



## The Legal Protection of Privacy in South Africa: A Transplantable Hybrid

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### I. Threats to Privacy

Threats to individual privacy are greater now than ever envisaged, even by an Aldous Huxley or George Orwell. Global technologies and convergence facilitate the dissemination of information but, at the same time, pose enormous threats to individual (and corporate) confidentiality. The powers of a 'Big Brother' are no longer restricted to governments, political parties or the wealthy but extend to ordinary individuals. Accessible technological advances place greater opportunities for surreptitious surveillance in the hands of ordinary persons who access personal information for their own use or are used by the state to access such information. A comprehensive personal dossier can now take minutes to compile electronically and a digital camera or mobile phone can record images in an infinite variety of ways and circumstances.

If the law does not recognize the protection of individual privacy as a hallowed right, then a combination of governmental knee-jerk reaction to perceived terror threats and individual exploitation of the intrusive potential of electronic communications and data capture might signal the demise of what little privacy we have.

The European Court of Human Rights has recently held that telephone calls and e-mails from a business fall under 'private life' and 'correspondence', are subject to a reasonable expectation of privacy and that monitoring of these communications constitutes a breach of Article 8 of the European Convention on Human Rights (ECHR).<sup>1</sup> The Court did, however, leave open the possibility of monitoring in terms of a specific law or where proper notice is given, but the judgment is a timely reminder of the need to protect the privacy of individual communications.

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<sup>1</sup> *Copland v UK* [2007] ECHR 253.

## II. The Basis for Legal Protection of Privacy

'Privacy', 'dignity', 'identity' and 'reputation' are facets of personality. Paradoxically invoked by those who have bartered a measure of their private sphere for celebrity status, privacy has lost some of its perceived value as a requisite for individual growth. Naturally, we are sceptical about reliance on the protection of private sphere, in particular by those who make a living out of being in the public eye. But, it is the *financial benefit* derived from this celebrity status that really blinds us to the reality that although celebrities may have voluntarily circumscribed their own sphere of privacy, even *they*<sup>2</sup> have a residual private realm. All of us have a right to privacy and this right, together with the broader, inherent right to dignity, contributes to our humanity.

Of course, a balance is needed between respect for our private spheres *and* the involvement of others in our lives. We are fully human not only through engagement with other human beings, but also because others show respect for our private domain. In a sense, the African concept of *ubuntu* (we are human through others) highlights a spirit of interconnectedness or collectivity rather than individual privacy.<sup>3</sup> It is the personality rights of dignity and privacy that underscore individuality and set both the limits of humanity and of human interaction. A community-centred *ubuntu* needs to be complemented by the individualism implicit in the fundamental personality rights of dignity and privacy. But, the reasons for protecting privacy are wider than just protecting the dignity of the individual. Those who engage in e-commerce are uneasy about the unregulated communication of personal information and an argument is advanced that trade will be facilitated by uniform privacy laws.

The legal (as opposed to media) protection of privacy can be derived from a variety of sources, the three major tributaries being the common (or civil) law (usually the law of delict or tort), a Bill of Rights<sup>4</sup> and legislation. This article will argue that, based on South African experience, these streams do not necessarily flow independently and, in fact, their confluence increases the potential power of the resultant protection of privacy. Ultimately, though, the major source of legal protection of privacy should lie in the law of tort or delict for the reasons advanced in this article.

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<sup>2</sup> And their families: see *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446 (J K Rowling's son who was photographed in his stroller with his parents). Apparently Halle Berry is also litigating in the United States for photographs taken by the paparazzi of her children at play at home. She is suing for trespass: *Cape Times* 28 July 2008.

<sup>3</sup> It is perhaps significant that the African Charter of Human and People's Rights adopted in June 1981 does not refer to privacy rights: see *Privacy and Data Protection* South African Law Reform Commission, Discussion Paper 109, Project 124, October 2005, 17.

<sup>4</sup> The protection of the right to privacy in the United States of America can be traced back to the pioneering article by Warren and Brandeis in the (1890) 4 *Harv LR* 193 (apparently prompted by Mrs Warren's annoyance at the constant attention given by the Boston press to the social activities of her family: John H F Shattuck *Rights of Privacy* (1977) 145).

Privacy is most often seen as a fundamental personality right deserving protection either as part of human dignity<sup>5</sup> or, if not subsumed under dignity, nevertheless warranting independent, but similar, protection to other facets of personality rights like dignity or reputation.<sup>6</sup> The argument for recognizing privacy is an independent right really only acquires significance where the concept of impairment of dignity is given a narrow focus, linked to insulting behaviour. If however, dignity is given its true human rights sweep, ranging beyond mere prevention of insulting conduct, then privacy can rightly find its place as part of the fundamental right to human dignity. Aspects of individual autonomy are more appropriately located within his broad concept of 'dignity' than under an artificially extended concept of 'privacy', as in the United States of America.<sup>7</sup>

Systems of tort (or delict) derived from the Roman *actio iniuriarum*, like those in South Africa and Scotland, have the immediate advantage of being able to locate a law of privacy within the civil-law protection of dignity. Common-law systems lacking such a convenient host have to grow their own law of privacy, possibly using as inspiration the protection of privacy contained in a Bill of Rights.<sup>8</sup> Perhaps the South African protection of privacy, which reveals both civil law and Constitutional strands, may provide some guidance in developing a viable law on invasions of privacy in Scotland. The mutually beneficial interaction between protection of privacy under the modern law of delict in South Africa *and* protection of privacy under the South African Constitution could even provide inspiration for development of a comprehensive law of privacy in the rest of the United Kingdom.

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<sup>5</sup> See Jonathan Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) Juta and Co Ltd; B Markesinis et al 'Concerns and Ideas About the Developing English Law of Privacy (and How Knowledge of Foreign Law Might be of Help)' (2004) *52 American Journal of Comparative Law* 133 at 153.

<sup>6</sup> Lord Hoffmann in *Campbell v MGN Ltd* [2004] 2 All ER 995 (HL) at para [51] recognised this when he said about privacy:

Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity—the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.

The esteem and respect of others is really a matter for the field of defamation (or libel and slander) but privacy is correctly linked to dignity and autonomy.

<sup>7</sup> In the United States of America 'privacy' of necessity includes individual autonomy and decision-making because there is no developed concept of 'dignity' under the Constitution and its amendments. If the framers of the United States Constitution had included 'dignity' as a fundamental right as well as privacy, like the framers of the 1996 South African Constitution, there would have been no need to overburden the concept of 'privacy'.

<sup>8</sup> In the context of aggravated damages, Professor Birks did suggest that there is an *actio iniuriarum* lurking in the English law (P B H Birks 'Harassment and hubris, the right to equality of respect' (1997) *32 Irish Jurist* 1) but this observation does not seem to have been followed up in other areas of the law of tort. Morgan at 462 comments that resort in the English law to an *actio iniuriarum* is 'akin to outright legislation' and that such an approach 'remains far out of normal "interpretative reach"'. The same conclusion, of course, does not apply to the Scots law!

If the Court of Appeal judgment in *Murray v Big Pictures (UK) Ltd*<sup>9</sup> is a prediction of the future, the protection of privacy in the United Kingdom, encouraged by a case whose facts incidentally arose in Edinburgh, may already be developing along lines not dissimilar to those in South Africa. The progress that has been made is aptly described by Eady J in the latest High Court pronouncement in *Mosley v News Group Newspapers*:<sup>10</sup>

The cause of action now commonly described as infringement or breach of privacy, involving the balancing of competing Convention rights, usually those embodied in Articles 8 and 10, has recently evolved from the equitable doctrines that traditionally governed the protection of confidential information.

### III. Differences and Similarities in the Human Rights Milieu

Before describing South Africa's 'long walk' to privacy, attention should be drawn to some peculiarities arising from the South African Constitution of 1996 and its interpretation. Framers of the interim and the final South African Constitutions were able to benefit from the merits, and strive to avoid the pitfalls, of other international human rights instruments. Similarly, the drafters of the two versions of the South African Constitution were obviously cognisant of the considerable jurisprudence on the 'horizontal' debate in other jurisdictions. Therefore, the final version of the South African Bill of Rights specifically states that its provisions bind the judiciary,<sup>11</sup> natural and juristic persons<sup>12</sup> and, what would seem to be a conclusive indication of directness of application, oblige a court 'in *applying* the provisions of the Bill of Rights to natural and juristic persons' to develop the common law 'to the extent that legislation does not give effect to that right'.<sup>13</sup> Furthermore, there is an injunction in the Constitution to judges in *interpreting* any legislation or developing the common and customary law to promote the 'spirit, purport, and objects of the Bill of Rights'.<sup>14</sup>

The Constitutional Court, invoking these incentives, has underscored the application of the Bill of Rights (Chapter 2 of the Constitution) to relationships between private individuals, as well as between State and the individual. In *Khumalo v Holomisa*,<sup>15</sup> the Constitutional Court

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<sup>9</sup> [2008] EWCA Civ 446. The Court of Appeal referred to the following factors in determining whether the child had a reasonable expectation of privacy:

the attributes of the claimant, the nature of the activity in which he was engaged, the place at which it happened, the nature and purpose of the intrusion, the absence of consent, the effect on the claimant and the circumstances in which, and the purposes for which, the information reached the hands of the publisher.

The Court of Appeal, adopting an objective test of the reasonable person and emphasizing the rights of children, held that there was an arguable case of invasion of privacy (breach of Art. 8 ECHR), sufficient to proceed to trial, despite the celebrity status of the child's parents and the day-to-day activities which were photographed without consent.

<sup>10</sup> [2008] EWHC 1777 (QB) at para 181.

<sup>11</sup> Section 8(1) of the 1996 Constitution. Section 7(1) of the 1993 Interim version of Constitution did not include the 'judiciary'. Although the United Kingdom Human Rights Act does not specifically apply Convention rights to *all* law it does impose obligations to act compatibly with the Convention on 'courts and tribunals' under Art. 6(1).

<sup>12</sup> Section 8(2) of the Constitution of the Republic of South Africa, 1996.

<sup>13</sup> Section 8(3) of the Constitution, 1996 (emphasis added).

<sup>14</sup> Section 39(2) of the Constitution, 1996.

<sup>15</sup> 2002 (5) SA 401 (CC).

held that a defamation action between two private parties was *directly* affected by provisions in the Constitution, in particular the freedom of expression and dignity provisions.<sup>16</sup>

Furthermore, historical conditions in South Africa prior to the democratic transition impelled a Constitution that not only reaffirmed the inherent dignity, equality and freedom of all, but one that went well beyond most other human rights instruments by providing protection for socio-economic rights. The South African Constitution is a transformative instrument.

Obviously, there are *differences* in the ethos leading to the ECHR and the background to the Bill of Rights in the South African Constitution of 1996 and there are *variations* in the wording of the two documents. Also there does not appear to be a clear consensus among commentators in the United Kingdom on the extent of horizontal effect, if any, on the private law and especially on the possible emergence of a protectable right to privacy, of the provisions of the ECHR via the Human Rights Act of 1998.<sup>17</sup> The last word has obviously not yet been written on this topic, but the judiciary in the United Kingdom is required by Section 6 of the Human Rights Act to have regard to the Convention in developing the common law. Like Section 39(2) of the South African Constitution, this would acknowledge at least an 'indirect' or 'weak' version of horizontality (whereby the courts must take into account the values on the Convention in common-law adjudication).<sup>18</sup>

Despite these differences, there are major broad *similarities* between the European and South African human rights provisions, especially regarding the scope of privacy and the qualified nature of rights in terms of a limitation clause, reflecting the reasonableness and justifiability of an infringement of rights in its South African version and public benefit or interest in the ECHR limitation on the Article 8 right to privacy. These similarities are sufficient to suggest that the South African Constitutional jurisprudence on the meaning and scope of privacy

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<sup>16</sup> The assessment of damages in a civil suit might be seen as the classic preserve of a trial judge taking into account guidelines set out in cases decided under the common law. Recently, the majority of the South African Constitutional Court in *NM v Smith (Freedom of Expression Institute as Amicus Curiae)* 2007 (7) BCLR 751 (CC) granted leave to appeal to the Constitutional Court on a matter concerning the private law governing invasion of privacy (despite the fact that the High Court and the Supreme Court had dismissed applications for leave to appeal on the matter) and proceeded to deal with the appeal. The Constitutional Court examined the sweep of the common law of privacy against fundamental concepts of dignity and privacy, upheld the appeal and set aside the order made by the trial judge, and reassessed the quantum of damages! If one were looking for an example of Constitutional jurisprudence influencing the development of the common law and the resolution of private disputes in South Africa one could hardly ask for a more vivid one. Interestingly, the majority of the Constitutional Court has not similarly embraced direct application of the Bill of Rights to a contractual setting in *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC), but compare the dissent of Langa CJ at para 186: see Stu Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *SALJ* 762 at 774-5.

<sup>17</sup> The debate between Lord Justice of Appeal Buxton and Professor H W R Wade epitomises the dispute: Richard Buxton 'The Human Rights Act and Private Law' (2000) 116 *LQR* 48 (against the notion of horizontal effect of the Convention rights on the private law) and H W R Wade 'Horizons of Horizontality' (in favour of horizontal effect and the development of the common law in order to adequately protect privacy). Murray Hunt 'The "Horizontal Effect" of the Human Rights Act' [1998] *PL* 423 clearly favours a horizontal effect on the private law for Convention rights but shies from accepting its full effect by stating that the extent of horizontality will fall short of conferring 'any new private causes of action against individuals in respect of breach of convention rights'. Jonathan Morgan 'Privacy, Confidence and Horizontal Effect: "Hello" Trouble' (2003) 62 *Cambridge LJ* 444 has convincingly demonstrated that, while breach of confidence can do some of the work of an action for protection of privacy, it 'cannot protect the whole sphere of privacy' (at 452).

<sup>18</sup> See Tanya Aplin 'The Future of Breach of Confidence and the Protection of Privacy', (2007) 7 *Oxford University Commonwealth Law Journal* 137 at 165.

could provide comparative inspiration to United Kingdom courts in interpreting the Human Rights Act incorporating Article 8 ECHR.

In short, on-going development of a modern *actio iniuriarum* providing for a viable remedy for invasions of privacy in South Africa might provide inspiration for similar growth of the law of tort in Scotland. Development of South African *Constitutional* jurisprudence on privacy, which both informs and is informed by the *actio iniuriarum*, could provide the rest of the United Kingdom with a comparative catalyst for encouraging the protection of privacy between private parties<sup>19</sup> to grow out of, and even beyond, breach of confidence.

### III. The South African Concept of Privacy

A brief sketch of the journey of the South African law on invasions of privacy from Roman law to the modern *actio iniuriarum* will give an idea of the current meaning of ‘privacy’, scope of the action for damages for invasion of privacy and the major defences which are used to balance freedom of expression against privacy.

#### *Roman Law Beginnings*

Roman jurists recognized a number of specific instances where a remedy (usually under the *actio iniuriarum*) was provided for a wrong which could be interpreted as an impairment of privacy: for instance, invasions of the sanctity of the home.<sup>20</sup> Blecher has suggested that the Roman law did not lack the means to protect privacy, although it might have lacked the need to do so.<sup>21</sup>

#### *Case Law on Privacy Emerges*

The need to protect privacy in South Africa emerged in the early 1950s in a case whose facts are not dissimilar to those of the classic English case of *Tolley v Fry & Sons Ltd* in 1931.<sup>22</sup> In the South African version (*O’Keeffe v Argus Printing and Publishing Company Ltd*),<sup>23</sup> the plaintiff who was a well-known radio personality had consented to the publication of her photograph, taken at a pistol range, being used for the purpose of a newspaper article. The photograph was, however, used in the press for advertising purposes. Watermeyer AJ in the Cape Supreme Court turned immediately to Voet’s Commentary on *Digest* 47.10 for guidance and found examples of what could be classified as invasions of privacy (or *iniuriae*).<sup>24</sup> Also cited was *Tolley v Fry*, but Watermeyer AJ acknowledged that that case was decided on the basis of defamation. It is significant that the Cape Supreme Court judge quoted a passage, not

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<sup>19</sup> The compatibility of the conduct of *public authorities* that infringe personal privacy can be tested against the privacy right in Article 8 ECHR.

<sup>20</sup> D 47 10 23; D 47 10 5pr; D 47 2 21 7. See also Johannes Voet *Commentarius ad Pandectas* (1698-1704) translated by Percival Gane 47 10 7. Case law also recognizes this type of infringement (akin to trespass): *De Foud v Town Council of Cape Town* (1898) 15 SC 399; *S v I* 1976 SA 781 (RA); *S v Boshoff* 1981 (1) SA 393 (T); and *Pretoria Portland Cement Co Ltd v Competition Commission* 2003 (2) SA 385 (SCA) at 408-9, 411.

<sup>21</sup> M D Blecher ‘Privacy in the Civil Law’ (1975) *Tijdschrift Voor Rechtsgeschiedenis* 279-96. In Roman-Dutch law, making public details of a person’s bodily disabilities constituted an *iniuria*: Voet (op cit n 20) 47. 10.8: J Neethling ‘The right to privacy, HIV/AIDS and media defendants’ (2008) 124 *SALJ* 36 at 42.

<sup>22</sup> [1931] AC 333.

<sup>23</sup> *O’Keeffe v Argus Printing and Publishing Company Ltd* 1954 (3) SA 244 (C).

<sup>24</sup> Watermeyer AJ acknowledged, however, that some of the examples referred to by Voet (such as the abduction of a matron’s attendant and so exposing the matron to the degradation of being seen unattended) would hardly be regarded in more modern times as invading privacy.

from the judgments in the House of Lords in *Tolley*, but rather from Greer LJ's prescient judgment in the Court of Appeal, concluding that the defendants had 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'.

After a brief reference to the fact that, in the United States, the unauthorised publication of a person's photograph for advertising purpose is actionable, Watermeyer AJ dismissed the exception to the plaintiff's claim in *O'Keeffe*, holding that the plaintiff could 'reasonably be held to have been subjected to offensive, degrading or humiliating treatment' and that this constituted an 'aggression upon that person's *dignitas*'.<sup>25</sup> For the benefit of future cases, he added:

Much must depend upon the circumstances of each particular case, the nature of the photograph, the personality of the plaintiff, his station in life, his previous habits with reference to publicity and the like.

From this modest, but auspicious, beginning the South African courts started to fashion a concept of privacy that now provides a remedy for the public disclosure of private facts extending to: the publication of details regarding an alleged romance between the plaintiff and a singer;<sup>26</sup> disclosing a person's relationship with a celebrity;<sup>27</sup> the publication of facts concerning the removal of children from the custody of their parents;<sup>28</sup> the publication of the photographs of policemen 'nominated' by counsel as the assaulters of a person held in custody;<sup>29</sup> and the disclosure by a doctor on a social occasion of the HIV-positive status of a patient.<sup>30</sup> Some of these disclosures could also amount to a breach of 'informational or data' privacy and the draft Protection of Personal Information Bill of 2005<sup>31</sup> elaborates on the definition of protected 'personal information' for the purpose of the protection of personal privacy.

The courts over the years also recognised unreasonable intrusions into the private sphere as actionable: bugging a person's room,<sup>32</sup> listening to private telephone conversations,<sup>33</sup> spying on someone while she was undressing,<sup>34</sup> reading private documents,<sup>35</sup> unauthorized blood

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<sup>25</sup> J Neethling *Personality Law* 285 regards *O'Keeffe* essentially as an infringement of identity case. Neethling sees dignity, privacy and identity as separate personality rights but, as was recognised *Khumalo v Holomisa* 2002 (5) SA 401 (CC) no sharp lines can be drawn between reputation, dignitas and privacy in giving effect to the value of human dignity in our Constitution' (para [27]) and the South African courts have included 'reputation' under 'dignity' for the purposes of reading the protection of reputation into the Constitution (see the cases cited in *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) 139. The Constitutional Court has clearly emphasised that privacy includes individual identity: see *NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)* 2007 (7) BCLR 751 (CC), discussed below 11-13. Furthermore, there seems to be no convincing reason to rigidly compartmentalise personality rights.

<sup>26</sup> *Mhlongo v Bailey* 1958 (1) SA 885 (E).

<sup>27</sup> *National Media Ltd v Jooste* 1996 (3) SA 262 (A).

<sup>28</sup> *Rhodesian Printing and Publishing Co Ltd v Duggan* 1975 (1) SA 590 (R).

<sup>29</sup> *La Grange v Schoeman* 1980 (1) SA 885 (E).

<sup>30</sup> *Jansen van Vuuren NO v Kruger* 1993 (4) SA 842 (A).

<sup>31</sup> *Infra* nn 73 and 77.

<sup>32</sup> *S v A* 1971 (2) SA 293 (T).

<sup>33</sup> *Financial Mail Pty Ltd v Sage Holdings (Pty) Ltd* 1993 (2) SA 451 (A).

<sup>34</sup> *R v Holliday* 1927 CPD 395. See also *MEC for Health, Mpumalanga v M Net* 2002 (6) SA 714 (T) at 718-9, 721.

<sup>35</sup> *Reid-Daly v Hickman* 1981 (2) SA 315 (ZA) at 323.

tests<sup>36</sup> and harassment<sup>37</sup> fell into this category. Certain unreasonable intrusions into the private sphere were recognised by the courts as being sufficiently serious to warrant liability for *criminal* invasion of privacy, in the form of *crimen iniuria*.<sup>38</sup>

Over fifty years since *O'Keefe* was decided, the South African Supreme Court of Appeal has recently affirmed in *Grütter v Lombard*<sup>39</sup> the right to personal identity, including a person's likeness and name. Endorsing the statement of O'Regan J in the Constitutional court in *Khumalo v Holomisa*,<sup>40</sup> that 'no sharp lines' can be drawn between various facets of personality rights 'in giving effect to the value of human dignity in our Constitution', Nugent JA in *Grütter* concluded that the right to identity, subject of course to any defences based on legal policy,<sup>41</sup> is protected under the South African law.

Over the years, the remedy for invasion of privacy in South Africa has even been extended to protect a *juristic* person's confidential sphere<sup>42</sup> but, as we will see later, the Constitutional Court has emphasized that as a person moves into business activities 'the scope of personal space shrinks accordingly'<sup>43</sup> and this would apply both to natural and juristic persons. Extending the remedy for invasion of privacy to corporate entities may prove somewhat controversial for other jurisdictions that might prefer to keep a discreet area of corporate confidences and trade secrets, regulated by a separate body of the law,<sup>44</sup> especially where there is already accumulated jurisprudence on the practices of the market place and the boundaries of corporate ethics. In South Africa, cases of unlawful competition or trade interference (including misuse of confidential information), where the loss is purely economic, would fall under the *lex Aquilia* (but based on *intentional* infliction of harm).

The development of the law of privacy in South Africa was encouraged by two obvious catalysts: (i) the continued existence of the Roman *actio iniuriarum* as a source of protection of personality rights, especially those of a dignitary nature; and (ii) the fact that the publication of truth alone was not even a defence to a defamation action—the disclosure of the truth in South Africa has to be 'for the public benefit' as well. Starting in 1878, a long line

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<sup>36</sup> *Seetal v Pravitha* 1983 (3) SA 827 (D) at 861-2; *M v R* 1989 (1) SA 416 (O) at 426-7; *Nell v Nell* 1990 (3) SA 889 (T) at 895-6; *C v Minister of Correctional Services* 1996 (4) SA 292 (T); and *S v Orrie* 2004 (3) SA 584 (T) at 589-1.

<sup>37</sup> Shadowing: *Epstein v Epstein* 1906 TH 87 and *Huey Extreme Club v Mc Donald t/a Sport Helicopters* 2005 (1) SA 485 (C) at 498-9. Some jurisdictions (such as the United Kingdom in 1997) have opted for anti-harassment or anti-stalking legislation (often providing for criminal penalties). However, in South Africa the developed civil action for invasion of privacy and impairment of dignity (as well as the crime of *crimen iniuria*) provide adequate and preferable remedies against harassment and staking.

<sup>38</sup> *S v A* supra n 32. See also above n 37.

<sup>39</sup> [2007] SCA 2 (RSA) at paras [8] to [13].

<sup>40</sup> 2002 (5) SA 401 (CC) at para [27]. Drawing sharp lines between facets of personality can only serve to constrict the ultimate meaning of both privacy and dignity and deny the practical reality that 'personality' often defies compartments.

<sup>41</sup> See para [13] and below VI 'Objective Boundaries of Privacy'.

<sup>42</sup> See *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A) and *Janit v Motor Industry Fund Administrators (Pty) Ltd* 1995 (4) SA 293 (A). See also Section 8(4) of the Constitution which says: 'A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of the juristic person'. There is some authority that because juristic persons are not bearers of human dignity, their privacy rights may be attenuated: *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) at para [18].

<sup>43</sup> See below 12.

<sup>44</sup> Section 156 of the National Credit Act 34 of 2005 creates an offence of breach of confidence.



of South African decisions<sup>45</sup> affirmed that the defence was ‘truth for the public benefit’<sup>46</sup> and the most vivid application of this test was in an 1892 judgment of the Cape Supreme Court<sup>47</sup> where it was held that it is not necessarily for the public benefit to ‘rake up the past’. In certain circumstances, persons should be given the opportunity to ‘live down’ their past misdemeanours. Dissemination (or re-publication) of material that is injurious to a living (or even dying) person, where there is no countervailing public benefit, could fall into this category.

Scots lawyers might have cause to smile, with a measure of complacency, about the first catalyst but might join English lawyers in frowning about the second. As Kenneth Norrie points out, in the early Scots cases there was some confusion ‘whether or not the maxim *veritas convicii non excusat*...represented the law of Scotland’ but ‘by 1830 at the latest’ *veritas* was seen as a complete defence.<sup>48</sup> In England, although a select committee of the House of Lords in 1843 recommended that the publication of the truth had to be for the public benefit to be a defence, this recommendation was adopted by Lord Campbell’s Libel Act of 1843 only for the *criminal* law and the view that truth alone is a complete defence subsequently triumphed as far as the English *tort* of libel and slander was concerned. Arguably, this was an unfortunate move in both jurisdictions from the perspective of the development of a remedy for invasion of privacy. But, all is not lost. The objective limits placed by the ECHR on protection of privacy can, arguably, provide the source of a ‘public benefit’ proviso in any action for invasion of privacy in the United Kingdom.

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<sup>45</sup> Cited in Jonathan Burchell *The Law of Defamation in South Africa* (1985) 207 n23. See also *Independent Newspaper Holdings Ltd v Suliman* [2004] 3 All SA 137 (SCA).

<sup>46</sup> There is even authority for this view in a passage from Voet *Commentarius ad Pandectas* 47.10.9.

<sup>47</sup> *Graham v Ker* (1892) 9 SC 185 at 187.

<sup>48</sup> Kenneth McK Norrie *Defamation and Related Actions in Scots Law* 125-6.

In terms of *actio iniuriarum* an infringement of reputation, dignity or privacy has to be based on *intentional* conduct, but recent decisions of the Supreme Court of Appeal<sup>49</sup> and the Constitutional Court<sup>50</sup> on the modern *actio iniuriarum* in South Africa have held that negligence is sufficient for the liability of the media, as opposed to the individual, for defamation. This approach to media liability is endorsed in the context of invasions of privacy by three Justices of the Constitutional Court.<sup>51</sup>

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<sup>49</sup> *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA). Commentators who dispute that *Bogoshi* introduced both a 'reasonable publication' defence and a negligence fault criterion (R Midgley 'Media Liability for Defamation' (1999) 116 *SALJ* 211 at 214-5 and Anton Fagan (2005) 122 *SALJ* 101-6) do not place sufficient emphasis on the following conclusions in the judgment:

- (i) Hefer JA in *Bogoshi* specifically overrules the strict liability basis for defamation by the media in *Pakendorf v De Flamingh* 1982 (3) SA 146 (A) and such overruling would be unnecessary simply in order to create a 'new' defence of 'reasonable publication' because of the already recognized principle that the list of defences excluding unlawfulness is not closed and defences excluding unlawfulness would be available even if strict (no-fault) liability applied; and
- (ii) After establishing the defence of 'reasonable publication' as a defence excluding unlawfulness, Hefer JA explicitly reverts to the 'question of fault' (at para 33). He then reviews the various fault options to strict liability (both intention and negligence) and concludes that the approach in other countries (that 'the media are liable unless they were negligent') places an 'entirely reasonable' burden on the media (at para 36). Hefer JA also specifically emphasizes that 'absence of *animus injuriandi* can plainly not be available to the media defendant' (i.e. a genuine lack of knowledge of unlawfulness cannot alone be a defence for the media, the ignorance or mistake must be reasonable as well in order to excuse) (at para 35). The Judge of Appeal acknowledges that counsel for the defendants rightly accepted that there were 'compelling reasons for holding that the media should not be treated on the same footing as ordinary members of the public by permitting them to rely on absence of *animus injuriandi* and that it was appropriate to hold media defendants liable unless they were not negligent in the circumstances of the case' (ibid). Any previous reference to 'ignorance or mistake at the level of lawfulness' (ibid) is surely meant to refer not to the *unlawfulness* inquiry itself but rather to *fault in regard to unlawfulness* i.e. to ignorance or mistake relating to unlawfulness (or, as it is more commonly described, lack of knowledge of unlawfulness) which, in the case of negligence, would have to be reasonable in order to excuse. If ignorance or mistake must be *reasonable* in order to excuse, then the fault element required for the media cannot be subjectively-assessed intention (as it is in the case of an individual defendant), it must be objectively-assessed negligence. Reference to the word 'legality' in Hefer JA's statement that negligence may well be the 'determinant of the legality of the publication' (ibid) is surely no more than an allusion to 'legal liability' in a broad, non-technical sense?

This approach is endorsed in *Mthembu-Mahanyele v Mail & Guardian Ltd and Another* 2004 (6) SA 329 (SCA) at para 46. However, Lewis JA unfortunately merged the fault and unlawfulness inquiries at para 47.

<sup>50</sup> *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) at para 20 (confirming the Constitutionality of the *Bogoshi* principles).

<sup>51</sup> See Langa CJ, O'Regan and Sachs J in *NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)* 2007 (7) BCLR 751 (CC), discussed below 12-13. Helen Scott 'Liability for the Mass Publication of Private Information in South Africa': *NM v Smith (Freedom of Expression Institute as Amicus Curiae)* (2007) 18 *Stellenbosch LR* 387 at 402 has argued that the 'application of the South African law of defamation regime to the invasion of privacy is inappropriate'. Her conclusion is partly based on the reasoning of other authors who incorrectly dispute that *Bogoshi* introduced a negligence criterion for the media (see above n 48). Scott does, however, acknowledge that the *Bogoshi* judgment introduces a *limited* negligence criterion concerning mistakes regarding the existence of defences excluding unlawfulness (e.g. truthfulness) but not a negligence criterion regarding the elements of the delict of defamation (such as mistaken reference to the plaintiff) (op cit at 395). This approach would seem to involve drawing fine distinctions between mistakes of law and mistakes of fact (is a mistake regarding the defamatory content of words or what constitutes the 'publication' element of the delict, one of law or fact?) and requiring a different fault criteria for aspects of a single delict. Hefer JA in *Bogoshi* at para 35 clearly underscores that he is dealing with 'ignorance or mistake on the part of the defendant regarding *one or other element of the delict*' (my emphasis). A further basis given by Scott for her view is she contends that mistake as to consent must be treated differently from mistake as to truth for the public benefit. Jurisprudentially, however, consent and truth for the public benefit are both defences excluding the unlawfulness of conduct in defamation and invasion of privacy cases (see the comments regarding absence of

As fault in the form of intention is required for the liability of an individual for invading another's privacy and negligence might be sufficient for the liability of the media for invasions of privacy, then absence of fault on the part of the defendant will also be a defence. For instance, if an individual genuinely believed that consent to disclosure of information had been given, then intention (or, as it is called in South Africa, *animus iniuriandi*) would be lacking. If negligence is regarded as sufficient for the liability of the media for invasions of privacy, and there is some recent judicial support for this approach, then a journalist who has taken reasonable steps to verify that consent has been given will have a defence of absence of negligence.

In terms of the law of defamation in South Africa, on proof of the publication of defamatory matter concerning the plaintiff, two presumptions arise; a presumption that the conduct was unlawful and a presumption that the publication was intentional. The first-mentioned presumption can be rebutted by proof of a defence excluding unlawfulness<sup>52</sup> and the last-mentioned presumption can be rebutted by the individual defendant adducing evidence of absence of intention.<sup>53</sup> The media defendant, however, bears a burden of establishing absence of negligence.<sup>54</sup> Whether similar presumptions arise in the context of proof that the plaintiff's privacy has been invaded has not yet been decided, but a Constitutional Court Justice has asserted that there 'does not seem to be any reason why, as a matter of principle, proof of the publication of a private fact in breach of a plaintiff's right to privacy should not give rise to presumptions both of wrongfulness and intention that the defendant must rebut'.<sup>55</sup>

Before, examining the role of other defences to an action for invasion of privacy (both in South African law and under the ECHR) it would be best to sketch briefly the jurisprudential influence of the *constitutional* protection of privacy in South Africa and the interpretation given to the concept of privacy by the South African Constitutional Court.

#### *Constitutional 'Privacy' in South Africa*

The Constitution of the Republic of South Africa of 1996 protects privacy in Section 14:

- Everyone has the right to privacy, which includes the right not to have—
- (a) their person or home searched;
  - (b) their property searched;
  - (c) their possessions seized; or
  - (d) the privacy of their communications infringed.

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knowledge of unlawfulness above n 48) and, further, 'IV Objective Boundaries of Privacy': *Consent* below). To require the media to take steps to determine the willingness of persons to disclose their HIV-positive status does not impose an unreasonable burden on the media, especially where the consequences of non-consensual (or mistaken) reference to HIV-positive status can in South Africa result in serious discrimination. Neethling suggests that the Constitutional Court in *NM* 'missed a golden opportunity to develop the common law and introduce negligence liability for violation of the right to privacy, especially media defendants' (op cit n 21 at 43).

<sup>52</sup> For these defences to an action for invasion of privacy, see 'IV Boundaries of Privacy' below.

<sup>53</sup> O'Regan J overstated the matter by placing a legal burden of proof, as opposed to an evidential burden, on the individual (i.e. non-media) defendant in defamation proceedings to 'disestablish' intention (at para [152]). According to case authority, it is only in the instances of defences excluding the unlawfulness of conduct or the defence of absence of negligence on the part of the media (see 'Boundaries of privacy' below) that a legal burden or proof (i.e. on a balance of probabilities) rests on the defendant: see Jonathan Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* 180, 238, 249, 268, 304, 305.

<sup>54</sup> O'Regan J *Holomisa* supra n 50 at para 20.

<sup>55</sup> O'Regan J in *NM* supra n 51 at para [153].

The broad right of all to privacy is broken down into this non-exhaustive list of facets of privacy which refer predominately to potential infringements by the *State* of an individual's privacy. Section 32 of the South African Constitution also provides for the right of access to personal information.

Although the natural focus of the Constitutional Court's judgments on the nature of privacy has fallen on forced legislative disclosure of information,<sup>56</sup> the right to possess obscene matter in the seclusion of one's home,<sup>57</sup> and successful arguments for decriminalisation of the offence of sodomy,<sup>58</sup> the Constitutional Court, especially in the judgments of Ackermann J, has nevertheless grappled with the broad meaning of a general right to privacy.

Various fundamental facets of privacy emerge from the judgments of Ackermann J: (i) privacy extends beyond the individual's 'personal realm' to cover 'autonomous identity';<sup>59</sup> (ii) '[i]n South African common law "the right to privacy is recognised as an independent personality right which the Courts have included within the concept of *dignitas*"';<sup>60</sup> and (iii) '[p]rivacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities, such as business and social interaction, the scope of personal space shrinks accordingly'.<sup>61</sup>

The interrelationship between the common-law and Constitutional dimensions of privacy is enhanced by the scope for horizontal effect conferred by the South African Constitution. Furthermore, O'Regan J in *Khumalo v Holomisa*<sup>62</sup> has emphasized that 'no sharp lines' can be drawn between various facets of personality rights 'in giving effect to the value of human dignity in our Constitution'.

Recently, the South African Constitutional Court has even commented on the boundaries of the *private-law* protection of privacy under the *actio iniuriarum*!<sup>63</sup> In a case involving the disclosure of the names of three HIV-positive women,<sup>64</sup> the majority of the Constitutional Court held that those who had republished the names in a book had intentionally violated the women's privacy and dignity. The majority emphasized that the use of pseudonyms would have sufficed. The majority defined 'privacy' as the 'right of a person to live his or her life as he or she pleases'<sup>65</sup> and 'private facts' as 'those matters the disclosure of which will cause mental distress and injury to anyone possessed of ordinary feelings and intelligence in the

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<sup>56</sup> *Bernstein v Bester NO* 1996 (2) SA 751 (CC).

<sup>57</sup> *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC).

<sup>58</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC). See also the unsuccessful Constitutional challenge to the offence of bestiality: *S v M* 2004 (3) SA 680 (O).

<sup>59</sup> Ackermann J in *Bernstein* supra at paras 65 and 67 and in *The Coalition* case supra at para 32. Incidentally, 'personal autonomy' was regarded by Sedley LJ in the Court of Appeal in *Douglas v Hello!* [2001] QB 967 at 1001 as the essence of privacy.

<sup>60</sup> *Bernstein* supra n 56 at para 68. As O'Regan J in *NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)* 2007 (7) BCLR 751 (CC) said: the value we place on privacy reflects 'our constitutional understanding of what it means to be human' (at para [131]). See further below 13.

<sup>61</sup> *Bernstein* supra para 67 and *Investigating Directorate: Serious Offences and Others v Hyundai Motor Distributors (Pty) Ltd* supra n 41 at para [18].

<sup>62</sup> Supra n 49.

<sup>63</sup> *NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)* 2007 (7) BCLR 751 (CC). One might be forgiven for wondering whether any clear the line between what constitutes 'Constitutional' and what constitutes 'Private Law' cases can be drawn after this case.

<sup>64</sup> All three of whom clearly had no celebrity status.

<sup>65</sup> At para [33].

same circumstances and in respect of which there is a will to keep them private'.<sup>66</sup> The disclosure of identity of the three women's seropositive status fell into this category and, so the majority of the Court held, the publication of the information was intentional, based either on awareness that consent had not been given or that it was foreseen as a possibility that consent to such disclosure had been withheld.

In a separate concurring judgment Sachs J, transposing *Bogoshi* principles relating to defamation by the media to invasions of privacy by the media, held that the respondents did not meet the standard of reasonable publication.<sup>67</sup>

Langa CJ concurred with the majority decision that two of the respondents were liable for invasion of privacy by disclosing the identity of the HIV-positive persons. The Chief Justice concluded that two of the respondents who fell into the category of the media (viz, the journalist/author and publisher of a book) had been negligent (according to the *Bogoshi* criterion governing defamation by the media) in not verifying that the applicants had consented to their names being revealed. In placing certain of the respondents in the category of the media and applying the *Bogoshi* defamation test to an invasion of privacy, Langa CJ also concurred in part with the dissenting judgment of O'Regan J and the majority judgment of Sachs J.

It is the dissenting judgment of O'Regan J, however, that contains the most detailed consideration of the meaning of privacy and the justification for its protection in South African law. She places the justification for the protection of privacy firmly on the 'constitutional conception of being a human being'<sup>68</sup> and 'as a necessary part of a democratic society as a restraint on the power of the State'.<sup>69</sup> She also recognises that privacy must be balanced against the right to freedom of expression which, according to her, enhances human dignity and autonomy and makes democracy possible.<sup>70</sup> She affirms that privacy is 'protected under the rubric of *dignitas*'<sup>71</sup> and mentions that the main defences to an action for invasion of privacy would be that the publication was in the public interest or that informed consent had been given.<sup>72</sup>

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<sup>66</sup> At para [34].

<sup>67</sup> At para [203]-[207]. Sachs J endorsed the setting of objective standards of reporting for journalists.

<sup>68</sup> At para [131].

<sup>69</sup> At para [133].

<sup>70</sup> At para [145].

<sup>71</sup> At para [151].

<sup>72</sup> At para [154]. These remarks were obiter as none of the respondents relied upon either these defences, preferring to base their defence on the argument that the HIV-positive status of the applicants was no longer a private fact as the names of the applicants had already appeared in an investigatory report that had been sent to a limited number of people. According to O'Regan J both the first and the second respondent had relied on the authority of the original investigatory report, which mentioned the names of the respondents without mentioning that consent to disclosure of the fact of HIV-positive status had been withheld. These two respondents had therefore not been negligent as journalists 'must be entitled to publish information provided to them by reliable sources, without rechecking in each case whether the publication was unlawful, unless there is some material basis upon which to conclude that there is a risk that the original publication was not unlawful' (at para [187]). According to O'Regan J the 'source of the harm will be the original publisher' who was not sued in the instant case (at para [188]). According to O'Regan J, the third respondent (the publisher) in persisting in publication once it discovered that the applicants had not given consent, acted intentionally in invading the applicants' privacy. For available defences to an action for invasion of privacy, see further 'Boundaries of privacy' below.

### *Information Privacy in South Africa*

In *Mistry v Interim Medical and Dental Council of South Africa*<sup>73</sup> the Constitutional Court listed some general guidelines governing data protection: was the information obtained in an intrusive manner; was the information about intimate aspects of the subject's personal life; was it provided for one purpose but used for another; was it disseminated to the press or general public from whom the subject 'could reasonably expect such information would be withheld'? The Court in *Mistry* specifically left open the precise meaning of 'search' and 'property' in Section 13 of the interim Constitution (now Section 14 of the 1996 Constitution) but took the view that, even though it was not specifically mentioned in the Constitutional right to privacy, the protection of informational privacy was included.<sup>74</sup>

Although the private law and constitutional dimensions of privacy are moderately well-developed in South African law, well over 30 countries (including the United Kingdom) have led the way in enacting specific data protection legislation. Comprehensive legislative protection of State and personal information is only in draft form in South Africa.

However, the South African Constitution leads other Constitutions in providing for the right of access to information held by the State and private bodies which gave rise to the Promotion of Access to Information Act<sup>75</sup> that, *inter alia*, stipulates reasonable access to such information by the subject. The Electronic Communications and Transactions Act<sup>76</sup> which sets out information protection principles has also created certain offences of unauthorised access to, interception of or interference with data. The National Credit Act<sup>77</sup> regulates credit information and credit bureaux. This raft of legislation links to the draft Bill on the protection of State and private information in South Africa, but it would seem that the draft Bill would protect *private* information (and access to such information) and the Promotion of Access to Information Act would govern the right to *all other* information.<sup>78</sup>

One advantage of being slow to introduce legislation on data protection is that it is possible for South Africa to build on the experience of other countries and it is confidently predicted that the legislation soon to emerge in South Africa will be compatible with the fundamental guidelines for collection, protection and use of private information set out by the Organisation

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<sup>73</sup> 1998 (4) SA 1127 (CC).

<sup>74</sup> At para [23].

<sup>75</sup> Act 2 of 2002 (Section 88), enacted to give effect to Section 32(2) of the Constitution. The definition of 'personal information' in the draft Bill on the Protection of Personal Information (South African Law Reform Commission Discussion Paper 109 Project 124 *Privacy and Data Protection* (October 2005) 95 and 414-5, see further below n 79) corresponds to the definition of 'personal information' in the Promotion of Access to Information Act 2 of 2002. Access to information legislation furthers the protection of privacy because a person needs access to information held regarding him or her in order to be able to exercise his or her right to privacy (see SALRC's Discussion Paper *op cit* para 4.2.199). The relationship between the South African Promotion of Access to Information Act 2 of 2002 and South African draft Bill of Protection of Private Information (see above) and mirrors the relationship between the United Kingdom Freedom of Information Act 2000 (which gives persons a general right to all recorded information held by or on behalf of public authorities) and the United Kingdom Data Protection Act of 1998 (which is built on a set of enforceable principles, protecting personal privacy, encouraging good practice and granting individuals a right of access to information about themselves) (*op cit* para 4.2.201).

<sup>76</sup> Act 25 of 2002 (Sections 51 and 52). In terms of Section 51(1) the consent of the subject is needed for processing personal information.

<sup>77</sup> 34 of 2005.

<sup>78</sup> The same conclusion applies in the United Kingdom regarding analogous legislation (see n 74 above).

for Economic Cooperation and Development (OECD) in 1980 and followed in a number of other countries.<sup>79</sup> At the moment though, it appears that separate legislation seems to be envisaged for the protection of private information<sup>80</sup> and protection of State-held information.<sup>81</sup>

An issue that will probably arise in the future is whether the legislation enacted in South Africa to protect private information and provide access to State-held information will become the sole sources of the right to information privacy and the right to have access to information held by the State? The law of privacy in South Africa clearly ranges more broadly than the protection of personal information and so residual resort to the common-law of privacy and the Constitutional protection of privacy in Section 14 still remains. Similarly, the legislation designed to give effect to the Constitutional right of access to information held by the State surely cannot totally exclude residual recourse to Section 32.<sup>82</sup>

A further matter that might eventually need clarification is whether a data collector who unlawfully releases protected personal data must be 'at fault' before liability can be imposed for contravening data protection legislation? Neethling et al suggest that data collection (especially in an electronic form) poses such a serious threat to personality that liability could be imposed on the data collector in such a case even without intention or negligence on his or her part.<sup>83</sup> Surely, negligence-based liability should be required for the data collector's liability, on the analogy with the liability of the media?<sup>84</sup> Neethling rightly sees data protection as governed by the common law, facilitated by legislation that develops the common law (for instance, by providing the data subject with the ability to have 'active control' over his or her personal data or creating exemptions to the application of statutory data protection principles).<sup>85</sup> Surely then, the legislative provisions should be interpreted in the light of the common-law principles of fault, unless the legislature specifically provides to the contrary?

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<sup>79</sup> The eight guiding principles are set out by the South African Law Reform Commission in its Discussion Paper 109 Project 124 *Privacy and Data Protection* (2005) as follows: the collection limitation principle (fair and lawful processing); the data quality principle; the purpose specification principle; the security safeguards principle; the openness principle; individual participation principle; and the accountability principle.

<sup>80</sup> See the draft Bill referred to in n 75 above. At the time of writing, this Protection of Personal Information Bill requires the final comments of the Department of Justice Policy Unit before the Bill is published later in 2008 with the intention of placing it before Parliament in 2009:

<http://wwwserver.law.wits.ac.za/mi/privacy/briefing.htm>, accessed 29 July 2008

<sup>81</sup> Protection of Information Bill [BXX-2008] *Gazette* No 30885 *Notice* 376 of 2008.

<sup>82</sup> See Burchell *Personality Rights* op cit n 53 at 64.

<sup>83</sup> *Neethling's Law of Personality* 2ed (2005) LexisNexis Butterworths 278.

<sup>84</sup> Neethling apparently concedes this approach when he says that 'the wrongfulness of the data controller's processing should be set aside if he took *all reasonable steps* to comply with the data protection principles' (op cit 280, italics added).

<sup>85</sup> Op cit 272-3.

#### IV. Breach of Confidence: Both an Inhibitor and Potential Catalyst in Developing a Concept of Privacy?

The protection of privacy in the United Kingdom can be located in a variety of sources,<sup>86</sup> the most notable being the remedy for breach of confidence<sup>87</sup> or, as it has more recently been called, ‘misuse of private information’.<sup>88</sup> It seems clear, however, that breach of confidence, even released from the shackles of finding a pre-existing relationship of confidentiality and focused more on the nature of the information protected, cannot fully achieve protection of privacy.<sup>89</sup>

Breach of confidence clearly cannot provide a remedy for what Morgan calls the ‘acid test for a personality right’—‘disseminating images of an individual taken in a public place’.<sup>90</sup> Publication of information that is already in the public domain might also not constitute a breach of confidence, but could constitute an invasion of privacy.<sup>91</sup>

Every so often there are judicial utterances either expressing discontent with having to ‘shoe-horn’ recourse for invasion of privacy into some other existing remedy<sup>92</sup> or attempting to provide a more modern classification of the remedy.<sup>93</sup> The best route, it has been suggested, is to recognise a new right of privacy *eo nomine* in England.<sup>94</sup> According to Morgan, control

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<sup>86</sup> See, generally, *Winfield & Jolowicz on Tort* 17 edited by W V H Rogers (Thomson: Sweet & Maxwell, 2006) 607-18. For instance, Glidewell J in *Kaye v Robertson* [1991] FSR 62 at 66 identified the remedy as malicious falsehood. Remedies for invasion of ‘privacy’ in the United Kingdom have been sought in libel, malicious falsehood, nuisance and trespass.

<sup>87</sup> Notably the more recent judgments of *Campbell v MGN Ltd* [2004] 2 All ER 995 (HL); [2004] UKHL 22 and *Douglas and Others v Hello! Ltd* [2005] 4 All ER 128 (CA); [2005] EWCA Civ 595.

<sup>88</sup> Lord Nicholls in *Campbell v MGN Ltd* at para [14] and Sir Anthony Clarke MR in *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446 at para 24. Tanya Aplin ‘The Future of Breach of Confidence and the Protection of Privacy’ (2007) 7 *Oxford University Commonwealth Law Journal* 137 argues that a limited tort of privacy in the form of misuse of private information should be recognized in the United Kingdom.

<sup>89</sup> See Morgan op cit n 17. The legal basis for liability for breach of confidence is in doubt (*Winfield & Jolowicz* op cit n 84 at 612). It is not entirely clear whether the remedy lies in equity, unjustified enrichment or tort.

<sup>90</sup> Morgan op cit n 17 at 448

<sup>91</sup> The facts of *Peck v UK* (2003) 36 EHRR 41 (publication of images of applicant photographed by local authority CCTV in a public street) illustrate this: See *Markesinis et al* op cit n 5 at 162. The so-called ‘iniquity principle’ that a man cannot be made ‘the confidant of a crime or fraud’ appears to apply to breach of confidence (see *Mosley v New Group Newspapers* supra n 10 at para 13) but conduct that could be disapproved of by many might still need to be regarded as part of ‘privacy’ and so protected from public gaze (as in the case of the sadomasochistic sexual behaviour involved in *Mosley*). Even criminals may have a right to privacy: see *Mosley* para 118.

<sup>92</sup> See Lord Phillips in *Douglas v Hello! Ltd* [2007] UKHL 21 at para 53.

<sup>93</sup> See the passage from Lord Hoffmann’s judgment in *Campbell v MGN Ltd* cited in n 6 above.

<sup>94</sup> Jonathan Morgan op cit n 17 at 469, citing Lord Scott ‘Confidentiality’ in J Beatson and Y M Cripps (eds) *Freedom of Expression and Freedom of Information* (Oxford 2000); J Wright *Tort Law and Human Rights* (Oxford, 2001) 178-82; R Singh QC and J Strachan ‘The right to privacy in English law’ [2002] EHRLR 129. Morgan op cit 472 adds that ‘Parliament, fearful of media disapproval, will never in the foreseeable future enact such a law [protecting privacy]’ Morgan’s gloomy prediction might be reinforced by the report in *The Guardian* of 1 April 2008 that the Prime Minister has apparently backed down on a Bill that would have increased penalties for private detectives and journalists who raid data banks in search of the private lives of celebrities. Anyway, it would seem that the use of *tort law* (in the form of a remedy for invasion of privacy) rather than a criminal provision would surely be more appropriate in dealing with this type of conduct. The general defence of public benefit would strive to find the appropriate balance between privacy and freedom of expression, taking into account the nature of the information sought and the ‘celebrity status’ of the complainant?



over identity is being recognised in other jurisdictions<sup>95</sup> and is even emerging in the jurisprudence of the European Court of Human Rights.<sup>96</sup>

Recent judgments of the Court of Appeal of England and Wales perhaps provide the catalyst for developing a law of privacy along South African lines. Although bound by *Campbell*, the Court of Appeal appears to have been somewhat more adventurous in inclining towards a European-Court-of-Human-Rights definition of privacy, more in keeping with the jurisprudence and outcomes of judgments of this court in *Von Hannover v Germany*<sup>97</sup> and *Peck v UK*.<sup>98</sup> These post-*Campbell* judgments in the Court of Appeal echo the words of Lord Justice Sedley in *Douglas v Hello! Ltd*: 'We have reached a point at which it can be said with confidence that the law recognizes and will appropriately protect the right of personal privacy.'<sup>99</sup>

Moreover, these recent Court of Appeal judgments promise a bolder approach to horizontal application of Convention rights to private disputes.

Ironically, a recent judgment by Buxton LJ (himself an opponent of the horizontal effect of Convention rights in the United Kingdom) on the scope of breach of confidence might reveal an alternative way ahead for the development of the protection of privacy for those who remain unconvinced that the seeds of the protection of privacy, at least in Scotland, lie in the *actio iniuriarum*, and who would rather seek inspiration in the right to privacy under the ECHR.

A folk singer in *McKennitt v Ash*<sup>100</sup> sought to restrain further publication of passages from a book, written by her former friend and confidant, which revealed intimate details of her private life. Clearly this was an obvious case for invoking the rules of breach of confidence. Buxton LJ, who delivered the main judgment, pointed out that Section 6 of the Human Rights Act required a court to refrain from acting 'in a way incompatible with a convention right' and he approved of Lord Woolf CJ's statement in *A v B Plc*<sup>101</sup> that this can be achieved by 'absorbing the rights which Arts 8 and 10 protect into the long-established action for breach of confidence'. But, in a comment on this judgment, N A Moreham in the *LQR*<sup>102</sup> indicates, that Buxton LJ went further and said 'in order to find the rules of English law of breach of confidence we now have to look in the jurisprudence of Arts 8 [privacy] and 10 [freedom of expression]'.<sup>103</sup> As Moreham concludes, Buxton LJ 'applied Arts 8 and 10 directly to the dispute between McKennitt and Ash and relegated the common law to a supporting role'.<sup>104</sup> The court rightly found that it was a breach of confidence to reveal intimate details about a person who had carefully avoided exposure of her private life.<sup>105</sup>

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<sup>95</sup> Canada: *Les Editions Vice-Versa Inc v Aubry* [1998] 1 SCR 591

<sup>96</sup> *Peck* supra n 91.

<sup>97</sup> (2004) 16 BHRC 545.

<sup>98</sup> Supra n 91.

<sup>99</sup> [2001] 2 All ER 289.

<sup>100</sup> [2006] EWCA Civ 1714.

<sup>101</sup> [2002] EWCA Civ 337; [2003] QB 195 at [4].

<sup>102</sup> 'Privacy and Horizontality: Relegating the Common Law' (2007) 123 *LQR* 373.

<sup>103</sup> At 11.

<sup>104</sup> Op cit n 102 at 375.

<sup>105</sup> Apparently leave to appeal to the House of Lords has been refused (Moreham op cit n 102 at 378) so the legal issues raised in the case will have to await further consideration in another case.

Of course, a remedy for breach of confidence already exists in English law and, taking into account a certain overlap between the concept of ‘confidential information’ in English law and ‘privacy’ under the Convention, it was perhaps inevitable that Convention jurisprudence could apply directly to determining the scope of an already extant English wrong. But, what if one applied Buxton LJ’s reasoning to a potential Scots protection of privacy under a rejuvenated *actio iniuriarum*? Couldn’t the Convention jurisprudence on *privacy* be invoked in Scotland to develop this *delictual* remedy that already exists, in principle, in Scots soil?<sup>106</sup>

It is, however, the judgment of the Court of Appeal in *Murray v Big Pictures (UK) Ltd*<sup>107</sup> which, while nodding in the direction of *Campbell*, nevertheless accommodates the essence of *Von Hannover*. Although deciding the preliminary matter whether there was a case to proceed to trial, the facts and the decision in *Murray* are compatible with the European Court’s judgment in *Von Hannover*. While a well-known author and her husband were taking their 19-month-old son for a walk in Edinburgh, a photographer took a covert picture of the family and this photograph was subsequently published in a national magazine. The parents, acting on behalf of their young son, argued that his privacy had been invaded by the publication. The photograph, like those taken of Princess Caroline of Monaco in *Von Hannover*, featured an everyday activity in a public place. The intrusion of the photographer did not in itself constitute press harassment, the subject of the picture was not embarrassing or humiliating and the photograph revealed no more than a passer-by in the street would have seen. Nevertheless, the Court of Appeal, taking into account the rights of children, held that the plaintiff arguably had a reasonable expectation of privacy, especially since the photograph would not have been taken or published had the child not been the son of a well-known author, and there was also case for contending that a court might find the balance between privacy and disclosure was struck in his favour. Like the European Court of Human Rights in *Von Hannover*, the Court of Appeal of England and Wales acknowledged that there might well be circumstances where there is no reasonable expectation of privacy in the private lives of public figures.

The court in *Murray* stated that, in determining a ‘reasonable expectation of privacy’, it could take into account the ‘attributes of the claimant, the nature of the activity in which he was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher’.<sup>108</sup> On the facts, the court found that there was a reasonable expectation of privacy. Furthermore, in deciding the appropriate balance between individual privacy and press freedom, the court affirmed that the criterion was whether the publication of those private facts would be considered offensive to an objective, ‘reasonable person’. It is not that difficult to draw comparisons with this line of reasoning and that of the South African courts in privacy cases.

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<sup>106</sup> Although Lord Rodger of Earlsferry in *R v HMA* [2002] UKPC D 3 (a case involving the right to trial within a reasonable time) did not classify the specific nature of the claim, the recognition of a damages claim in Scots law for reading or threatened reading of a prisoner’s correspondence, would appear to be based on an invasion of privacy (founded on a violation of art 8 of the European Convention) or an infringement of dignity (see para 18).

<sup>107</sup> *Supra* n 2.

<sup>108</sup> At para 36. Compare the factors mentioned in Watermeyer AJ’s judgment in the first South African case on privacy, *O’Keeffe* *supra* n 23.

Lord Nicholls and Baroness Hale in *Campbell* favoured a ‘reasonable expectation of privacy’ test<sup>109</sup> and Lord Hope in the same case opted for the ‘substantial offence to a person of ordinary sensibilities’.<sup>110</sup> The above statements about privacy in the Court of Appeal and those in the House of Lords constitute a step in the right direction—that is, of attempting to define ‘privacy’. But, surely the ‘reasonable expectation of privacy’ is far too general a test, lacking real clarity even if used as the preliminary inquiry? Furthermore, as Clarke MR in *Murray* acknowledged,<sup>111</sup> the test for determining privacy is that of a person of *reasonable sensibilities*. It is unnecessary to link this test to that of a ‘substantial offence’. Not every invasion of privacy has to involve ‘offence’ or ‘insult’ and, even where it does involve offence or insult, what constitutes ‘substantial’ offence adds a further evaluative complication.

However, the objective test for determining privacy, based as it is in South Africa and it would seem also in the United Kingdom,<sup>112</sup> on the assessment of a reasonable person with ordinary sensibilities, does import a significant, inherent limitation on the potential scope of an action for invasion of privacy.<sup>113</sup> This objective test also holds the key to the recognition of a *child’s* claim to privacy.

Assuming the Scots and English law can find paths leading to the successful identification of rights to privacy, the Scots perhaps by reviving the ancient *actio iniuriarum* and the English, acknowledging the narrowness of ‘breach of confidence’, and embracing a Convention-based right to privacy,<sup>114</sup> another potential obstacle still remains. What limits should be placed on this right to privacy? The objective limits which have emerged in the South African law of privacy are perhaps compelling.

#### IV. Objective Boundaries of Privacy

From the beginnings of the recognition of protection of personality rights in South Africa, the courts recognized that limits had to be set to this action for invasion of privacy and that the public benefit, or the public interest in freedom of expression, might override the individual’s right to privacy in certain circumstances. It is important to bear in mind that a balance between these two important rights must be sought—there is no presumptive preference for one interest above the other.<sup>115</sup>

It was acknowledged in South African law that the general defences to an action for invasion of privacy, or grounds of justification, are public benefit (interest) and consent, but other defences have also been recognized.

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<sup>109</sup> At [21] and [135].

<sup>110</sup> At [92].

<sup>111</sup> *Supra* n 2 at para 52.

<sup>112</sup> See *Murray v Big Pictures (UK) Ltd* *supra* n 2.

<sup>113</sup> To say, as does Neethling *op cit* n 21, that ‘a person himself (subjectively) determines the destiny of his private facts and therefore the scope of his interest in privacy’ not only opens the floodgates of litigation to the hypersensitive, but also creates an internal inconsistency in the law that some aspects of personality (such as dignity: *De Lange v Costa* 1989 (2) SA 857 (A)) are tested both subjectively and *objectively* while privacy would be tested *subjectively only*.

<sup>114</sup> The fact that the English law did not acknowledge a privacy tort prior to the Human Rights Act of 1998 was recognized in *Wainwright v Home Office* [2001] EWCA Civ 2081, [2002] QB 1334, paras [87] and [96]-[107].

<sup>115</sup> This point is made by Markesinis *et al* n 5 in the context of French and German law.

*Public benefit (or interest)*

As Madala J for the majority of the Constitutional Court in *NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)*<sup>116</sup> said:

This protection of privacy in my view raises in every individual an expectation that he or she will not be interfered with. Indeed there must be a pressing social need for that expectation to be violated and the person's rights to privacy interfered with.<sup>117</sup>

The 'public benefit' defence is, of course, flexible enough to accommodate a balance between individual privacy and the broad parameters of freedom of expression. But, 'public benefit' extends broader than the freedom of expression inquiry and, as Markesinis *et al* have indicated, there is even a public benefit in protecting privacy, say, in the rehabilitation of offenders.<sup>118</sup> The South African law recognised this in the late 19<sup>th</sup> Century by holding that ordinary persons have the right to 'live down their past'.<sup>119</sup>

Part of the confusion in privacy cases, both in South Africa and abroad, is generated by a lack of judicial engagement with traditional theories of freedom of expression. For instance, the European Court of Human Rights in *Von Hannover* appeared to take a restrictive view of freedom of expression, linked to 'debate of general interest' in a democratic society and the court placed emphasis on the fact that the applicant did not exercise an official function. Freedom of expression is more than just a part of the democratic process or attaining truth in the market place of ideas.<sup>120</sup> Freedom of expression is a vital part of individual autonomy and ultimately a facet of individual dignity. This exercise of individual autonomy is not confined to 'political' speech, it extends to literature, art, scientific endeavour, entertainment, and sport. The ultimate legality of this free expression depends not just on its cherished position, in both the United Kingdom and South Africa, but upon a delicate balancing of competing interests and the development of precedent on this balance.

It is extremely difficult to generalise about the bounds of liability or the scope of free expression. The answer often lies in a compromise: The public have a legitimate interest in knowing that a supermodel is undergoing drug rehabilitation treatment, especially if she has previously denied that she has a drug problem, but the details of this treatment would seem to fall outside the public benefit and could arguably even jeopardise the ultimate success of treatment. Similarly, the media have an undoubted right to publish, and the public have a correspondingly indubitable right to *read*, the details of Princess Diana's fatal motor accident, but do they have the similar right to *see* vivid pictures of her last breath?<sup>121</sup>

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<sup>116</sup> 2007 (7) BCLR 751 (CC).

<sup>117</sup> At para [45]. See also Sachs J at para [209] who referred 'public interest' and 'consent' as defences to an action for invasion of privacy and emphasized that evidence would be needed that the information was 'in the broad public domain'. According to the majority, there was no such compelling public interest found in this case: see below 21-22.

<sup>118</sup> *Op cit* n 5, 157-8.

<sup>119</sup> *Graham v Ker* (1892) 9 SC 185 at 187.

<sup>120</sup> Although, obviously, freedom of political debate is a vital aspect of freedom of expression: see, for instance, the declaration on freedom of political debate in the media adopted by the Committee of Ministers of the Council of Europe on 12 February 2004: <http://www.bhnovinari.ba/en/Print.aspx?ID=113>, accessed on 16 July 2008.

<sup>121</sup> Following Princess Diana's death, suggestions were made that the United Kingdom Press Complaints Commission's Code of Practice should be amended to refer to 'overriding' public interest and there were calls for drafting a European Convention on Privacy from the 40-nation Council of Europe's Parliamentary Assembly:

One approach is to argue that a reporter represents the ‘ears and eyes’ of the public and is entitled to report what is heard or seen. In *La Grange v Schoeman*<sup>122</sup> a South African court emphasized that the publication of a report of judicial proceedings concerning a person will be a defence to invasion of privacy if it is fair and accurate. But, the court also acknowledged that, in certain circumstances, the publication of a photograph of that person, in addition to the report, might not necessarily fall into the same category. In other words, reporting must not only be accurate—it must be ‘fair’ as well.

The ‘public benefit’ defence would also accommodate an assessment of the ‘public figure’ status of the person claiming an invasion of privacy and whether an ordinary individual has been catapulted into the public eye.<sup>123</sup> The public benefit or interest in disclosure is assessed objectively by the court and includes weighing in the balance the following types of factors: the way the information was gathered (for instance, the unlawful,<sup>124</sup> clandestine, even deceitful or extortionate, as opposed to legitimate means used);<sup>125</sup> ‘titillation for its own sake’ will not be justified whereas a contribution to a debate of general interest to society can be justified; and not every ‘gory detail’ is automatically in the public interest.<sup>126</sup> The hallowed distinction should be drawn between the disclosure of matter which is genuinely ‘in the public interest’ and the disclosure of matter which simply interests members of the public—and might increase the sales of the publication.

Qualifications to information protection principles in the draft Protection of Personal Information Bill of 2005 and Protection of (State) Information Bill of 2008<sup>127</sup> reflect the public interests in State security, prevention, detection and prosecution of crime and economic and financial interests of the State.

Of course, those systems of law that opted for truth alone as a defence to a defamation action will have to strike out in a different direction if a public benefit/interest defence is to be recognised for invasion of privacy. But, the internal limitation to the protection of privacy in Article 8 ECHR could well provide some impetus for this development.

Moreover, there are other defences to an action for invasion of privacy that could either arise out of the analogy with defamation (viz qualified privilege occasion and ‘reasonable publication’ by the media) or out of general defences such as consent or necessity.

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<http://www.leeds.ac.uk/law/hamlyn/diana.htm>, accessed 22 July 2008. If photographs of Princess Diana’s *dead* body are published, a preliminary matter will be whether the right to privacy survives death.

<sup>122</sup> 1980 (1) SA 885 (E).

<sup>123</sup> French and German jurisprudence on this matter is fairly well-developed: B Markesinis et al op cit n5 at 133 at 145-7.

<sup>124</sup> *Sage Holdings Ltd v Financial Mail (Pty) Ltd* 1991 (2) SA 117 (W).

<sup>125</sup> *Mosley* supra n 10 paras 16 and 17.

<sup>126</sup> See *La Grange v Schoeman* supra n 116 and *Mosley* supra n 10 at para 13.

<sup>127</sup> ‘Public interest’ is defined in the Bill as ‘those matters that constitute the common good, well-being or general welfare’. Having stated the ‘General Principles of State Information’ in the Bill as including the ‘basic human right’ of access to information, clause 7(g) adds: ‘some confidentiality and secrecy is however vital to save lives, to enhance and to protect the freedom and security of persons, bring criminals to justice, protect the national security and to engage in effective government and diplomacy’.

### *Privileged occasion*

The defence of ‘privileged occasion’ which applies to a defamation action is readily adapted to invasions of privacy. In fact, in *Jansen van Vuuren NO v Kruger*<sup>128</sup> the South African Appellate Division applied the general principles relating to ‘qualified privilege’ to a case involving the disclosure of HIV-positive status, holding that a doctor had no duty to transfer information about his patient’s HIV-positive status to another doctor in the course of a game of golf and that the recipient of the information had no corresponding right to receive the information.

Although the House of Lords in *Reynolds v Times Newspapers*<sup>129</sup> rejected the argument for what was described as a ‘generic’ qualified privilege for political speech by the media in defamation cases, the Court did endorse a judicially-controlled, incremental ex post facto development of the list of categories of duty/interest.<sup>130</sup> A similar expansive approach to media freedom, taking account of the right of the public to be informed and duty of the media to inform, in defamation cases would logically apply to invasions of privacy as well.<sup>131</sup>

### *‘Reasonable Publication’*

‘Reasonable publication’ by the media is also acknowledged by the Supreme Court of Appeal in *Bogoshi*<sup>132</sup> and the Constitutional Court in *Holomisa*<sup>133</sup> as a defence to a defamation action and this defence could apply to media invasions of privacy.<sup>134</sup>

### *Consent*

Consent to disclosure of private facts or intrusion into private sphere may be given expressly or impliedly, but the consent must be voluntarily given and informed. Consent to disclosure given for a particular purpose may not be valid for disclosure for another purpose.

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<sup>128</sup> 1993 (4) SA 842 (A).

<sup>129</sup> [2001] 2 AC 127.

<sup>130</sup> Jonathan Burchell and Kenneth McK Norrie ‘Impairment of Reputation, Dignity and Privacy’ in *Mixed Legal Systems in Comparative Perspective—Property and Obligations in Scotland and South Africa* Reinhard Zimmermann, Daniel Visser and Kenneth Reid (eds) Juta and Co Ltd (2004) 564.

<sup>131</sup> For instance, disclosure of statements made by a person at a ‘privately arranged discussion group’ which are alleged to be unlawfully recorded and published to the media could constitute an invasion of the speaker’s privacy, but if the statements are made in a public speech they would cease to be private: see the story in *Cape Times* 13 October 2008.

<sup>132</sup> *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA). Incidentally, when Lord Hoffmann in *Campbell* said that newspapers should not be held ‘strictly liable for exceeding what a judge considers to have been necessary’ and that courts should give latitude to the ‘practical exigencies of journalism’ (at para 62) wasn’t he, in fact, indicating that the standard for judging the media should be *reasonableness*, a realization that would be compatible with acknowledging a ‘reasonable publication’ or possibly even a ‘negligence’ standard?

<sup>133</sup> *Khumalo v Holomisa* 2002 (5) SA 401 (CC) at para 43.

<sup>134</sup> See O’Regan J in *Holomisa* loc cit. ‘Reasonable publication’ might be a more likely defence to apply in the context of invasion of privacy than the pleading of absence of negligence. Scott argues (op cit n 51) that, in the context of invasions of privacy by the media, a negligence basis of liability could involve a diminution of free expression. However, a negligence fault criterion for the media does not only imply possible freedom-of-expression inhibitors (such as taking reasonable steps to verify information or obtain consent—say, to the disclosure of HIV-positive status, see above n 51). A negligence fault criterion for the media may also imply the taking of freedom-of-expression enhancing steps (such as securing an opportunity for reply, where reasonably possible).

Express consent is, of course, a major legal basis for the collection and use of data which reinforces the major principles of data collection that information gathered for one purpose cannot be used for another purpose. The requirement that the consent be informed also underscores the fundamental principle of ‘openness’ in data collection. Perhaps the only area where the consent requirement might be less important is in the context of the prevention of crime.<sup>135</sup>

Implied consent can arise by conduct and so voluntary assumption of risk could even be a defence. For instance, simply attending a large, public sporting event and being photographed as part of the spectators at that event could lead to the conclusion that one has impliedly consented to being photographed on that occasion or voluntarily accepted the risk of being photographed. If, however, this photograph is used as part of a television programme on mass hysteria and the de-individuation of persons forming a crowd, then this further publication constitutes an unwarranted invasion of one’s privacy.<sup>136</sup> This last-mentioned type of invasion of privacy could overlap with what in the United States is seen as ‘false light’ privacy cases.

Consent, expressed or implied, is merely a defence to an action for invasion of privacy. Lack of consent is a factor to weigh in the balance in determining whether an actionable invasion of privacy has resulted. Lack of consent is not, however, the essence of a definition of privacy. Neethling urges a definition of privacy that ‘embraces all those personal facts which the person concerned has himself determined to be excluded from the knowledge of outsiders, and in respect of which he has the will that they be kept private’.<sup>137</sup> This approach would, unacceptably, leave the availability and scope of the action for invasion of privacy in the hands of the individual defendant. Unscrupulous politicians and gold-digging celebrities would be delighted to be the sole arbiter of the limits of their own private sphere!

Although consent might equally be a defence to breach of confidence, there is no doubt that the jurisprudence on this defence has developed in the field of tort or delict.

### *Necessity*

The general defence of necessity<sup>138</sup> could apply to invasions of privacy: for instance, intrusion into another’s home in order to escape a natural disaster, the use of CCTV in a store to prevent shoplifting or an employer monitoring the use (and maybe content) of e-mail messages sent to employees during office hours.<sup>139</sup> Interception of telephone calls and other communications in South Africa is regulated by Regulation of Interception of Communications and Provision of Communication-related Information Act.<sup>140</sup> Even that most

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<sup>135</sup> South African Law Reform Commission Discussion Paper 109 Project 124 (2005) *Privacy and Data Protection* para 4.2.104.

<sup>136</sup> In terms of the United Kingdom Data Protection Act of 1988 (second principle) and the draft South African legislation (third principle) (see n 76 above) information gathered for one purpose cannot be used for another.

<sup>137</sup> ‘The right to privacy, HIV/AIDS and media defendants’ (2008) 124 *SALJ* 36 at 40. The Neethling approach to privacy denies the relevance of the objective reaction of a person of ‘ordinary feelings and sensibilities’ (loc cit).

<sup>138</sup> Lord Hoffmann in *Campbell* referred to the test of necessity or proportionality, at para [59].

<sup>139</sup> See above n 1.

<sup>140</sup> Act 70 of 2002. A recent controversial Cabinet proposal that would grant the Intelligence Minister (rather than a judge) sole discretion to authorise eavesdropping on foreign communication signals has met with criticism: *Cape Times* 31 July 2008.

hallowed of confidential relationships, between doctor and patient, might have to yield to the dictates of public benefit in special circumstances.<sup>141</sup>

The essence of both necessity and ‘public interest’ defences appears in the qualification to the right to privacy mentioned in Article 8 ECHR in regard to intrusions by a public authority: what is ‘*necessary* [italics supplied] in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others’.

Qualifications to information protection principles in the draft Protection of Personal Information Bill of 2005 and Protection of (State) Information Bill of 2008<sup>142</sup> are often based on the necessity defence which recognises a balancing of interests.<sup>143</sup> The essence of a necessity defence involves an examination of overriding socio-political needs. Of course, extravagant, post 9/11 governmental responses to perceived threats to national security need to be balanced against a firm, but at the same time realistic, commitment to individual privacy.

## V. Conclusion

The law of delict or tort<sup>144</sup> provides a general, accessible and relatively speedy means of protecting rights of personality, avoiding the piece-meal quality of legislative protection of privacy. Constitutional protection of personality rights, although important in setting broad standards and providing inspiration for common-law development, is more limited in scope and cumbersome than its private-law counterpart.

Actual or perceived differences between private-law and Constitutional protection of personality rights should not obstruct development of an over-arching jurisprudence that can be beneficial to both branches of the law and, most significantly, to a viable protection of individual personality. It is generally acknowledged that the conceptual divide between private and public law is in the process of blurring. The smudging of bright lines of the past is understandable, and indeed justifiable, if it serves the interests of the greater protection of human rights—in other words, if the interaction between common-law and Constitutional (or Conventional) jurisprudence not only brings a clearer concept of personality rights, but also a more comprehensive and balanced protection of these rights for individuals. Both private and public branches of law will have to grow by interpretation in order to achieve this objective. It is obvious that common-law and Constitutional meanings of a term such as ‘privacy’ must be compatible, or at least complementary, rather than contradictory.

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<sup>141</sup> *Jansen van Vuuren* supra n 122 and *Davis v Additional Magistrate, Johannesburg* 1989 (4) SA 299 (W) at 303E-I.

<sup>142</sup> ‘Public interest’ is defined in the Bill as ‘those matters that constitute the common good, well-being or general welfare’. Having stated the ‘General Principles of State Information’ in the Bill as including the ‘basic human right’ of access to information, clause 7(g) adds: ‘some confidentiality and secrecy is however vital to save lives, to enhance and to protect the freedom and security of persons, bring criminals to justice, protect the national security and to engage in effective government and diplomacy’.

<sup>143</sup> See clauses 12(4), 14(3), 16(5), 26, 27, 28, 29, 30, 31, 33.

<sup>144</sup> Sir Anthony Clarke MR in *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446 at para 24 interpreted Lord Nicholls judgment in *Campbell* as seeing the remedy for ‘misuse of private information’ in ‘tort’.



However, it is the action for damages<sup>145</sup> in tort or delict that will ultimately ensure the realistic protection of privacy and achieve the viable, flexible balance between rights to dignity, privacy, identity and reputation, on the one hand, and countervailing rights to free expression and public interest, on the other hand. Defences to actions for damages for invasions of privacy are better accommodated under a supple, yet detailed, incremental development of the common law than under broadly-framed limitations clauses in human rights instruments directed predominantly at the conduct of government or public bodies and not often, like the South African Constitution, at private individuals as well. Most jurisdictions have developed a considerable body of case law on the factors affecting the computation of damages in tort or delict, especially the calculation of damages for intangible losses for distress, hurt feelings and loss of dignity.<sup>146</sup> Incidentally, an incremental extension of the equitable remedy for breach of confidence to cover an award of general damages,<sup>147</sup> and even to include some photographs of persons in public places, could end up causing more confusion in, and even damage to, the original concept of breach of confidence<sup>148</sup> than benefit to the cause of privacy.

But, the first step is to recognise privacy (or dignity) as a personality right worthy of protection under the law of tort and to acknowledge the pitfalls of trying to squeeze the protection of privacy into the ill-fitting garb of confidentiality. Courts in the United Kingdom are not being asked 'to boldly go where no man has gone before'. They are being asked to boldly acknowledge that the case law on 'breach of confidence' has started a journey which, with the assistance of the ECHR, should have its ultimate destination in the recognition of a right to privacy. The fact that a right to privacy is recognised explicitly or implicitly in most Bills of Rights and that numerous common- and civil-law systems have already achieved a nuanced balance between the protection of privacy and free expression, must be a compelling inducement. In addition, dignity, privacy and identity are surely essential attributes of humanity and respect for humanity lies at the centre of all human rights ideologies and, hopefully, at the heart of all civilised systems of law.

Once the right to privacy, either founded on dignity or recognized as an independent facet of personality, is recognized then it becomes necessary to identify the appropriate interaction between private- and public law in the actual protection of this fundamental human right and, ultimately, to devise a workable balance between privacy and freedom of expression. A range of defences derived from defamation, such as truth for the public benefit, consent, privileged occasion and 'reasonable publication', and a general defence, such as necessity, can serve to keep the action for invasion of privacy within reasonable bounds. An objective fault criterion for the media can further help to achieve a workable balance between free expression and individual privacy. In achieving this balance the detail of the common-law and Constitutional

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<sup>145</sup> Of course, the assessment of damages must take into account the 'chilling effect' that excessive damages awards may have on freedom of expression and 'gold diggers' must not be allowed to exploit the law for pecuniary advantage alone.

<sup>146</sup> The issue of exemplary damages was recently raised, and rejected by the High Court, in a privacy case in England: see *Mosley* supra n 10. The court awarded compensatory damages of 60 000 pounds for invasion of privacy in this case.

<sup>147</sup> Tanya Aplin op cit n 18 suggests that the basis of awards of 'damages for mental distress for breaches of obligations of confidence (whether contractual or equitable) concerning personal or private information' have been 'inadequately explained'.

<sup>148</sup> See Aplin op cit n 18 who comments on the need to avoid distortion of breach of confidence principles (at 145ff) but ultimately concludes that such claims have been overstated (at 146).

experience of comparable and compatible<sup>149</sup> systems of law, such as South Africa, could prove *directly* valuable to Scotland and *indirectly* valuable to the United Kingdom as a whole.

What may appear in the United Kingdom to be a step into the unknown is actually not.

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<sup>149</sup> South Africa being a mixed (civil-law and common-law) system where most authorities are in English (or translated into English) with a Constitution that protects both freedom of expression (Section 16) and privacy (Section 14) could be seen as the ideal source of comparison.