 7.

“The principal considerations are, on the one hand, the court’s concern to establish the truth and, on the other, the incentive which the admissibility of such evidence provides for professional and amateur spies. In the field of criminal law, we have hesitantly come to the conclusion that the needs of the community for its own safety outweigh the opposing considerations. However, in the field of civil litigation we consider that the upholding of the standards of civilised life is a great deal more important than the few occasions on which one party or another may be deprived of evidence which could be obtained in no way other than by an offensive method of spying. Accordingly, we recommend that evidence so obtained should no longer be admissible in civil litigation.”³⁷

12.34 Since evidence obtained through an actionable invasion of privacy may be the only means of establishing the truth of a crucial fact which otherwise might not be accepted, such evidence should not be excluded in civil proceedings. It is open to the party whose right to privacy has been infringed to start a separate action for invasion of privacy.

Recommendation 27

We recommend that there be no exception to the general rule that evidence obtained through an actionable invasion of privacy is admissible in civil proceedings.

Relationship between the new remedies and existing remedies

12.35 The remedies proposed in this paper overlap with those available under the Personal Data (Privacy) Ordinance. We think that an individual should not be obliged to exhaust his remedies under the Ordinance before he could bring an action for invasion of privacy under the proposed legislation. In Canada, all the privacy statutes (except the British Columbia Act) provide that the right of action is in addition to existing remedies.

Recommendation 28

We recommend that the statutory torts of invasion of privacy should be in addition to other right of action or other remedy under existing law.

³⁷

Para 149.

Level of court

12.36 The legislation need not specify the level of court at which privacy actions may be started. It would be up to the plaintiff to decide at which level of court to commence a privacy action. The amount of damages he is claiming is a factor to be taken into consideration.

Chapter 13 - Summary of recommendations

Recommendation 1

We recommend that any person who intentionally or recklessly intrudes, physically or otherwise, upon the solitude or seclusion of another or into his private affairs or concerns, should be liable for a statutory tort of invasion of privacy, provided that the intrusion is seriously offensive and objectionable to a reasonable person of ordinary sensibilities. *(Chapter 7)*

Recommendation 2

We recommend that the Privacy Commissioner for Personal Data should give consideration to issuing a code of practice on all forms of surveillance in the workplace for the practical guidance of employers, employees and the general public. *(Chapter 7)*

Recommendation 3

We recommend that any person who gives publicity to a matter concerning the private life of another should be liable for a statutory tort of invasion of privacy provided that the disclosure in extent and content is of a kind that would be seriously offensive and objectionable to a reasonable person of ordinary sensibilities and he knows or ought to know that such disclosure is seriously offensive and objectionable to such a person. *(Chapter 8)*

Recommendation 4

We recommend that for the purposes of the statutory tort of invasion of privacy based on public disclosure of private facts recommended above, matters concerning the private life of another should include information about an individual's private communications, home life, personal or family relationships, private behaviour, health or personal financial affairs. *(Chapter 8)*

Recommendation 5

We recommend that the Broadcasting Authority should give consideration to adopting in their Codes of Practice on Advertising Standards provisions governing the use of personal data in advertisements broadcast by the licensed television and sound broadcasters in Hong Kong. *(Chapter 9)*

Recommendation 6

We recommend that the Privacy Commissioner for Personal Data should give consideration to issuing a code of practice on the use of personal data in advertising materials for the practical guidance of advertisers, advertising agents and the general public. *(Chapter 9)*

Recommendation 7

We conclude that it is not necessary to create a statutory tort of invasion of privacy by appropriation of a person's name or likeness. (*Chapter 9*)

Recommendation 8

We conclude that it is not necessary to create a statutory tort of giving publicity to a matter concerning an individual that places him before the public in a false light. (*Chapter 10*)

Recommendation 9

We recommend that it should be a defence to an action for invasion of privacy if the plaintiff expressly or by implication authorized or consented to the act, conduct or publication constituting the invasion. (*Chapter 11*)

Recommendation 10

We recommend that it should be a defence to an action for invasion of privacy by intrusion upon another's solitude or seclusion if the act or conduct constituting the invasion was in the nature of an interception of a communication to which the defendant was not a party and such act or conduct was authorized or consented to by one of the parties to that communication. (*Chapter 11*)

Recommendation 11

We recommend that for the purposes of the tort of invasion of privacy by intrusion, the surreptitious use of a device to collect visual data relating to an individual ("the data subject") by a person who is otherwise lawfully present on the premises in which the data are located ("the data collector") in circumstances where the data are visible to the naked eye of the data collector but are not open to public view should be deemed to be an intrusion upon the seclusion of the data subject or an intrusion into the private affairs or concerns of that data subject. (*Chapter 11*)

Recommendation 12

We recommend that it should be a defence to an action for invasion of privacy if the act, conduct or publication constituting the invasion was authorized by or under any enactment or rule of law. (*Chapter 11*)

Recommendation 13

We recommend that it should be a defence to an action for invasion of privacy if the act, conduct or publication constituting the invasion was reasonably necessary for the protection of the person or property of the defendant or another. (*Chapter 11*)

Recommendation 14

We recommend that it should be a defence to an action for invasion of privacy based on public disclosure of private facts if the public disclosure would have

been privileged in accordance with the rules of law relating to defamation.
(Chapter 11)

Recommendation 15

We recommend that it should be a defence to an action for invasion of privacy based on public disclosure of private facts if the matter publicised could be found in a public record which was readily accessible to the public, or otherwise had come into the public domain through no fault of the defendant.
(Chapter 11)

Recommendation 16

We recommend that consideration should be given to extending the statutory prohibition on identifying victims of rape, non-consensual buggery and indecent assault under section 156 of the Crimes Ordinance (Cap 200) to cover victims of other sexual offences. (Chapter 11)

Recommendation 17

We recommend that consideration should be given to providing the court in criminal proceedings with a statutory power to make an order prohibiting the publication of any matter which is likely to lead to the identification of the person against whom an offence is alleged to have been committed until the conclusion of the proceedings or until such time as may be ordered by the court, provided that the making of such an order or any extension thereof is in the interest of the private life of that person and would not prejudice the interests of justice. (Chapter 11)

Recommendation 18

We recommend that it should be a defence to an action for invasion of privacy based on public disclosure of private facts if the matter publicised was a matter of legitimate concern to the public. (Chapter 11)

Recommendation 19

Without limiting the generality of Recommendation 18 above, we recommend that information or facts which relate to any of the following matters should be deemed to be a matter of legitimate concern to the public for the purposes of the statutory tort of invasion of privacy based on public disclosure of private facts:

- a) the prevention, detection or investigation of crime;
- b) the prevention or preclusion of unlawful or seriously improper conduct, public dishonesty or serious malpractice;
- c) the ability of a person to discharge his public or professional duties;
- d) the fitness of a person for any public office or profession held or carried on by him, or which he seeks to hold or carry on;

- e) the protection of public health or safety; and
- f) the protection of national security and security in respect of the Hong Kong Special Administrative Region. (*Chapter 11*)

Recommendation 20

We recommend that both the tort of invasion of privacy by intrusion upon another's seclusion or solitude and the tort of invasion of privacy based on public disclosure of private facts should be actionable *per se* without any proof of damage. (*Chapter 12*)

Recommendation 21

We recommend that in an action for invasion of privacy, the court may -

- a) award damages;
- b) grant an injunction if it shall appear just and convenient;
- c) order the defendant to account to the plaintiff for any profits which he has made by reason or in consequence of the invasion;
- d) order the defendant to destroy or deliver up to the plaintiff all articles or documents containing information about the plaintiff which have come into the possession of the defendant by reason or in consequence of the invasion; or
- e) order the defendant to publish an apology which is of equal prominence to the original publication on which the action is based. (*Chapter 12*)

Recommendation 22

We recommend that damages in an action for invasion of privacy should include compensation for the mental distress, embarrassment and humiliation suffered by the plaintiff. (*Chapter 12*)

Recommendation 23

We recommend that in awarding damages the court should have regard to all the circumstances of the case, including:

- a) the effect of the invasion on the health, welfare, social, business or financial position of the plaintiff or his family;
- b) any distress, annoyance or embarrassment suffered by the plaintiff or his family;
- c) the conduct of the plaintiff and the defendant both before and after the invasion, including the adequacy, publicity for and manner of any apology or offer of amends made by the defendant. (*Chapter 12*)

Recommendation 24

We recommend that no action for invasion of privacy should be brought after expiration of 3 years from the time of the occurrence of the act, conduct or publication constituting an invasion of privacy, subject to the normal rules applicable to plaintiffs who are under disability. (Chapter 12)

Recommendation 25

We recommend that actions for invasion of privacy should be limited to living individuals and that the person to whom any right of action should accrue is the individual whose right of privacy is threatened or has been infringed. (Chapter 12)

Recommendation 26

We recommend that on the death of the plaintiff or defendant in an action for invasion of privacy, the cause of action should survive for the benefit of the plaintiff's estate, or, as the case may be, against the defendant's estate. (Chapter 12)

Recommendation 27

We recommend that there be no exception to the general rule that evidence obtained through an actionable invasion of privacy is admissible in civil proceedings. (Chapter 12)

Recommendation 28

We recommend that the statutory torts of invasion of privacy should be in addition to other right of action or other remedy under existing law. (Chapter 12)

Annex - Breach of confidence¹

Introduction

1. In its report *Breach of Confidence*² the English Law Commission considered the role of the duty of confidence in protecting improperly obtained information. The Commission noted that “it is a glaring inadequacy of the present law that ... the confidentiality of information improperly obtained, rather than confidentially entrusted by one person to another, may be unprotected.” The Commission recommended that this situation be redressed by *treating* improperly obtained information as being impressed by a duty of confidence. The Commission identified the following situations as ones where it is reasonable to impose the duty:

- “(i) *A person should owe an obligation of confidence in respect of information acquired in the following circumstances:*
 - (a) *by unauthorised taking, handling or interfering with anything containing the information;*
 - (b) *by unauthorised taking, handling or interfering with anything in which the matter containing the information is for the time being kept;*
 - (c) *by unauthorised use or interference with a computer or similar device in which data is stored;*
 - (d) *by violence, menace or deception;*
 - (e) *while he is in a place where he has no authority to be;*
 - (f) *by a device made or adapted solely or primarily for the purpose of surreptitious surveillance where the user would not without the use of the device have obtained the information;*
 - (g) *by any other device (excluding ordinary spectacles and hearing aids) where he would not without using it have obtained the information, provided that the person from whom the information is obtained was not or ought not reasonably to have been aware of the use*
 - (h) *of the device and ought not reasonably to have taken precautions to prevent the information being so acquired.*
- (ii) *An obligation of confidence shall be imposed on a person who jointly participates in the acquisition of information if, though he did not use any of the improper means listed in paragraph (i) above, he personally acquired the information and he is, or ought to be, aware that the information was acquired by the use of any such improper means by his fellow participator.*
- (iii) *An obligation of confidence should not arise in accordance with paragraph (i) above where the information has been obtained by a person in the course of the lawful exercise of an official function in regard to the security of the State or the prevention, investigation or prosecution of crime or by a person acting in pursuance of any*

¹ This Annexure first appeared in: HKLRC Privacy Sub-committee, *Consultation Paper - Privacy: Regulating Surveillance and the Interception of Communications* (1996). Much of the text of this annexure was prepared by Professor Raymond Wacks, a member of the sub-committee. The members of the sub-committee are indebted to Professor Wacks for his contribution to this part of the paper.

² Law Commission Report No. 110 (Cmnd 8388)

*statutory provision so far as the information has been disclosed or used for those purposes or for any purpose expressly or impliedly authorised by a statutory provision.*³

2. The Law Commission explains that it would be beyond its terms of reference to deem unlawful the use of any surreptitious surveillance device, and such a measure would be additional.

3. Items (f) and (g) are most directly relevant to our terms of reference. The distinction is made between devices primarily designed for surveillance purposes, and those lacking that specific purpose but which may nonetheless be so used e.g. binoculars or tape recorders. In both cases, the Commission recommends that the duty of confidence apply, provided that the information would not have been acquired without the use of such a device. However, the recommendation accommodates the fact that only in the former situation should it be assumed that the person from whom the information is obtained is not aware of the device's use. Professor Wacks has identified a difficulty of the clause is that it is potentially restrictive:

*"by prescribing a catalogue of specific forms of conduct there is a danger, especially in an area which is constantly undergoing technological change, of new methods of intrusion developing which call for legislative adaptation. A preferable analysis (suggested by the Scottish Law Commission) is to refer in a general manner to the acquisition by illegal means or by means which would be regarded as improper by a reasonable man."*⁴

4. Whichever formulation is adopted, also relevant is the public interest defence in breach of confidence cases. Under the Law Commission's proposals: "It should be for the defendant to satisfy the court that there was a public interest involved in the relevant disclosure or use of the information."

5. On 12 March 1985 the Home Secretary announced the Government's intention to legislate:

*"The Commission recommends that people who obtain information by 'improper means' - which includes the use of surveillance devices, as the Hon Gentleman knows - would be subject to an obligation not to use or disclose information. If they did so, they would be civilly liable to an action for breach of confidence. That approach has, I believe, the considerable advantage of concentrating on the real mischief - that is, the use to which information obtained is put. It provides the victim with a direct means of redress. I am able to announce today that the Government intends to introduce legislation based on the Law Commission's proposals. This will offer people an important and wholly new safeguard in an area of legitimate concern."*⁵

6. By 1990 legislation had still not been introduced and the Calcutt Committee declined to generally endorse the Commission's proposals, without adverting to this specific recommendation. That Committee's terms of reference were limited to "activities of the press". But other commentators have continued to urge the adoption of the draft clause quoted above. James Michael reviewed the disparate recommendations of the Younger Committee (1972), Law Commission, and the Calcutt Committee. The Younger Committee (whose terms of reference were restricted to the private sector) included a recommendation that it be a civil wrong "to disclose or otherwise use information which the discloser knows, or in all the circumstances ought to have known, was obtained by illegal means." James Michael concluded that: "of the three proposals, the Law Commission's draft bill was the most carefully thought out [it represented 8 years of work] and the Government should not need a

³ The Law Commission No 110, at para 6.46.

⁴ R Wacks, *Personal Information*, at p 263.

⁵ Quoted by James Michael in *New Law Journal*, May 4 1990 p 635.

nudge from Sir David Calcutt to carry out the undertaking given by Leon Brittan when he was Home Secretary to legislate on the basis of it.”⁶

7. Similarly, Patrick Milmo wondered:

*“why the current demand for legislation to counter press intrusion on privacy cannot be met by [the Law Commission’s draft] Bill rather than the vaguely formulated and controversial new law of privacy proposed by the Lord Chancellor.”*⁷

Recent developments in the law of confidence

8. The difficult question is whether, a third party, C, who intercepts a communication between A and B is liable to either A or B for breach of confidence. Where confidential information is acquired by the use of ‘reprehensible means’ (electronic surveillance, spying, and other forms of intrusive conduct), the authorities suggest the third party is not liable when he uses it. The apparent explanation for this ‘glaring inadequacy’⁸ (which means that if confidential information is obtained by improper means, it receives less protection by the law than if it were confided to a party who was under an obligation not to use or disclose it) is the absence of a relationship of confidence between the party who wishes to keep the information confidential, on the one hand, and another party, on the other.

9. But this may be a difficult position to defend. Thus, it has been argued⁹ that in these circumstances the defendant, since he knew that the information was confidential (why else would he be surreptitiously obtaining it?), is under an imputed duty no different from that which applies to the ordinary recipient of confidential information.

10. Some breach of confidence cases lend support to the view that protection is not confined to consensual disclosures of confidential information. In *Lord Ashburton v Pape*,¹⁰ the Court of Appeal, in a decision which involved a breach of confidence by a solicitor’s clerk, referred to its power to enjoin the publication of information ‘improperly or surreptitiously obtained’. More significantly, the Supreme Court of Queensland, in *Franklin v Giddens*¹¹ allowed an action for breach of confidence where the defendant had, in the absence of any confidential relationship, stolen genetic information in the form of cuttings from the plaintiff’s unique strain of cross-bred nectarines. Dunn J said:¹²

“I find myself quite unable to accept that a thief who steals a trade secret, with the intention of using it in commercial competition with its owner, to the detriment of the latter, and so uses it, is less unconscionable than a traitorous servant.”

11. A persuasive case in support of the contention that the eavesdropper may be caught by the action for breach of confidence is the important decision in *Francome v Mirror Group Newspapers Ltd*¹³ where the Court of Appeal granted an injunction to restrain the defendants from using information that had been obtained (by parties unknown) through the use of radio-telephony. The case conflicts with the judgment in *Malone v Commissioner of Police of the Metropolis (No 2)*¹⁴ in which Sir Robert Megarry VC declined to make a declaration that telephone-tapping by the police was a breach of the victim’s right of

⁶ Solicitor Journal, 31 July 1992 p 744.

⁷ New Law Journal, November 19 1993 p 1647.

⁸ Law Commission Report (note 1 above), paras 5.5 and 6.28. See generally R Wacks, *Privacy and Press Freedom* (London: Blackstone Press, 1995), Chapters 3 and 5.

⁹ G Jones, ‘Restitution of Benefits Obtained in Breach of Another’s Confidence’ (1970) 86 LQR 463.

¹⁰ [1913] 2 Ch 469, 475; approved in *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 50.

¹¹ [1978] 1 Qd R 72.

¹² Above, 80.

¹³ [1984] 1 WLR 892.

¹⁴ [1979] 2 All ER 620.

confidentiality in the conversations. In his view, an individual who divulges confidential information cannot complain when someone within earshot overhears his conversation. In the case of telephone conversations:

“The speaker is taking such risks of being overheard as are inherent in the system ... In addition so much publicity in recent years has been given to instances (real or fictional) of the deliberate tapping of telephones that it is difficult to envisage telephone users who are genuinely unaware of this possibility. No doubt a person who uses a telephone to give confidential information to another may do so in such a way as to impose an obligation of confidence on that other : but I do not see how it could be said that any such obligation is imposed on those who overhear the conversation, whether by means of tapping or otherwise.”¹⁵

12. He was in no doubt that ‘a person who utters confidential information must accept the risk of any unknown over-hearing that is inherent in the circumstances of the communication’.¹⁶ Relying on this dictum, the defendants in *Francome* argued that the plaintiffs had no cause of action against them or the eavesdroppers for breach of an obligation of confidence. The Court of Appeal rejected this contention on the ground that in *Malone* the court was expressly concerned only with telephone-tapping effected by the police for the prevention, detection and discovery of crime and criminals. Fox LJ distinguished the two forms of intrusion in the following terms:

“Illegal tapping by private persons is quite another matter since it must be questionable whether the user of a telephone can be regarded as accepting the risk of that in the same way as, for example, he accepts the risk that his conversations may be overheard in consequence of the accidents and imperfections of the telephone system itself.”¹⁷

13. In other words a telephone user’s ‘reasonable expectation of privacy’ may be vindicated when the eavesdropper turns out to be a private individual, but not when it is the police acting under lawful authority. And it has been suggested that this judgment suffers from a ‘fundamental misconception’:

“That because equity acts in personam it responds to some personal dealing between the parties so that the eavesdropper is in a quite different case to the confidant. But what the maxim indicates is that equity responds to unconscionable conduct by the defendant; this may but need not flow from any consensual dealing with the plaintiff. Accordingly, it requires no great effort, no straining of principle to restrain the activities of the eavesdropper.”¹⁸

14. The absence of a relationship between the parties has not inhibited the Hong Kong courts from imposing liability for breach of confidence. In *Koo and Chiu v Lam*,¹⁹ the Hong Kong Court of Appeal recently held that a medical researcher was under a duty of confidence in respect of a questionnaire that had been prepared by a ‘rival’ research team and which, by the appellant’s admission, he had used formulating his own questionnaire. It is unfortunate that there is no clear evidence as to how the appellant obtained access to the respondents’ questionnaire. Penlington JA, commenting upon the trial judge’s finding that the appellant had obtained the information ‘surreptitiously’, remarked:

“He did somehow come into possession of the document, and he must have known it was confidential because of the amount of work which had gone into its preparation. It had not been given to him by the persons whose

¹⁵ Above, 376.

¹⁶ Above, 376.

¹⁷ [1984] 1 WLR 892, 900.

¹⁸ Meagher *et al*, p 827.

¹⁹ Civil Transcript No 116 (1992).

*information it was and again he must have realised he was not entitled to use it.”*²⁰

15. This dictum takes the law considerably further than both *Franklin* and *Francome* for in those decisions the ‘surreptitious taker’ acted contrary to law (theft and an offence contrary to the UK Wireless Telegraphy Act 1949, respectively). In *Koo*, Penlington JA emphasised that the finding of ‘surreptitious obtaining’ did not extend as far as theft which, he said ‘cannot be supported by the evidence’.²¹ But if surreptitious taking extends to the mere fact that the appellant ‘did somehow come into possession’ of the questionnaire with the knowledge that it was confidential, the Hong Kong Court of Appeal appears (by accident or design) to have grasped the nettle and embraced the notion of receipt-based liability, albeit under cover of surreptitiousness rather than unconscionability.

16. Some caution is, however, required. First, the actual finding, at first instance, that the information was imparted in circumstances imposing an obligation of confidence was not challenged upon appeal.²² Secondly the rival teams of researchers worked at the same university which implied a ‘course of dealing’ between the parties during which the appellant arguably became aware that the questionnaire was confidential. This could, to some extent, approximate to a relationship of confidence on orthodox principles.

17. The decision is plainly not one of a stranger stumbling across a diary in the street. Nevertheless, assuming it is correct, the judgement demonstrates the utility of the breach of confidence action where the strict requirement of a prior relationship is relaxed. It does not, however, remove all the obstacles in the path of the protection of ‘privacy’, for the finding that the appellant knew that the information contained in the questionnaire was confidential was derived less from the nature of the information than from his personal experience, and the limited relationship between the parties.

18. Nevertheless, to catch the eavesdropper, the Younger Committee considered legislation necessary:²³

“We think that the damaging disclosure or other damaging use of information acquired by any unlawful act, with knowledge of how it was acquired, is an objectionable practice against which the law should afford protection. We recommend therefore that it should be a civil wrong, actionable at the suit of anyone who has suffered damage thereby, to disclose or otherwise use information which the discloser knows, or in all the circumstances ought to have known, was obtained by illegal means. It would be necessary to provide defences to cover situations where the disclosure of the information was in the public interest or was made in privileged circumstances. We envisage that the kinds of remedy available for this civil wrong would be similar to those appropriate to an action for breach of confidence.”

19. One difficulty with this approach is that the Younger Committee rejected the introduction of an action for unwanted publicity; the only remedies considered necessary in cases of ‘public disclosure’ were the action for breach of confidence and this one which will only assist the plaintiff where the information was acquired *unlawfully*. This means that where, say, a journalist obtains personal information *lawfully*, the plaintiff will have no remedy. But should unlawful means be employed, an action may lie, subject to the proposed defence of ‘public interest’. In other words, in the view of the Younger Committee, the only circumstances under which a civil action would lie where there has been disclosure of personal information are where the means used to obtain the information were unlawful. And this confuses the interests in issue in ‘intrusion’ with those that arise in ‘disclosure’. Since the availability of remedy is, *prima facie*, made dependent upon the use of illegal means, the question of whether there has been an intrusion becomes a crucial criterion in determining whether the

²⁰ Above, 30.

²¹ Above, 29.

²² One is bound to ask ‘why not?’ The decision of the trial judge represents a significant divergence from existing authority.

²³ Younger Report, para 632.

plaintiff has a remedy at all. This factor ought *not* to be of primary importance in cases of disclosure. Equally, unlawful means ought not to be permitted merely because the eventual disclosure is justified. The two questions should be kept separate.

20. The Law Commission recognise that there is an important distinction between the imposition of an obligation of confidence in the normal case, and in the case of improper acquisition, when they state:²⁴

“There is undoubtedly a considerable difference in nature between on the one hand the obligation imposed on a person for breaking an undertaking to another to keep information confidential and, on the other, an obligation imposed on a person as a result of his having used improper means to gain information which may, indeed, be so secret that the plaintiff has never entrusted it to anyone, not even in confidence. Nevertheless, we believe that it is possible to encompass both forms of behaviour within the framework of our new statutory tort.”

21. They conclude that the common feature in both cases is that the receiver of information is in a position where it is *reasonable* to impose a duty of confidence upon him. They therefore propose a number of situations²⁵ in which the acquirer of information should, by virtue of the manner in which he has acquired it, be treated as being subject to an obligation of confidence in respect of such information acquired in the following circumstances:

- (a) by unauthorized taking, handling, or interfering with anything containing the information;
- (b) by unauthorized taking, handling, or interfering with anything in which the matter containing the information is for the time being kept;
- (c) by unauthorized use of or interference with a computer or similar device in which data are stored;
- (d) by violence, menace, or deception;
- (e) while he is in a place where has no authority to be;
- (f) by a device made or adapted solely or primarily for the purpose of surreptitious surveillance where the user would not without its use have obtained the information;
- (g) by any other device (excluding spectacles and hearing aids) where he would not, without using it, have obtained the information, provided that the person from whom the information is obtained was not or ought not reasonably to have been aware of the use of the device and ought not reasonably to have taken precautions to prevent the information being so acquired.

22. This approach is potentially restrictive: by prescribing a catalogue of specific forms of conduct there is a danger, especially in an area which is constantly undergoing technological change, of new methods of intrusion developing which call for legislative adaptation. A preferable analysis (suggested by the Scottish Law Commission)²⁶ is to refer in a general manner to the acquisition by illegal means or by means which would be regarded as improper by a reasonable person. This has the advantage of anticipating advances in electronic surveillance technology. The English Law Commission would impose automatic liability ‘without qualification’²⁷ for the use of confidential information upon a person who obtains such information with the assistance of a device which is ‘clearly designed or adapted solely or primarily for the surreptitious surveillance of persons, their activities, communications or property’.²⁸

23. They draw a distinction between such devices and those, such as binoculars or tape recorders, which are not in themselves designed primarily for that purpose, although

²⁴ Law Commission Report, para 6.30.

²⁵ Above, para 6.46.

²⁶ Scottish Law Commission, *Breach of Confidence* (Scot Law Com No 90, 1984), paras 4.36-41.

²⁷ Law Commission Report, para 6.35.

²⁸ Above.

they are capable of being so used. In the case of the latter, liability for the subsequent use or disclosure of the information should arise only if the subject was not or ought not reasonably to have been aware of the use of the device and failed to take precautions to prevent its acquisition.²⁹ This would seem to be a sensible distinction.

24. The Scottish Law Commission would impose an automatic obligation on a person not to use or disclose *any* information so acquired 'however trivial it may seem to an outsider'.³⁰ The obligation is therefore not dependent on the nature of the information acquired; it is not restricted (though, in practice, will normally relate) to confidential information. While consistent with the general concern to prevent intrusive activities (and not merely their consequences), this proposal again demonstrates the different objectives of the control of intrusion, on the one hand, and the protection against the *misuse* of personal information, on the other. The former extends beyond (but may accommodate) the present concern with confidential information and, *a fortiori*, personal information, and is, of course, in any event, more satisfactorily dealt with by the criminal law or by administrative control.

25. No obligation of confidence should be imposed upon a 'surreptitious taker' by virtue only that he used illicit means to obtain the information. Liability should always rest upon general principles of unconscionability; the fact that improper means were necessary to acquire the information is persuasive in deciding whether the defendant had constructive knowledge, but is not an inexorable rule of law.

26. To what extent, if at all, is the fact of intrusion punished by the action for breach of confidence? As in the American jurisprudence, the English case law suggests a tendency to confuse intrusion and disclosure. In *Malone*, the plaintiff's telephone had been tapped by the Post Office under a warrant signed by the Secretary of State; Malone being under suspicion of handling stolen goods. In the course of his judgment, Sir Robert Megarry VC, having adverted to Lord Denning's 'just cause or excuse' formulation for the public interest defence,³¹ remarks that 'the question is ... whether there is just cause or excuse for the tapping and for the use made of the material obtained by the tapping'.³² This is to confuse the two issues.

27. In *Francome*, the Court of Appeal upheld the granting of an interlocutory injunction to prevent the defendants from disclosing information concerning the jockey Peter Francome which had been obtained by telephone tapping. An important distinction between this decision and *Malone* is that in the latter the defendant was both the intruder and the potential discloser, whilst in *Francome* the intruders were not a party to the proceedings. Thus, maintaining the rigid and logical distinction suggested above, the only pertinent question here is whether the *Daily Mirror* received the information subject to an obligation not to disclose it to others. Again, the fact of the tapping does figure in this assessment, but only in so far as it might determine what reasonably constitutes unconscionable behaviour.

28. The analysis of Sir John Donaldson MR is in this respect correct. That he realised that intrusion was not in issue is clear from his comment that the question at trial 'is likely to be whether the defendants can make any, and if so what, use of the fruits of [the illegal tapping]'.³³

Reforming the law

29. In its *Report on Breach of Confidence*, the Law Commission advocated the creation of a statutory tort of breach of confidence. Having concluded that, under the existing principles of the equitable action for breach of confidence,³⁴ the plaintiff has no protection where information is surreptitiously taken from him (as opposed to his having imparted it to

²⁹ Above, para 6.38.

³⁰ Scottish Law Commission, para 4.38.

³¹ See *Fraser v Evans* [1969] 1 QB 349, 362.

³² [1979] Ch 345, 377.

³³ [1984] 1 WLR 892, 895.

³⁴ See *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1963] 3 All ER 413.

another in circumstances imposing an obligation of confidentiality³⁵), the Commission proposed that if information were so acquired, the 'surreptitious taker' and any person obtaining the information from him, with knowledge, was under an obligation of confidence by virtue solely of that surreptitious taking.³⁶

30. This approach conflates disclosure and intrusion; the fact of intrusion is the basis upon which disclosure is to be prevented or compensated. And the Law Commission propose no separate sanctions against intrusion itself.³⁷ In clause 14(1)(b) of their draft bill, the Commission define recoverable damages to include those in respect of 'any mental distress, and any mental or physical harm resulting from such distress' in consequence of the defendant's breach of confidence. This explicit restriction of those damages to distress suffered in 'consequence of the breach'³⁸ suggests that, along with the narrowness of the Commission's terms of reference mentioned above, it is highly unlikely that the Commission envisaged an enhancement of these damages by virtue of additional distress caused by the intrusion.³⁹ The Law Commission Report proposed no sanction for the act of intrusion per se, preferring, as is logically consistent with its terms of reference, to use the intrusion as a springboard from which to attach an obligation of confidence to prevent or compensate disclosure.

31. In its report, the Calcutt Committee recommended that three forms of physical intrusion should be criminal offences, namely:

- (a) Entering private property, without the consent of the lawful occupant, with intent to obtain personal information with a view to its publication;
- (b) Placing a surveillance device on private property, without the consent of the lawful occupant, with intent to obtain personal information with a view to its publication;
- (c) Taking a photograph, or recording the voice, of an individual who is on private property, without his consent, with a view to its publication with intent that the individual shall be identifiable.⁴⁰

It proposed a public interest type defence to these offences.⁴¹

32. Just as the Law Commission concentrates exclusively on disclosure, so the Calcutt Committee directs its legislative recommendations at intrusion, leaving disclosure to the regulation of a newly formed Press Complaints Commission.⁴² The prospect of confusion between the two issues is thus obviated.

33. The National Heritage Committee recommend the introduction of a Protection of Privacy Bill, one part of which concerns what the Committee call 'the main civil offence', namely infringement of privacy and it is clear from the definition of that offence that liability

³⁵ In Para 5.5 of the Report, the Law Commission states: 'It is a glaring inadequacy of the present law that ... the confidentiality of information improperly obtained, rather than confidentially entrusted by one person to another, may be unprotected'. The reasoning by which the Commission reaches this conclusion is set out in paras 4.7-4.10.

³⁶ This proposal is embodied in clause 5 of the draft bill (*ibid*, Appendix A).

³⁷ Though this may be readily explained by reference to the terms of reference of the Commission's enquiry. The relevant term asks the Commission to: 'consider and advise what remedies, if any, should be provided for persons ... who have suffered loss or damage *in consequence of the disclosure or use of information unlawfully obtained* and in what circumstances such remedies should be available'. (*ibid*, Para 1.1)

³⁸ Clause 14(1)(b) of the draft bill.

³⁹ This view is supported by para 6.106 of the Report where the Commission confine its analysis to 'mental distress' suffered as a *result of the breach of confidence*.

⁴⁰ Calcutt Report, para 6.33.

⁴¹ Above, para 6.35. The defences are: '(a) for the purpose of preventing, detecting or exposing the commission of any crime, or other seriously anti-social conduct; (b) for the protection of public health or safety; or (c) under any lawful authority'. This approach was again proposed by the Calcutt in his Review, with minor alterations (paras 7.1-7.26).

⁴² Above, paras 15.1-15.31.

attaches to both 'obtaining and/or publishing' personal information.⁴³ Here, however, intrusion and disclosure are entirely separated, each, independently, giving rise to a cause of action. But, again, it is to be regretted that a public interest defence is proposed to apply both to acts of publication and to the *obtaining* of the personal information.⁴⁴ The bill includes provisions along the lines of the Calcutt Report for the introduction of criminal sanctions against certain intrusive techniques.⁴⁵

⁴³ Above.

⁴⁴ Above, and see para 55.

⁴⁵ Above, para 52