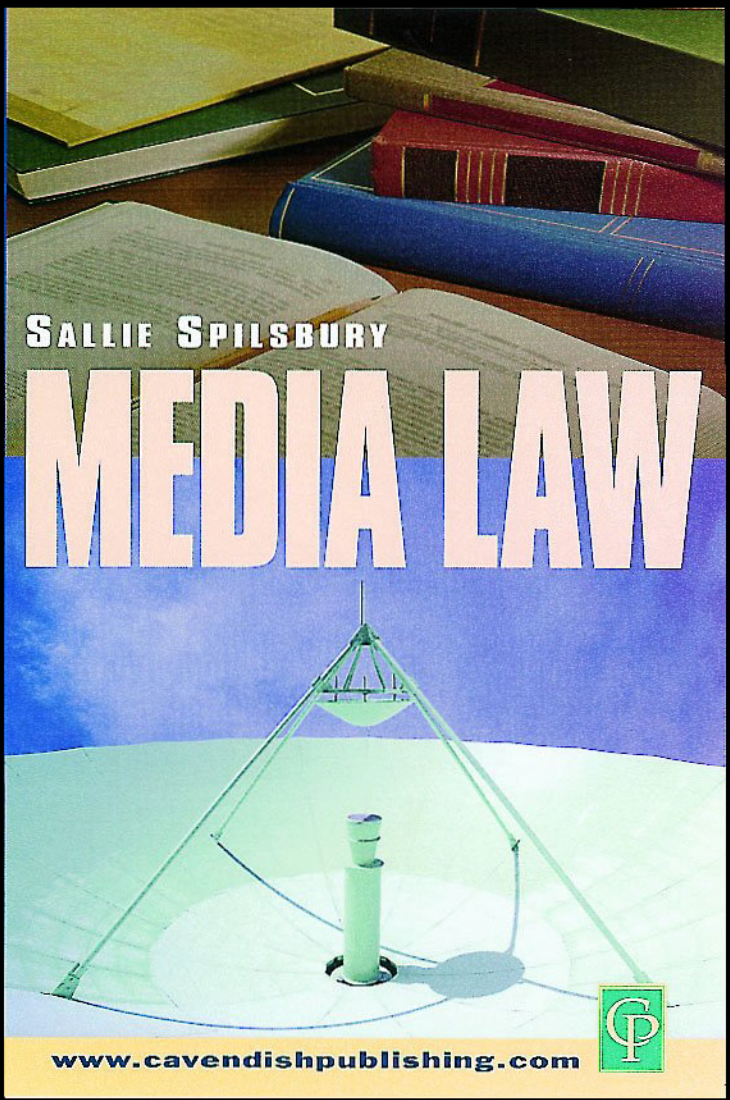
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PRIVACY AND THE MEDIA

> Newspapers are there to expose: that is their function. At their best, the media expose crooks, spies and fraudsters, although at their worst they intrude into private lives when no public interest is served. The difficulty is obviously in drawing a line.[1]
>
> The judges are pen-poised, regardless of incorporation of the Convention, to develop a right to privacy to be protected by common law. This is not me saying so: they have said so. It must be emphasised that the judges are free to develop the common law in their own judicial sphere.[2]

THE CONCEPT OF PRIVACY: WHAT IS PROTECTED?

At the present time, there is no satisfactory definition in law of the concept of 'privacy'. Attempts to introduce a statutory tort of infringement of privacy have tended to fall at the preliminary hurdle of securing a definition of the concept for which protection is sought.

In its 1972 Report, the Younger Committee[3] expressed the view that privacy was not capable of being satisfactorily defined – of the available definitions, the committee thought 'either they go very wide, equating the right to privacy with the right to be let alone, or they boil down to a catalogue of assorted values to which the adjective 'private' or 'personal' can reasonably, but not exclusively, be attached'. There is an obvious danger that a wide privacy law will make it difficult for the media to perform the watchdog function to which the European Court of Human Rights attaches great importance.[4]

The 1990 Calcutt Committee on privacy and related matters agreed with the Younger Committee that there was little possibility of producing a precise definition of privacy.[5] It adopted a working definition with reference to the media in the following terms:

> 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.

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1 Sir Norman Fowler, *Hansard*, 17.6.1998, col 404.
2 The Lord Chancellor, *Hansard*, 3.11.1997, col 1229.
3 *Report of the Committee on Privacy*, Cmnd 5012, 1972.
4 See, eg, *Observer v UK* (1991) 14 EHRR 153.
5 *Report of the Committee on Privacy and Related Matters*, Cmnd 1102, 1990.

The Calcutt Committee was of the view that a right to privacy in this form could include protection from physical intrusion, publication of hurtful or embarrassing personal material (whether true or false), publication of inaccurate or misleading personal material, or publication of photographs or recordings of an individual taken without consent.

The Committee also observed that it was not possible to lay down a definitive benchmark against which to judge whether material does or does not infringe privacy. The decision of what constitutes an unwarranted infringement of privacy could only be made in a particular case in terms relative: (a) to that subject's status and conduct; and (b) in the context of what is socially acceptable at the time.

In the view of the Calcutt Committee, the application of any test for violation of privacy involves a value judgment based on the attitudes and perceptions of society generally at the time of publication. The British public as a whole likes to see human interest stories – especially where they involve well known figures. In the review of press self-regulation which followed on from the 1990 Calcutt Report, Sir David Calcutt observed that many of the highly publicised cases involving alleged violations of privacy of well known figures by the press had led to significant increases in the circulation of the newspapers concerned.[6] Yet the public mood can be subject to swift changes. In the wake of the death of Diana, Princess of Wales, there was a public backlash against the methods of the paparazzi employed in taking the very photographs which the public had so loved to see. The editor of *The Sun* misjudged the public mood in 1999 when he published, on the eve of her marriage, photographs of Sophie Rhys Jones 'cavorting' with a well known media personality. The public uproar generated by the photographs led to a stern reprimand from the PCC and a public apology from the newspaper's editor in the following terms:

> Publication of the photograph has caused an outcry and *The Sun* now realises its mistake.[7]

The Sun misjudged the mood, but perhaps it was an understandable error in this shady area of the public-private divide if one of the determining factors is something as changeable as the public's taste.

The precise ambit of a person's privacy becomes crucial when we begin to talk of a protectable right enforceable at law. If an issue which essentially involves a value judgment becomes subject to legal control, any error in the exercise of the value judgment will sound in legal remedies. On that basis, defining the extent of any legally enforceable right of 'privacy' becomes of crucial importance to ensure that the media are aware of the standards with which they must comply.

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6 Sir David Calcutt QC, *Review of Press Self-Regulation*, Cmnd 2135, 1990.

7 (1999) *The Sun*, 27 May.

The importance of setting down the nature and ambit of the right to privacy is reflected in the jurisprudence of the European Convention on Human Rights. A right to privacy operates as a limitation on freedom of expression (the freedom enshrined in Art 10 of the Convention). If privacy is to be a justifiable restriction to freedom of expression, it must be prescribed by law. This requirement is considered in some detail in Chapter 1. The gist of the requirement is that the restriction must have a basis in law *and the law must be sufficiently precise to enable a citizen to regulate his conduct*.[8] A privacy law which is dependent on arbitrary considerations, such as personal taste, is unlikely to satisfy this requirement.

In *R v Broadcasting Standards Commission ex p BBC*,[9] Lord Mustill gave his opinion on the nature of privacy in the following terms:

> To my mind, the privacy of a human being denotes the personal 'space' in which the individual is free to be itself, and also the carapace, or shell, or umbrella, or whatever other metaphor is preferred, which protects that space from intrusion. An infringement of privacy is an affront to personality, which is damaged both by the violation and by the demonstration that the personal space is not inviolate …

This analysis of privacy is centred not so much on the sensibilities of the general public in determining what is or is not acceptable, but on the psychological damage to the individual whose rights have been violated. The right flows from the feeling of violation rather than the social *mores* of the time. This offers a more certain basis from which the law may develop.

Whose privacy may be violated?

Another reason why it is so important to pinpoint the nature and extent of the right to privacy is in order to determine who will be able to maintain an action for violation of the right. In particular, is the right limited to individuals (as the Calcutt report envisaged) or may companies and other bodies corporate bring proceedings too? In the *BBC* case referred to above,[10] Lord Mustill expressed the view that, because a company is an impersonal entity without personal sensitivities which might be wounded or a 'selfhood' to protect, he found it difficult to square his concept of privacy with a body corporate.[11] His

8 *Sunday Times v UK* (1979) 2 EHRR 242, para 49.

9 *R v Broadcasting Standards Commission ex p BBC* (2000) unreported, 6 April, CA.

10 *Ibid*.

11 The first instance decision of Forbes J in *R v BSC ex p BBC* (1999) unreported, 6 July, (which was overruled by the Court of Appeal) contained an analysis of the jurisprudence of the European Court of Human Rights in relation to Art 8 (respect for private and family life) and Art 9 (freedom of thought, conscience and religion). This analysis was conspicuously lacking in the Court of Appeal judgment. On his analysis, Forbes J agreed with Lord Mustill's opinion that a company could not entertain an action for violation of its right to privacy.

views are *obiter*, but the speech is likely to operate as a strong persuasive authority.

The law in England pre-Human Rights Act

To date, English common law has not recognised an enforceable right to privacy as a cause of action *per se*. The Court of Appeal decision in *Kaye v Robertson* graphically illustrated the judiciary's reluctance to affirm an enforceable right to privacy.[12]

In that case, the Court of Appeal granted a limited injunction restraining the defendants from publishing anything which could be reasonably understood to covey to a reader that Mr Kaye had voluntarily permitted the photographs to be taken or the interview to take place. The court held that on the application for an interim injunction Mr Kaye could make out a sufficiently strong case that any such representation would amount to a malicious falsehood.[13]

The court did not restrain publication of the material altogether. It professed its hands to be tied. Glidewell LJ observed: 'It is well known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy. The facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals.'

All of the Appeal Court judges expressed regret that the common law did not grant Mr Kaye an enforceable right of privacy which would enable him to restrain any publication of the interview or photographs. However, all three Appeal Court judges thought that any such right could only be recognised by the Parliament.[14]

Although English law does not presently enforce a general right to privacy, it does afford protection to various interests which may be categorised as aspects of 'privacy'.

The protection it offers is patchy – relying not on one discrete cause of action, but rather from a hotchpotch of law drawn from various sources.

The prime sources are as follows:

12 *Kaye v Robertson* [1991] FSR 62.

13 This aspect of the decision was considered further in Chapter 4.

14 Eg, Bingham LJ: '... the right has so long been disregarded here that it can be reconciled now only by the legislature.' For criticism of the conservative nature of this decision, see Sherman and Kaganas. 'The protection of personality and image – an opportunity lost' [1991] 9 EIPR 340 and, more generally, Lester, A, 'English judges as law makers' [1993] PL 269.

RIGHT TO PRIVACY OF CERTAIN PHOTOGRAPHS AND FILMS

Section 85 of the Copyright, Designs and Patents Act (CDPA) 1988 sets out a narrow right of privacy in the following terms:

> A person who for *private and domestic purposes* commissions the taking of a photograph or the making of a film has, where copyright subsists in the resulting work, the right not to have:
>
> (a) copies of the work issued to the public;
>
> (b) the work exhibited or shown in public; or
>
> (c) the work broadcast or included in a cable programme service,
>
> and … a person who does or authorises the doing of any of those acts infringes the right.

There are a few exceptions to the right which are set out in s 85(2) of the CDPA, most notably for the incidental inclusion of the work in an artistic work, film, broadcast or cable programme.[15]

The following points should be noted about this right:

- the right belongs to the person who commissions the photograph or film. That person may not be the subject of the material. There is, therefore, no guarantee that the subject will be able to prevent the exploitation of the material where they did not commission it;
- the photograph or film must have been commissioned for a private and domestic purpose. Commissions for commercial purposes will not give rise to a right of privacy under this section;
- if a photographer takes a photograph on a private occasion, the right of privacy under this section will not apply. The photograph must have actually been commissioned for a private and domestic purpose. The CDPA does not define 'commission'. It is not therefore clear whether a mere request that the photograph be taken can amount to commission or whether something more formal would be required;
- copyright must subsist in the photograph or film before the right of privacy can arise. The right of privacy will continue to subsist only so long as copyright subsists in the work.[16]

15 CDPA 1988, s 31.

16 *Ibid*, s 86.

HARASSMENT

Where the infringement of privacy takes the form of harassment by the media, the subject of the intrusive conduct can seek redress under the causes of action set out below.

The Protection from Harassment Act 1997

The Act introduces two criminal offences[17] and a statutory tort.[18]

Section 1 of the Act is a general prohibition on conduct which amounts to harassment or which the defendant knew or ought to know amounts to harassment (an objective test). Unhelpfully, the Act does not define what is meant by harassment. It goes some way to confining the concept within limits, in that it provides that a course of conduct will not amount to harassment if the defendant shows that it was pursued for the purpose of preventing or detecting crime or if it was carried out under any enactment or rule of law or that in the particular circumstances the pursuit of the course of conduct was reasonable.

The lack of a definition of harassment makes the Act unacceptably wide. In *DPP v Selvanayagam*,[19] Collins J indicated that 'whatever may have been the purpose behind the Act, its words are clear and it can cover harassment of any sort'. The definition could easily extend to harassment by the media, including conduct such as persistent telephone calls, 'doorstepping' or prolonging contact with a subject when he/she has made it clear they wish to terminate it. There is no defence that the harassment was for the purposes of reporting material which is in the public interest.

The criminal offences

Section 2 provides for an offence of harassment triable on summary conviction and carrying a maximum penalty of imprisonment for a term not exceeding six months and/or a fine not exceeding level 5 on the standard scale.

Section 4 creates a more serious offence where the accused is guilty of a course of conduct which causes another to fear, on at least two occasions, that violence will be used against him where the accused knows or ought to know (an objective test) that his course of conduct will cause the other to fear on each of those occasions.

17 Protection from Harassment Act 1997, ss 2 and 4.

18 *Ibid*, s 3.

19 *DPP v Selvanayagam* (1999) *The Times*, 23 June.

It is a defence to the s 4 offence for the accused to show that the course of conduct was pursued for the purpose of preventing or detecting crime, or was pursued under any enactment or rule of law or that it was reasonable for the protection of himself or another or for the protection of his or another's property.

A person guilty of the s 4 offence is liable on conviction on indictment to imprisonment for a term not exceeding five years or a fine or both or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both.

Where a defendant is charged under s 4, the court may find him not guilty under s 4, but guilty under of the lesser offence provided for in s 2.

In addition to the above penalties, the court is also empowered to make a restraining order under s 5 of the Act for the purpose of protecting the victim or any other person mentioned in the order from further conduct which amounts to harassment or which will cause a fear of violence. Breach of the restraining order is itself a criminal offence carrying the same sanctions as the s 4 offence.

The civil cause of action

Section 3 provides that an actual or apprehended breach of the s 1 prohibition may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question. The Act provides that amongst the available remedies are damages to compensate for anxiety caused by the harassment and any financial loss caused by the harassment. The remedies also include an injunction.

The breach by the defendant of an injunction made under s 3 is not punishable as a contempt of court in the usual way.[20] Instead, a specific criminal offence is committed where the breach was without reasonable excuse.[21] The offence carries a maximum penalty of indictment of imprisonment for a term not exceeding five years or a fine or both and on summary conviction a term of imprisonment not exceeding six months or a fine not exceeding the statutory maximum or both.

Harassment and the common law

The Protection from Harassment Act provides the most likely avenue for redress at law for an individual who feels harassed by the media. The common law offers a more speculative cause of action which could also be

20 Protection from Harassment Act 1997, s 3(7).

21 *Ibid*, s 3(6).

employed against the media. The case of *Wilkinson v Downton*[22] established that an intentional act of a defendant which is calculated to cause harm to the claimant (calculated is used in the sense of meaning 'likely to') is a tort actionable at common law. Physical harm includes psychiatric illness, but would not, as the law currently stands, include simple emotional distress. The *Wilkinson* case concerned a practical joke played by the defendant, who told the claimant that her husband had been involved in an accident and was badly injured. As a result of this news, the claimant suffered nervous shock which made her physically ill.

In the more recent case of *Khorasandijian v Bush*,[23] the Court of Appeal seemed to favour an extension of the scope of the *Wilkinson v Downton* tort to cover harassment. The court recognised that there was an obvious risk that the cumulative effect of persistent unwanted telephone calls to the claimant would cause her physical illness or psychiatric harm if they were not restrained by interim injunction. In *Hunter v Canary Wharf*,[24] Lord Hoffman went further and expressed the view (on an *obiter* basis) that distress, inconvenience or discomfort caused by harassment may be sufficient in themselves to give rise to liability without the need to show actual damage to physical or mental health or the likelihood of such damage.

DATA PROTECTION

Data protection laws impose an important restraint on the uses to which information about individuals may be put. They offer vital protection for privacy. The Data Protection Act 1998 is considered in Chapter 9.

INDIRECT PROTECTION FOR PRIVACY VIA THE ENFORCEMENT OF INTERESTS IN LAND

Protection for privacy may be indirectly secured where the claimant has an interest in land which is the subject of interference by the defendant. The two principal ways in which the protection may be secured are as follows:

Trespass to land

A defendant may be liable for trespass to land if he enters or remains on land which belongs to the claimant without permission. The claimant must own an

22 *Wilkinson v Downton* [1897] 2 QB 57.

23 *Khorasandijian v Bush* [1993] 3 All ER 669.

24 *Hunter v Canary Wharf* [1997] 2 All ER 426, p 451.

interest in the land (freehold or leasehold) or have a right to exclusive occupation in order to have a cause of action.[25] A tenant in possession or a licensee with exclusive possession can also sue. However, a mere licensee or occupier cannot. In the *Kaye* case referred to above, Mr Kaye was unable to bring a claim in trespass against *The Sport* in respect of their unauthorised entry into his hospital room because he did not have the necessary proprietary interest.[26]

In order to give rise to a claim of trespass to land, there must be an entry onto the claimant's land. If photographs of the claimant are taken from a public highway or from land on which the claimant has no interest, an action in trespass will be available to the claimant.[27]

In *Baron Bernstein v Skyviews,*[28] an aerial photograph of the claimant's property was taken without his consent. The claimant sued for trespass. The court held that a landowner's rights in the air space above his land extended only to such height as is necessary for the ordinary use and enjoyment of his land. Above that height, he has no greater rights in the air space than any other member of the public.

If a defendant has a right of action, he does not have to prove actual damage in order to bring a claim. Where a claim for trespass is brought in circumstances where the action essentially concerns an infringement of privacy, the measure of damages is likely to be small, unless an award for aggravated or exemplary damages is also made. An injunction may be awarded to restrain any further trespass.

Nuisance

The tort of nuisance will lie for any activity causing a substantial and unreasonable interference with a claimant's land or his use or enjoyment of his land. The tort is directed at protecting the claimant's enjoyment of his rights over his land. As with trespass, the cause of action will only lie at the suit of a person who has a right to the land affected. The primary remedy is compensation for the diminution of the value of the land and/or to the amenity of the land and an injunction. Compensation will not be awarded for personal injury or interference with personal enjoyment.[29]

To be an actionable nuisance, the activity must cause substantial interference with the above interests. In the *Bernstein* case,[30] the court held

25 *Hickman v Maisey* [1900] 1 QB 752.
26 *Kaye v Robertson* [1991] FSR 62.
27 *Hickman v Maisey* [1900] 1 QB 752.
28 *Baron Bernstein v Skyviews* [1978] QB 479.
29 *Hunter v Canary Wharf* [1997] 2 All ER 426.
30 *Baron Bernstein v Skyviews* [1978] QB 479.

that the taking of a single photograph of the claimant's property was not an actionable nuisance. However, the judge opined on an *obiter* basis that, had the circumstances been such that the claimant had been subjected to the harassment of constant surveillance of his house from the air, accompanied by the photographing of his every activity, then that might amount to an actionable nuisance for which the court would grant relief. But in reality the remedy would not have been for infringement of privacy *per se*, but rather for the impairment of the claimant's use of and enjoyment of his property.

THE REGULATION OF THE INTERCEPTION OF COMMUNICATIONS

Where telephone conversations or postal communications are the subject of unauthorised interception, a criminal offence is committed.

The Wireless Telegraphy Act 1949 prohibits the unauthorised use of wireless apparatus with intent to obtain information about the contents of any message being sent through the postal or telecommunications system.

The Interception of Communications Act 1985 creates a criminal offence of unlawful (that is, unauthorised) interception of communications by post or by a public telecommunications system (it does not apply to cordless telephones).[31] The Act also does not apply to the use of bugs or other types of listening apparatus planted in a room (even if the effect of the apparatus is to pick up the contents of telephone conversations). Nor does the Act apply to the interception of telephone conversations on internal telephone systems.

New interception of telecommunications legislation is due to come into force in the near future (the Regulation of Investigatory Powers Act 2000). The Act will amend the law to take into account technological developments and the rights of individuals.[32] The Act will place the interception of telephone conversations on internal telephone systems on a statutory footing for the first time. The Government's proposals will extend the law to all telecommunications networks, to communications carried by wireless telegraphy and mail delivery systems. The new legislation is intended to cover communications sent by e-mail and fax and pager communications.[33]

31 *R v Effick* [1994] 3 WLR 583.

32 The European Court of Human Rights has found that the absence of any basis in law for the regulation of the interception of telephone conversations on internal systems is a violation of Art 8 of the Convention: *Halford v UK* (1997) 24 EHRR 523.

33 The Act received Royal Assent on 28 July 2000. The majority of the Act's provisions are not yet in force.

REPORTING RESTRICTIONS AND THE COURTS

The privacy of individuals is sometimes safeguarded by reporting restrictions imposed on the media by the courts during trials. The overriding aim of such restrictions is generally the administration of justice rather than the protection of privacy.

These restrictions are considered in detail in Chapter 10.

PRIVACY BY ANY OTHER NAME

If the defendant's activities are not covered by the above specific actions set out above, a claimant seeking redress for infringement of his right to privacy must rely on other areas of the law, just as Gorden Kaye had to. A typical claimant might bring a claim for copyright infringement, defamation, malicious falsehood, passing off and/or breach of confidence provided he can satisfy the requirements of the various causes of action. But the substance of the complaint essentially concerns a violation of his privacy. Of these existing causes of action, the most significant is breach of confidence. The flexible nature of this cause of action has offered the courts a method of fashioning a *de facto* remedy for privacy where the breach of confidence involves personal information. The development of the law in this area, and the limitations of breach of confidence as a way of protecting privacy, were examined in Chapter 5.

In view of the difficulties in fashioning a satisfactory definition of privacy *per se*, this piecemeal protection might be considered to be the most satisfactory solution to an insoluble problem. But is it really? At the very least, the protection of privacy is dependent upon the claimant coincidentally being able to satisfy the requirements of what are often quite unconnected causes of action. A reading of the *Kaye* decision vividly reveals how deserving complaints can slip through the cracks.

Reliance on these disparate causes of action in order to protect privacy often results in claimants having to assert contrived claims in order to meet the criteria giving rise to any of the causes of action. For example, in the *Kaye* case, the claimant was forced to extract the implied falsehood that he had consented to publication in order to obtain what was, in any event, only partial relief. The real claim was the fact that the newspaper had intruded upon his privacy in the most blatant way, for which he was unable to obtain any redress.

Example

Consider a case involving the publication of a photograph of a public figure walking along a public street arm in arm with a new lover. The public figure wishes to keep this relationship secret in order to protect his partner from media scrutiny. The publication has not involved any conduct which amounts to harassment, nor has it involved the interception of communications or the interference with the claimant's land. What action might a claimant take?

There is at present no cause of action for infringement of privacy.

If the photograph has not been doctored in any way, it will depict a factually correct situation. An action for defamation will not succeed if the publication is true (the defendant could rely on the defence of justification). A claim for malicious falsehood will also not be available if the information is true.

A claim for copyright infringement will only be available if the publication involves the reproduction of a copyright work in which the claimant owns copyright. Under copyright law, copyright belongs to the photographer, rather than the subject.

Passing off is unlikely to be available unless the publication takes the form of a misrepresentation by the defendant which causes or is likely to cause damage to the claimant's trading reputation. This is unlikely on these facts.

The most likely cause of action is breach of confidence, provided that the personal material is confidential and the information is the subject of an express or implied obligation of confidence on the part of the defendant. But if the client was walking quite openly along a street and the photographer did not have to engage in surreptitious activity to take the picture, it may be difficult to satisfy these requirements.

The claimant may be without any form of relief.

The detailed requirements of the above causes of action are considered in more detail in the relevant subject chapters.

PRIVACY AND THE HUMAN RIGHTS ACT 1998

The question whether the Human Rights Act 1998 will give rise to the development of a privacy law was considered in Chapter 1. The Lord Chancellor has made clear that, in his view, the courts will not be empowered to create a common law right to privacy unless there is sufficient in the existing common law to enable them to fashion such a remedy. In his opinion, the courts will be able to fashion such a remedy by continuing to apply the existing law of trespass, nuisance, copyright and confidentiality. The shortcomings of such development are considered above.

In 1997, the then Lord Chief Justice, Lord Bingham, also indicated that, in his view, Parliament would not need to introduce a statutory law of privacy. Instead, he predicted that a privacy law would develop through individual cases before the courts as an 'inevitable' consequence of the incorporation of the European Convention on Human Rights into British law.[34] What remains to be seen is whether the courts will continue to try to fit a law to protect privacy into the confines of the existing causes of action as the Lord Chancellor envisages or whether, given time, the courts will enforce a right of privacy *per se*.

In the remainder of this chapter we examine the privacy provisions of the media industry Codes of Practice. We also examine the relationship between the law and the Codes and whether that relationship could over time lead to the development of a *de facto* legal standard for the protection of privacy.

PRIVACY AND THE REGULATORY CODES

Whilst the law does not generally recognise a right of privacy *per se*, the various Codes of Practice which regulate the activities of the media all contain provisions relating to privacy. The fact that the media has complied with the relevant Code – or has not – is a factor that the court should consider when deciding whether to grant relief, although it is not determinative. Section 12 was considered in more detail in Chapter 1.

The Codes share a common feature that compliance with their provisions is not an obligation as a matter of law. A breach of the Codes does not necessarily mean that the defendant has behaved unlawfully. However, the scheme of s 12 of the Human Rights Act will mean that the provisions of the Codes are likely to come under close scrutiny by the courts in cases involving assertions of infringement of privacy.

The press

The Press Complaints Commission Code of Practice as a whole, and the system of self-regulation generally, is considered in Chapter 16. The provisions of the Code which are relevant to privacy are as follows.

34 (1997) *The Times*, 9 October.

Privacy

(a) Everyone is entitled to respect for his or her private and family life, home, health and correspondence. A publication will be expected to justify intrusions into any individual's private life without consent.

(b) The use of long lens photography to take pictures of people in private places without their consent is unacceptable.

Private places are public or private property where there is a reasonable expectation of privacy.

The Code provides that there may be exceptions to the above where includes they can be demonstrated to be in the public interest.[35] The public interest *includes* (but is not limited to):

(a) detecting or exposing crime or serious misdemeanour;

(b) protecting public health and safety;

(c) preventing the public being misled by some statement or action of an individual or organisation.

In any case where the public interest is invoked, the PCC will require a full explanation by the editor demonstrating how the public interest was served. The Code recognises that there is a public interest in freedom of expression itself. It provides that the Commission will therefore have regard to the extent to which material has, or is about to, become available to the public. In cases involving children, editors must demonstrate an exceptional public interest to override the normally paramount interests of the child.

The Code also contains provisions relating to *harassment* in the following terms at cl 4:

(a) journalists and photographers must neither obtain nor seek to obtain information or pictures through intimidation, harassment or persistent pursuit;

(b) they must not photograph individuals in private places (as defined above) without their consent; must not persist in telephoning questioning, pursuing or photographing individuals after being asked to desist; must not remain on their property after being asked to leave and must not follow them;

(c) editors must ensure that those working for them comply with these requirements and must not publish material from other sources which does not meet these requirements.

Clause 8 of the Code prohibits the obtaining and publication of material obtained by the use of *clandestine listening devices* or the *interception of private telephone conversations*.

35 Public interest is defined in cl 1.

The provisions on harassment and the use of listening devices can be overridden in the public interest as defined above.

Special rules apply to *children*. The Code states as follows (cl 6):

(a) young people should be free to complete their time at school without unnecessary intrusion;

(b) journalists must not interview or photograph a child under the age of 16 on subjects involving the welfare of the child or any other child in the absence of or without the consent of a parent or other adult who is responsible for the children;

(c) pupils must not be approached or photographed while at school without the permission of the school authorities;

(d) there must be no payment to minors for material involving the welfare of children nor payments to parents or guardians for material about their children or wards unless it is demonstrably in the child's interest;

(e) where material about the private life of a child is published there must be justification for publication other than the fame, notoriety or position of his or her parents or guardian.

Although the provisions relating to children can be overridden in the public interest, the Code makes clear that the publication concerned should be able to demonstrate an exceptional public interest, the privacy of the child normally taking precedence.

In Lord Wakeham's view, it is the third of these provisions prohibiting approaches to children on school premises without consent, which has been highly effective in protecting Princes William and Harry from press intrusions during their time at Eton – in effect, denying the photographers a market in the UK for any pictures which they take.[36]

Clause 5 of the Code provides that in cases involving *personal grief or shock*, inquiries should be carried out and approaches made with sympathy and discretion. Publication must be handled sensitively at such times (but this should not be interpreted as restricting the right to report judicial proceedings). This clause cannot be overridden in the public interest. Clause 9 of the Code refers to inquiries at *hospitals*. It provides that the restrictions on intruding into privacy are particularly relevant to inquiries about individuals in hospitals or similar institutions, again subject to public interest considerations.

Most of these provisions of the Code of Practice came into force in January 1998 and in part reflected public and media concern over press activity in the wake of the death of Diana, Princess of Wales. In the view of the PCC chairman, Lord Wakeham, they represent a 'substantial toughening' of the Code. By way of example, the specific reference to material obtained through

36 Speech to the Independent Schools Association, 8 May 1998.

persistent pursuit in the harassment provisions of the Code coupled with the onus on publications to ensure that the sources of their material have complied with the Code, is intended to stamp out the market in the UK for photographs of celebrities obtained from photographers who stalk, pursue or hound their subjects.

History of the Code

The first version of the PCC Code of Practice was promulgated in 1991 following the Report of the Committee on Privacy and Related Matters (the Calcutt report). The Calcutt report had proposed the terms of a Code to be implemented by the PCC, but the Code of Practice which was actually produced and implemented in the wake of the Calcutt report was one drafted by the *newspaper industry*. It differed in a number of significant respects from the Code put forward in the Calcutt report. The differences tended to shift the balance of the Code away from the public and in favour of the press. The January 1998 amendments to the Code which are referred to above have brought the Code more in line with the original recommendations in the Calcutt report, but there remain significant differences between the Code put forward by Calcutt and the Code of Practice which is currently in force.

The most significant of these remaining differences are as follows:

- the Code of Practice refers to an entitlement to respect for privacy and states that publications must be able to justify intrusions. The Calcutt wording had a different emphasis, stating that making inquiries about the personal lives of individuals and the publication of such material was not generally acceptable without consent. The starting point under Calcutt was prohibitive. Under the Code, the prohibitive approach has not been adopted, there is a reference to the need for respect unless an intrusion is justified, but this more permissive approach reads as more favourable to the press;
- Calcutt stated that an intrusion into an individual's private life could only be justified on certain grounds – namely, for detecting or exposing crime or seriously antisocial conduct, protecting public health or safety or preventing the public being misled by some public statement or action of the individual. The Calcutt Committee deliberately rejected a generalised 'public interest' exception to the basic prohibition observing that the term was not helpful in giving meaningful guidance as to whether an intrusion was justified or not – leaving the press to their own assessment as to what is or is not justifiable when probing into people's private lives. However, the industry Code of Practice refers to the 'public interest' generally. It gives a number of non-exhaustive instances of what might amount to publication in the public interest, but the concept of 'public interest' might extend much further than was envisaged by the Calcutt Committee. The danger here is that the press is prone to confuse the public interest with their own commercial interests in increasing their circulation figures;

- the Calcutt Code stated that journalists should not obtain their pictures through trespass. This was not reflected in the industry Code of Practice, which prohibits pictures taken through intimidation, harassment or persistent pursuit. The omission of trespass was justified by the press on the ground that it might be necessary for a journalist to trespass on private property to obtain information which would ultimately be in the public interest.

In his review of press self-regulation,[37] Sir David Calcutt was highly critical of the industry Code. In particular, he observed that the different treatment of 'public interest' significantly reduced the protection from that envisaged by the Calcutt Committee.

In order to get a flavour of the way in which the Code operates in practice, set out below are a number of random examples of PCC adjudications under the privacy provisions of the Code.

Paul Burrell v The Express on Sunday[38]

Paul Burrell is the fundraising manager of the Diana, Princess of Wales Memorial Fund. The newspaper published an article which asserted that he was paying the price of fame making intrusive references to his home and family life. He complained that the article was in breach of cl 3 of the Code (privacy).

The complaint was upheld. The PCC accepted that the claimant had always sought to maintain a division between his public role (in which he expected media scrutiny) and his private life. The article ignored that dividing line, eliding legitimate comment on his fundraising role with comment on his family life. The PCC did not accept that it was axiomatic that the family life of those involved in soliciting public donations to charities was a legitimate subject of media scrutiny and intrusion.

Private places

Begum Aga Khan and His Highness the Aga Khan v Daily Mail[39]

The complaint concerned a photograph showing the complainants on the deck of their yacht. The complainants alleged that the photograph had been published in breach of cl 3 (privacy) of the Code. They claimed that it must

37 Calcutt, D (Sir), QC, *Review of Press Self-Regulation*, Cmnd 2135, 1990.

38 (1998) PCC adjudication, 3 May.

39 (1998) PCC adjudication, 16 July.

have been taken from a private island near to where the yacht was moored to preserve privacy. The newspaper argued that the decks of the yacht was in full sight of casual observers, it was moored on the Mediterranean in the height of summer and was not therefore a place where the complainants could expect privacy. If they wanted privacy they should have gone below deck.

The PCC upheld the complaint. When the photograph had been taken, the complainants had been on board their private yacht, moored near a private island on which the general public was not allowed. This was a place where there was a reasonable expectation of privacy.

Sir Elton John v The Sport[40]

Sir Elton John complained that a photograph of guests relaxing in the privacy of his home in the South of France was a breach of cl 3 of the Code (privacy). He alleged that the photographs had been taken secretly, possibly from the top of a ladder placed against the wall of Sir Elton's property. The complaint was upheld. An individual had the right to respect for his home life. The taking of the photographs and the subsequent publication intruded into that home life and the privacy to which he and his guests were entitled. There was no public interest justification.

The newspaper argued that it obtained the pictures from a picture agency, which said that they had been taken from a public footpath adjacent to the property. This did not affect the Commission's decision against the newspaper.

Sir Paul McCartney v Hello![41]

Sir Paul McCartney complained about the publication of photographs of him with his family in Paris shortly after the death of his wife were in breach of cl 3 (privacy) and cl 5 (intrusion into grief and shock). The photographs showed him and his children walking through Paris and eating lunch outside a café. One picture showed the family inside Notre Dame cathedral. The editor of *Hello!* said that the pictures had been obtained from news agencies rather than being specially commissioned, and in addition that the picture in the cathedral had been added without her consent. She also made the point that the photographs depicted the family's very close relationship.

The PCC upheld the complaint. It stressed that the editor was responsible for the content of her publication. The fact that the pictures had been obtained from news agencies was irrelevant, as was the fact that a picture had been

40 (1998) PCC adjudication, 4 June.

41 (1998) PCC adjudication, 30 May.

added without her knowledge. The argument that the public interest was served by depicting the close relationship of the family was rejected.

The PCC 'deplored' the photograph in the cathedral. Journalists should respect the sanctity of acts of worship. The cathedral was a clear example of a place where there was a reasonable expectation of privacy.

Children

Blair v Mail on Sunday[42]

The Prime Minister, Tony Blair, and his wife complained that a story in the *Mail on Sunday* was in breach of cl 6 of the Code (children) and cl 1 (inaccuracy). The story concerned the decision of a certain secondary school to admit the Prime Minister's daughter, while rejecting local children. The article referred to suspicion that the school was operating an 'under the counter' selection policy.

The complaint was upheld. In relation to the cl 6 claim, the PCC observed that, while an article itself could be in the public interest, it was wrong to make an individual the focus of the story which could have been written without mentioning him or her. The reference to Tony Blair's daughter appeared to arise solely from the position of her father.

The Commission went on to consider whether there was an exceptional public interest which justified the reference to Miss Blair in the circumstances. It said that it believed it would be permissible to name the children of public figures in newspaper articles in a manner proportionate to the issues and facts involved in circumstances where:

- there is reasonable substance to a charge or allegation that provides the exceptional public interest required by the Code; and
- it is necessary to report the story and to identify the child because that child, and that child alone, had to be the centre of the story.

The Commission could find no justification for naming Miss Blair alone in connection with the admissions policy of the school nor, on the facts, was there reasonable substance to the allegations in question.

The Broadcasting Standards Commission

The BSC is the statutory body that monitors and sets standards and fairness in broadcasting. The Broadcasting Act 1996 places the BSC under a duty to draw up and review Codes of Practice on certain areas which include the unwarranted infringement of privacy in or in connection with the obtaining of

42 (1999) PCC adjudication, 20 July.

material to be included in programmes.[43] It is also the duty of the BSC to consider and adjudicate on complaints made to them under the Codes of Practice.[44] The BSC Codes of Practice are in part based on those of the former Broadcasting Standards Council, which the BSC replaced. The Codes apply to all broadcasters of radio and television programmes.

The Code on fairness and privacy provides that any invasion of privacy must be justified by an overriding public interest in the disclosure of the information. This, the Code provides, would include revealing or detecting crime or disreputable behaviour, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing significant incompetence in public office.[45] Privacy may be infringed during the obtaining of material for a programme, even if none of the material is broadcast, as well as in the way in which material is used within a programme.[46]

The Code distinguishes people who are in the public eye through the position that they hold or the publicity they attract from non-public figures. However, it stresses that not all matters which are interesting to the public are in the public interest: 'Even where personal matters become the proper subject of inquiry, people in the public eye or their immediate family and friends do not forfeit the right to privacy, though there may be occasions when private behaviour raises wide public issues either through the nature of the behaviour itself or by the consequences of its becoming widely known. But any information broadcast should be significant as well as true.'[47]

In relation to non-public figures, the Code cautions that the private lives of most people are of no legitimate public interest and consent must generally be obtained in relation to the broadcast of information which is not in the public domain.[48]

The means of obtaining the information must also be proportionate to the matter under investigation.[49] The Code covers such issues as the use of hidden microphones and cameras,[50] the conduct and recording of telephone calls[51] and 'doorstepping'.[52] There are special provisions relating to dealings with individuals who are suffering and distressed,[53] and children.[54]

43 Broadcasting Act 1996, s 107.
44 *Ibid*, s 110.
45 Clause 14.
46 Clause 15.
47 Clause 17.
48 Clause 16.
49 Clause 14.
50 Clauses 18–21.
51 Clauses 22–24.
52 Clauses 25–27.
53 Clauses 28–31.
54 Clause 32.

The ITC Code

The ITC sets the standards for the programme content of commercial broadcasters. Its functions are not limited to adjudications on complaints. It has the power to require compliance with a range of effective sanctions which are considered in Chapter 16.

Section 2 of the ITC Programme Code regulates privacy and the gathering of information. The Code refers to the individual's right to privacy, but makes the point that there are occasions where the individual's right to privacy must be balanced against the public interest. 'Public interest' is not defined but, by way of example, the Code refers to the detection or exposure of crime or serious misdemeanour, the protection of public health and safety, preventing the public being misled by some statement or action of an individual or organisation or exposing significant incompetence in public office. The Code provides, that even where there is a public interest in the broadcast, the act in question must be proportional to the interest served.

Where members of the public are filmed or recorded in public places, the broadcaster must satisfy itself that the words spoken or actions taken by the individuals are sufficiently in the public domain to justify their broadcast without express permission being sought from the individuals concerned. Where they are not sufficiently in the public domain, consent should be sought.

Interviews or conversations conducted on the telephone should not normally be recorded for inclusion in a programme unless the interviewer has identified himself as speaking on behalf of the broadcaster, has described the general purpose of the programme and the interviewee gives consent to the use of the conversation in the programme. The Code provides that, in exceptional cases, these requirements may not be observed, for example, in relation to matters involving the investigation of allegedly criminal or disreputable behaviour. In such cases, the consent of the broadcaster's most senior programme executive should be sought before the material is broadcast and a record of such consents should be maintained and made available to the ITC on request.

The use of hidden microphones and cameras to record individuals who are aware that they are being recorded is acceptable only when it is clear that the material so acquired is essential to establish the credibility and authority of a story and where the story is equally clearly of important public interest. The Code provides that the consent of the broadcaster's most senior programme executive be obtained before the recording (where practicable) and the transmission of the material in question and that records of this consultation process should be kept and made available to the ITC on its request.

Interviews sought on private property without the subject's prior agreement should not be included in a programme unless they serve a public

interest purpose. The same consideration applies to other places where the individual would reasonably expect personal privacy, such as restaurants and churches. Reporters and crews should leave 'media scrums' (involving large numbers of representatives from different organisations typically gathered outside the subject's home, the combined effect of which can be intimidating or unreasonably intrusive) unless there is a continuing public interest in their presence.

There are relatively few ITC adjudications or statements which concern violations of the right to privacy. In early 1998, the ITC issued a formal warning to Live TV for what it termed a serious breach of the Programme Code requirements on privacy. The violation concerned secretly filmed footage of Piers Merchant (a former MP) and a young woman in bed together, clearly indicating sexual activity between them. Mr Merchant had resigned as an MP a few days previously, following a storm of media activity about his alleged relationship with the woman in question.

As seen above, the Programme Code specifies that secretly filmed footage is acceptable only where it is acceptable to establish the credibility and authority of a story and where the story itself is clearly in the public interest. Live TV argued that the footage provided the first conclusive footage that Mr Merchant had consistently lied about his relationship with the woman, making the story one of important public interest. Only selected scenes had been shown – the more explicit material had been excluded.

The ITC did not accept these arguments. It concluded that the showing of such intimate and private material required a much stronger public interest justification. Further, the amount of footage shown exceeded that necessary to establish the credibility of the story.

Live TV had not itself shot the footage, but had acquired it from an independent source. It questioned whether such material should be treated in the same way under the Code. The ITC thought that the extent of the invasion of privacy was in no sense lessened by the material being supplied by an external source.

The Radio Authority also operates a Code of Practice which is in similar terms to the ITC Code.

The BBC producers' guidelines

The producers' guidelines contain comprehensive guidance about privacy and newsgathering. In general terms, they provide as follows:

They state that it is essential that the BBC operates within a framework which respect people's right to privacy, treats them fairly, yet allows the investigation of matters which it is the public interest to know about. Intrusions into privacy must accordingly be justified by the greater good.

Hidden recording and filming must only be used where appropriate, and records must be kept of consultations involving such techniques.

The guidelines make specific references to the privacy of public figures. They recognise that public figures are in a special position, but that they retain rights to a private life. The public should be given facts which bear upon the suitability and ability of the individual to perform their duties, but there is no general entitlement to know about their private behaviour unless broader public issues are raised either by the behaviour itself or by the consequences of it becoming widely known.

The Committee of Advertising Practice Code of Practice

The Committee of Advertising Practice Code of Practice is considered in relation to merchandising rights in Chapter 14.

Judicial review, the Codes and privacy

The ITC and the BSC have both been held to be susceptible to judicial review. By analogy, it is probable that the PCC would also be amenable, although the point is yet to be determined by the courts.[55] As we have seen in Chapter 1, it also probable that where a body is amenable to judicial review, it will also be a public authority for the purposes of the Human Rights Act 1998.

Decisions under the Codes of Practice might therefore be subject to review by the courts in the circumstances outlined in Chapter 2. Most applications to date have been based on a complaint that the body has acted unreasonably in reaching its decision or that it acted outside its authority. The courts have been able to resolve the application on the basis that the authority has acted within the scope of its authority (or not) and that the decision is one which a reasonable authority could have reached.

However, under the Human Rights Act there will be a new ground for judicial review where the body in question is claimed to have acted incompatibly with the Convention rights referred to in the Human Rights Act 1998[56] (which include the right to respect for home and family life under Art 8). A consideration of this type of claim will involve the courts answering either yes – the decision is compatible with Art 8, or no – it is not. Over time, a body of law on the scope and ambit of Art 8 is likely to emerge.

55 During the passage of the Human Rights Bill through Parliament, the Government indicated that the PCC would be a public authority for the purposes of ss 6 and 7 of the Act.

56 HRA 1998, ss 6 and 7.

Applications which concern the body's application and interpretation of the privacy provisions of the Codes have come before the courts on judicial review applications.

Examples

R v PCC ex p Stewart-Brady[57]

The applicant in that case was Ian Brady, one of the infamous 'moors murderers'. He was a patient at Ashworth Hospital. He sought judicial review of a PCC decision concerning an article which had appeared in *The Sun* accompanied by a photograph of Mr Brady in the hospital. The photograph had been taken with a long lens camera. Mr Brady complained that the photograph was a breach of clause of the privacy provisions of the Code of Practice together with provisions of the Code relating to hospitals and harassment. The PCC rejected the complaint. Mr Brady sought leave to apply for judicial review of the PCC's decision.

The Court of Appeal felt that the article was justified in the public interest; it concerned the treatment in hospitals of persons who had committed crimes. It then went on to consider whether the appearance of the photograph of Mr Brady alongside the article changed the public interest position. It observed that the photograph was indistinct and appeared to show Mr Brady in profile through the hospital window. Millett LJ observed that from looking at the photograph, it was not obvious that Mr Brady was in private or on private property.

Lord Woolf did not think that there had been a breach of the Code. His judgment is not as clear as it might have been on this point, but he appeared to be of the view that, given that the photographer had not intruded on private property, 'any privacy of the individual is completely removed'. Even if there was a breach, he did not think that it was a serious one. The PCC was entitled to come to the conclusion that the breach did not warrant censure.

Millett LJ observed that, whilst one could object to how the photograph had been obtained, one could not object to what was actually depicted in the photograph. It was an indistinct picture and not in itself objectionable. It had been taken without intrusion or harassment and without any 'exploitation of the vulnerability of the subject'. In the light of the above, and given that the picture was used to illustrate a story in the public interest, it was not, he said, necessary for the courts to interfere with the PCC's decision.

This decision serves to give pause to those parties who believe that nothing short of a judicially administered right to privacy will serve to protect

57 (1996) 18 November. On an application for leave to apply for judicial review against a decision of the PCC, the PCC reserved its position as to whether it was amenable to judicial review until the full hearing. As it happens, the court declined leave.

the interests of the public against the prying eyes of the media. The judicial reasoning reflects a limited interpretation of what is meant by 'privacy'. It seems to be out of step with current PCC adjudications, as set out above. It is submitted that the court erred in using the nature of what was depicted in the photograph as its starting point. The key point ought to have been whether Mr Brady was photographed in a public or private place where he had a reasonable expectation of privacy (cl 3 of the Code). A hospital would seem to meet this test without much difficulty – this is supported by clause 9 of the Code (privacy and hospitals). Assuming that Mr Brady had a reasonable expectation of privacy, the next question was whether there was justification for its violation – such as the relationship between the article and the photograph. The fact that the photograph was indistinct or that the photographer was not on private property when he took the picture ought to be irrelevant. In any event, Millett LJ's view that there was no exploitation of the vulnerability of Mr Brady is naïve. The taking of, and publication of, the picture was exploitation of Mr Brady's status and position in itself.

R v Broadcasting Standards Commission ex p BBC[58]

The BBC applied for judicial review of a decision of the BSC whereby it upheld a complaint by Dixons Retail Ltd against the BBC of an unwarranted infringement of privacy in the making of a 'Watchdog' programme. The complaint concerned secret filming by the BBC of 12 sales transactions at various branches of Dixons. The filming was carried out with a view to demonstrating that Dixons were in the habit of misrepresenting second hand goods as new (the secret filming did not produce evidence to this effect and the material obtained by the filming was not ultimately used in the programme, although reference was made to the transactions which had been filmed).

In its adjudication, the BSC found that the secret filming was an infringement of Dixon's privacy. The BBC sought review of this decision on three grounds as follows:

- a company or body corporate cannot enjoy a right to privacy;
- privacy cannot apply to the filming of events to which the public has access; and
- the decision of the BSC was unreasonable or failed to have regard to relevant factors.

The Court of Appeal adopted a narrow focus and confined its decision to the functions of the BSC as laid down in the Broadcasting Act 1996 and the application of the BSC Code of Practice. The appeal judges went out of their

58 *R v Broadcasting Standards Commission ex p BBC* (2000) unreported, 6 April, CA.

way to stress that they were not laying down principles of privacy *law*, or even principles which might apply in a wider context.[59] The appeal court held that

- for the purposes of the Broadcasting Act 1996 and the BSC Code of Practice, a body corporate could claim to the BSC of an unwarranted intrusion of its privacy;
- on the question of filming in a public place, the Court of Appeal held that the BSC acted reasonably in reaching its decision that secret filming could violate rights of privacy even where it took place in a public place. The court did not attempt to give an indication of whether this decision was correct as a matter of law;[60]
- accordingly, the decision of the BSC that there had been a violation of Dixons' privacy stood under the BSC Code of Practice.

The court stressed that the Code of Practice did not have legal status. Lord Mustill opined 'the task of the Commission is not to declare and enforce sharp-edged legal rights, but rather to establish and by admonition uphold general standards of decent behaviour. This regime leads itself to an expanded reading of privacy'.

All three judges indicated that if they had been considering the ambit of the legal right, the right would have been less extensive than the right which prevailed under the Codes.

THE ROLE OF THE CODES OF PRACTICE IN THE FUTURE

Some commentators have observed that the Human Rights Act 1998 has permitted the introduction of a right to privacy through the back door so far as the media are concerned.[61] The Act could have this effect in the following ways:

- the availability of judicial review against public authorities is likely to continue to involve the courts in a review of the decisions of the PCC, the ITC and Radio Authority and the BSC on the privacy provisions of the Codes. However, if the court's judgments follow the Court of Appeal's approach in the *BBC* case, a distinction will emerge between the Codes, which do not have the force of law, and the law. The Codes are likely to be interpreted more widely than any law of privacy would be;

59 With the exception of the speech of Lord Mustill, which contained a detailed opinion of the nature of the right to privacy in general.

60 At first instance, Forbes J had held this finding to be irrational.

61 See, eg, Lord Wakeham in (1997) *Mail on Sunday*, 2 November.

- significantly, under s 7 of the Human Rights Act, a judicial review application might be on the ground that the body has failed to have adequate regard for the Convention right to respect for home and family life in reaching its decision. Over time, a body of law is likely to emerge on the relationship between the decisions under the Codes and the Convention right to respect for private and family life, especially where the regulatory bodies do not give adequate protection to privacy (a complaint often levelled at the PCC). The Lord Chancellor told Parliament that 'it is strong and effective self-regulation if it – and I emphasise the if – provides adequate remedies which will keep these cases away from the courts';[62]
- in cases where the court is considering granting relief which could affect freedom of expression, one of the matters which the court must consider is whether any relevant privacy Code has been complied with by the defendant. The Codes will accordingly become subject to consideration by the court in private law actions involving considerations of privacy. But compliance with the Codes will not automatically mean that a remedy ought not to be granted against the defendant. For example, if the courts do not think that the Codes are sufficiently stringent to deal with a particular case, relief may be granted notwithstanding that the Codes may have been complied with.

This scrutiny and consideration by the judiciary in private law actions is likely to lead to a body of judicial comment about the Codes which may result in the establishment of a *de facto* right to privacy – albeit one which principally arises through the system of self-regulation.

One wonders whether the government has had this Machiavellian intention all along – fighting shy of blatantly legislating for a right of privacy, but adopting a course which may gradually, and indirectly, achieve the same result.

All of this is, of course, speculative. One thing is sure: there are interesting times ahead.

62 *Hansard*, HL, 3.11.1997, col 1229.