Text of a speech given by Mr Justice Eady at a seminar to celebrate the publication of *Privacy and the Media*, Gray's Inn, 12 December 2002

First, may I congratulate Michael Tugendhat, Iain Christie and the rest of the team at Raymond Buildings on the publication of *Privacy and The Media*. It is a remarkable achievement. Anything would be welcome in this field which is capable of bringing clarity, scholarship and discipline. This work has made an invaluable and timely contribution in all these respects. One of the problems about writing a legal textbook is choosing the right moment to leap off the research roundabout and go into hard copy. There always seems to be just one more case around the corner. Here it was, of course, *Campbell -v- MGN*. One can so easily yield pusillanimously to the temptation of being complete, up-to-date and unpublished. This team have triumphantly mastered that problem and have succeeded in updating the book before it was even launched by means of modern technology - namely the 5rb website (to which, at the risk of being thought to suck up outrageously to my hosts, I find myself referring regularly for quick and easy links on all kinds of legal and media topics).

This team is not alone in grappling with rapid change and uncertainty. One of the most fundamental (if hardly original) statements of principle to have emanated from the European Court of Human Rights is to be found, for example, in *Goodwin -v- United Kingdom* (1996) 22 EHRR 123, 140:

> "The court reiterates that, according to its case law, the relevant national law must be formulated with sufficient precision to enable the persons concerned - if need be with appropriate legal advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail".

It is ironic, therefore, if not entirely unexpected, that since well before and in anticipation of 2 October 2000 we have all found ourselves, in all areas of media law, in a greater state of uncertainty than ever before. Media lawyers are in real difficulty in giving editors and journalists their unequivocal pre-publication advice as to where they stand on matters of qualified privilege, confidence, privacy and contempt of court. It is seriously undermining of the rule of law if citizens find themselves in the position of simply having to ask the lawyers, "What do you think we can get away with?"

With particular reference to journalism, this state of flux means that the "chilling effect" is significantly increased rather than diminished. Furthermore, while we are on buzz words of the moment, it is surely an important aspect of "access to justice" that a citizen should at least sometimes be able to access the law in a library, or on a website, at negligible cost rather than having to sell the family home in order to go to the Court of Appeal and/or the House of Lords. Legal costs can make a significant dent even in the budgets of media corporations - the individual citizen can only look on in bewilderment. Conditional fee agreements are all very well but, generally speaking, lawyers will only play that game if they have some chance of taking an informed decision and a calculated risk. It was never intended to be simply a lottery.

How far then has judge-made law, on a case by case basis, taken us towards the Strasbourg goal of reasonable clarity and foreseeability?

So far as privacy is concerned, I believe that it is now possible to assert with some confidence that at least the following propositions have crystallized:

1. We do not know whether there is a tort of breach of privacy in English law, following the Human Rights Act, because in the light of concessions by counsel the Court of Appeal did not need to resolve the question in *Campbell -v- MGN*, 14 October 2002 (see para 38).

2. Judges at first instance, invited to grant an injunction to protect privacy, should accept that it is not necessary to tackle the vexed question of whether there is a separate tort of invasion of privacy; see *A -v- B*, 11 March 2002.

3. Generally, the question of whether there is an interest capable of being the subject of a claim for privacy should not be allowed to be the subject of detailed argument - since usually the answer will be obvious: *A -v- B*.

4. In the great majority of situations, if not all, where the protection of privacy is justified, an action for

breach of confidence will, where this is appropriate, provide the necessary protection: once again, *A -v- B*, but

5. where an aspect of an individual's private life is published, which he does not wish to be published, but which has not been confided to a third party, it is better described as a breach of privacy rather than a breach of confidence: *Campbell -v- MGN*.

So that's all right then.

I have occasionally wondered, if no one is going to decide whether there is a tort of privacy at first instance, how an appellate court will have the opportunity. Does this mean that we shall never be let into the secret?

I have been asked to say a few words about the *Calcutt Committee*, which reported to the Home Secretary in June 1990 and to reflect what, if any, relevance its contents may have today.

There were only two tangible results of the report, so far as I am aware. First, there was the recommendation to get rid of the Press Council, which was replaced within six months on 1 January 1991 by the Press Complaints Commission with its Code of Practice (based, in part, upon the draft Code attached as an appendix to the *Calcutt Report*).

The second outcome was the Sexual Offences (Amendment) Act of 1992 which afforded anonymity to the victims of a wide range of sexual offences rather than merely in respect of rape.

Apart from those matters, it may fairly be said that this Report moulders away gathering dust like so many before and since. I do not, however, regret having participated. We spent a great deal of time thinking about and discussing the problems and practicalities of the various solutions proposed. We took a great deal of evidence, both oral and written, from a huge range of witnesses which included visits, for example, from Rupert Murdoch, Kelvin Mackenzie, Sonia Sutcliffe, Max Hastings, Peter Preston and Robert Maxwell and Sir Robin Janvrin (then the Queen's Press Secretary).

Indeed, one of the most vivid memories I retain is of the arrival of Robert Maxwell, swathed in scarf and overcoat. He swept into the room and placed beside him on a chair none other than the late lamented Oscar Beuselinck (who I know is remembered by many here tonight with great affection). Maxwell introduced him as his legal adviser and then proceeded to hold forth in a low and menacing rumble. What I noticed, however, was that Oscar looked extremely uncomfortable, shifting about uneasily in his chair, and trying to find a way of slipping under the table without being noticed. I couldn't think why until, some time later, Oscar explained the situation himself. Apparently, when Maxwell bundled him into his car and set off a quarter of an hour earlier, Oscar knew nothing about the *Calcutt Committee* at all - he merely thought he was being taken out to lunch.

Naturally, our starting point in 1989 was the European Convention and especially Articles 8 and 10. The tension between them is, of course, inevitable. It is not something that can be resolved in general terms. The best one can hope for is to address the conflict on a case by case basis - but one does need the assistance, I would suggest, of clear guidelines and principles to point the way.

After all, the conflict between freedom of expression and the rights of individuals in the context of reputation is capable of resolution with the assistance of such well established concepts as privilege, justification, fair comment, public interest and so on - even if some of them need to be adapted for modern conditions. As to the right of fair trial, there is at least a set of statutory concepts to look to - such as when proceedings become "active", whether there is a substantial risk of serious prejudice, and so on. By contrast, however, when it comes to protecting personal privacy, we are still in need of principles and guidelines to work to, so that justice is not administered arbitrarily and lawyers can hope to advise their clients with some chance of accurately predicting the outcome.

Nowadays, we have some guidance, it is true. We know for example that the answer is almost always going to be "obvious". Or we can test the issue by whether one's conscience is shocked, or perhaps whether one finds it "highly offensive" or perhaps just "offensive" to one's sensibilities, in accordance with the words of Gleeson CJ.

How does it work in practice? I am only in a position to speculate, of course, as I now reside in an ivory tower and am completely out of touch with the real world. Distant memories, however, lead to me to suppose that the following scenario may not be wholly unfamiliar. I envisage a long table in a newspaper's offices, where 2 or 3 lawyers are gathered together. I seem to see a tabloid editor. He comes in and tosses a bunch of intrusive and juicy photographs onto the table.

"*What do you think of that lot, then? How's that for a pair of role models? We've caught them in flagrante*"

The most senior lawyer of the bunch replies:

"*Well, the answer is obvious. My conscience isn't shocked and, for good measure, they are not even 'highly offensive to the sensibilities of a reasonable person'. I think you are okay to publish.*"

The editor looks rueful:

"*Perhaps you are right. I always said they weren't worth publishing*"

"*And by the way*," says the legal manager, "*we don't talk about in flagrante any more. Since the CPR we say 'caught at it without notice'*".

A key question is where the necessary guidelines should come from. In the long distant days of 1990, I was stuffy enough to take the view that a new set of doctrines could only legitimately come from the democratically elected representatives of the people in Parliament. We therefore included in Chapter 12 of the Report some recommendations as to how this might work. The Report was unanimous, but it represented a compromise between two positions. The three lawyers on the Committee, David Calcutt, John Spencer from Cambridge, and myself, were all in favour of introducing a law of privacy in the circumstances then prevailing. The journalists, in particular Simon Jenkins, and the other members of the Committee, were against it.

The compromise was, in effect, that we would not recommend the introduction of a law of privacy at that juncture, but would at least spell out how a statutory tort might work. John Spencer and I accordingly drafted out a scheme over the Christmas vacation of 1989. The Committee was then at least prepared, as a body, to reject what was then the received wisdom, namely that problems of definition were insurmountable.

We were all agreed even by that time that something needed to be done. Furthermore, none of us could ignore the events which occurred one month later leading to *Kaye -v- Robertson*. This was half way through our deliberations, at the end of January 1990, when as everyone knows photographers and journalists from *Sunday Sport* burst into the private hospital room where Gordon Kaye was recovering from brain surgery, took photographs of him and even purported to carry out an interview.

I took the view then, and still do, that there is a serious gap in the jurisprudence of any civilized society if that can happen without redress.

The reasons hardly need to be stated, but the case illustrates very well why such matters cannot be catered for by existing causes of action, such as assault or trespass. There is something about the elusive right to human dignity which cannot be embraced within those templates. Those are concerned with property rights in the one case and physical integrity on the other. There is, however, something about human beings, for so long as they live, which goes beyond the merely physical, or the proprietary, and of which the law ought now to take cognizance. What that extra dimension is may not be easy to define (especially in ten minutes) but it is nowadays perhaps most conveniently captured by the concept of "personality" or "personal life" or "personal information" or "personal dignity". What those intruders did in January 1990 to Gordon Kaye was not to be assessed in terms of earning capacity or property. They did not assault him physically. They did not trespass on his property.

One might ask what more proof was required that the time was ripe for reform? Indeed, I believe it was Leggatt LJ who expressed the hope in *Kaye -v- Robertson* that the *Calcutt Committee* would take the opportunity to do something about it. As I have said, the lawyers were all for legal reform for the purpose of bringing order and redress. The others simply did not perceive the law, even the civil law, as a matter of order but rather of potential oppression by the state against journalists. Sure enough, something needed to be done. But self-regulation was perceived as capable of doing the trick, because journalists were, and apparently are, very sensitive to peer pressure. What is more, it was perceived that ordinary citizens of this country did not wish to prevent infringements of their privacy - nor to have monetary compensation after it had occurred. What they really would like would be a simple apology after it had happened.

What then was their solution to the Gordon Kaye problem? The answer given was that of course it had been an unfortunate incident but, after all, the Sunday Sport was not a newspaper. It was a comic, and those who had entered the room were not to be confused with journalists. It would be unfair to hold this in any way against proper journalists.

I have some difficulty reconciling this analysis with the solution proposed, that it would all be sorted by

journalists regulating themselves and exerting peer pressure on each other. If those individuals were not actually journalists at all, and thus beyond the pale of self-regulation, surely only the law could be effective.

Incidentally, I would be interested to read the answers if an examination question were now to be set: Compare 1990 with 2002: Are there more or less comics on the news stands? Discuss.

So what then did we propose? We set out provisions for creating a statutory tort of privacy. I know that it is hopelessly old-fashioned, and out of kilter with the times we now live in, but I happened to believe that it was by and large preferable in a democracy for fundamental changes of law, and the introduction of new civil liberties, to be left to Parliament. The questions of whether to introduce a law of privacy, and as to the circumstances in which it should be applied, involve major questions of public policy - such as how you define "the public interest" and where the balance is to be struck between privacy, on the one hand, and freedom of expression on the other. It is also to be noted that the government quite specifically decided not to legislate for a new law of privacy.

I have heard it suggested both in relation to the previous government, and the present one, that they would never legislate to restrict the media because of the adverse coverage they would get. I have no idea whether that is so, but even if it were, I would say that is merely an aspect of democracy.

I would prefer the legislative route partly because it seems to me to be right as a matter of principle but also because, particularly in the context of privacy, there has to be a clear scheme of principle whereby each case can be tested consistently. It is the classic area for hard cases making bad law and, therefore, all the more important to have a clear framework of principle to work to.

First one has to define what is to be protected. We suggested that this should be done in terms of what is truly personal information - nothing to do with business, commerce, professional activities or trade would be embraced within that protection. So therefore, incidentally, the favourite argument of Robert Maxwell and subsequently of Lord Wakeham, to the effect that a law of privacy would merely provide the rich and famous with a way of hiding their wrongdoing is, in my judgment, simply unsustainable.

Once you have defined the nature of the information within broad terms, by reference to what an individual citizen can reasonably expect to be kept private (rather, I would suggest, than in terms of what might shock someone else), the next point is to address whether any particular publication or proposed publication would fall within a specific defence (such as for example consent or privilege) and, if not, whether what would otherwise be unlawful should nonetheless be published genuinely in the public interest.

The concept of "public interest" in this context needs some definition. Even if it does not have the sanction of the legislature, there must be some degree of clarity. It should never depend on what the judge had for breakfast. John Spencer and I worked out a draft for the purposes of enforceability and consistency. In particular, we were concerned to identify what were the essential elements of "public interest" in this context:

- the detection or exposure of crime or seriously anti-social behaviour (this latter phrase deriving from the judgment of Sir John Donaldson MR in *Francome -v- MGN* [1984] 1 WLR 892);

- protecting public health or safety;

- preventing the public from being materially misled by some statement or action of an individual or organization.

This formulation is now broadly echoed in the PCC Code, although I believe that the phrase "anti-social behaviour" has now been replaced by that of "serious misdemeanour". That is rather confusing since the concept of misdemeanour was intended largely to disappear in 1967. We had used that phrase because we intended to include behaviour falling outside the criminal law.

Does this have any continuing relevance? Presumably it does, because courts are invited to take codes of practice into account.

I believe that there are two fundamental points of principle which need especially to be discussed and approached with caution given the absence of any democratic mandate. First, it remains vital, I suggest, to keep a clear distinction between public interest in that sense, on the one hand, and matters which are merely interesting to sections of the public on the other hand. That distinction should never be fudged.

Secondly, I very much take the view that individual citizens should not be separated out into different classes when it comes to the application of the law. In the *Neill Committee Report*, the following year, we made the following point, in relation to a so-called "public figure" defence, in a passage which was discussed in passing in the Court of Appeal in *Reynolds -v- Times Newspapers*:

> "[Such a defence] would mean, in effect, that newspapers could publish more or less what they liked, provided they were honest, if their subject happened to be within the definition of a 'public figure'. We think this would lead to great injustice. Furthermore, it would be quite contrary to the tradition of our common law that citizens are not divided into different classes. What matters is the subject-matter of the publication and how it is treated, rather than who happens to be the subject of the allegations."

I have been asked to express my view on the present state of the law, without of course being in any way controversial, and it is true to say that both of these matters are topical. First I should refer to the general concept of "public interest". There is a passage in *A -v- B* which I believe may have been misconstrued:

> "Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media .... The public figure may hold a position where higher standards of conduct can be rightly expected by the public. The public figure may be a role model whose conduct could well be emulated by others. He may set the fashion .... In many of these situations it would be overstating the position to say that there is a public interest in the information being published. It would be more accurate to say that the public have an understandable and so a legitimate interest in being told the information .... The courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest."

It is important, I would suggest, not least so that people can know where they stand, to tease out from that passage at least two concepts and to address them separately:

- is the information inherently of a private or personal character, and of sufficient significance (i.e. not trivial), that it is within the contemplation of the law to protect it at all;

- only if it is, the second question may arise as to whether there is a genuine public interest in having it published (i.e. are there factors of public policy engaged such that the public has a right to know?).

It is of course elementary that you do not have to establish that it is in the public interest before you publish something. The problem does arise, however, if what you intend to publish comes genuinely into conflict with another's enforceable personal rights - including any right to privacy. If that tension does arise, then it should not suffice to say either that the person is a public figure or that the public is interested in the information.

I come, therefore, to my second hobby horse - about separating out different groups of citizen not by reference to their conduct but by attaching labels to them.

Later in the same judgment in *A -v- B*, it was said that footballers are role models for young people and that undesirable behaviour on their part can set an unfortunate example.

Now, I know that judges are out of touch, and I like to think that I am as out of touch as the next one, but the confession I am about to make will undoubtedly shock some of those present. I am a veritable walking, talking, Bateman cartoon. I am the man who had never heard of Gary Flitcroft. I am not sure whether, when this young man woke up, he would have been more surprised to find himself a footnote in legal history or appointed as a moral guardian of the nation's youth.

In *A -v- B* it was accepted that the footballer in question had not courted publicity, but it was said that someone holding his position was inevitably a figure in whom a section of the public and the media would be interested.

It is a major policy question, whether certain classes of citizens should be treated differently by the law according to their trades or professions. I merely raise the question whether it is apt to be decided by the courts. Because someone happens to play football or snooker, or darts, is it right that he should have a judicially imposed label which requires him to behave with the rectitude of a bishop? Or, if he fails to live up to those standards, is it right that his private life should then be, as it were, open season for any salacious coverage?

In any event, am I being unduly naïve or flippant to suggest that, if a football or darts player is truly setting an "unfortunate example" to young people by his sexual behaviour, this is an argument against rather than in favour of giving it wider publicity? After all, according to the draft articles before the court in that case, they were

concerned with “the salacious description of the sexual activity between the claimant and [the young women in question]”. The supposedly vulnerable young persons would surely not have realised they were being set a bad example until this salacious material was set out before them.

It is perhaps worth posing the further question: By what authority do we, as judges, when asked to protect their privacy, set out to grade intimate sexual relationships outwardly from a central hub of traditional domestic bliss to a far flung perimeter - where one just has time for a few one night stands before tumbling over into outer darkness? This is what was done in *Theakston -v- MGN* and in *A -v- B*. Just because someone happens to be good at football, why does he have to be subjected to different standards of sexual behaviour from those applying to the rest of his contemporaries - including tabloid journalists? There is no longer, if there ever was, a generally agreed code of sexual morality. Marriage no longer appears to have the particular status it used to be accorded. We are not courts of morals. Nowadays many people, particularly young people, lead lives which in the old days what would have been called “promiscuous”. Now it is simply known as a “sexually active” or “fun loving” lifestyle. If a sportsman or model does not presume to preach to the general public, why should he or she have imposed upon them by anyone, let alone judges or tabloid journalists, the standards which used to be applied from behind the twitching curtains of suburbia half a century ago - on pain of prurient exposure?

I do not believe that people should be classified as “role models”, any more than they should be deemed “public figures”, if that means that the law does not apply equally to them. What matters first is whether the information in question is truly personal information and, if it is, whether there is nevertheless, in the particular circumstances, a genuine public interest in its disclosure - which would include for the purpose of preventing the public being seriously misled.

A classic example is provided by *Campbell -v- MGN*, because there had actually been public statements to the effect that the claimant did not take drugs. It was thus legitimate to set the record straight. So too, if a politician or cleric holds forth on standards of personal morality, and is shown not to apply them in his or her own private life, the element of hypocrisy justifies exposure - once again so that the public are not misled. But that is justified not because the claimant happens to be a politician or a well known model, but by virtue of that individual’s public stance voluntarily adopted.

There have, however, in my view been three significant advances in recent years, all developed judicially. They are conveniently illustrated by reference to the facts of a well known case.

Some of you may recall, ten years ago, that a certain duchess went on holiday with her financial adviser. When part way through the holiday, he began to show distinct signs of becoming rather more multi-disciplinary. Photographs were snatched by long distance lens of certain activities on private property. Three persons were shown relaxing by a swimming pool - the duchess, the financial adviser and a rubber duck. To the casual tabloid observer, some of the shots might have suggested that the adviser had acquired a closer interest in chiropody than asset management.

And so I found myself off to what we used to call the Judge in Chambers, in order to apply for relief of an interlocutory nature. I was to argue not only that mouth to toe resuscitation was a private and personal activity, but that the photographs contained information which was obviously, from the circumstances of long distance intrusion, confidential in character. Moreover, insofar as I needed to anticipate any conceivable defence, it took but a moment to assert boldly that the public interest could only be rarely engaged by issues of digital hygiene.

I happened to come in front of Latham J (as he then was) who was tasked with resolving these weighty issues. I am happy to say, however, that I did not trouble him for long. In accordance with what is the now approved practice he was not subjected to detailed legal argument.

I am not sure on whose behalf I was instructed to appear, but for all the impact I made it could have been the rubber duck!

His Lordship did not follow what is now the approved practice. He did decide whether there was a law of privacy. It did not take him long to do so. He said that I was trying to obtain a remedy for a tort unknown to the law - and confidence did not come into it.

As I said a moment ago, there have been three developments in judicial thinking since that time which might have a bearing on such an application if made today:

First instance judges do not need to trouble themselves about whether there is a specific cause of action for breach of privacy or not. That was what troubled Latham J.

It appears that it is no longer necessary, in seeking the court's protection, to show that the confidential information was formally "imparted" - it is enough now to show that it has been snatched: see *Campbell -v- MGN*.

Similarly, it is now more readily accepted that photographs are capable of containing information which is, therefore, in appropriate circumstances correspondingly capable of being the subject of a duty of confidence: see e.g. *Hellewell -v- Chief Constable of Derbyshire* [1995] 1 WLR 804 (discussed extensively in chapter 6 of the new work), *Douglas -v- Hello Magazine* [2001] 2 All ER 289 and Campbell -v- MGN [2002] EWCA Civ 1373 (discussed in the website update).

Whether any of these recent developments in the law would make any difference to the outcome is a different question. I am bound to say that I am glad I am not an in house media lawyer, because I still cannot tell whether, if a similar incident were to arise today, a different judge (now called the Interim Applications Judge) would come to a different answer. But one need not perhaps worry because it is comforting to know that, to the judge dealing with the application, "usually the answer to the question whether there exists a private interest worthy of protection will be obvious". One wonders, however, if it is so obvious to the judge, why it is not equally obvious to the legal advisers to the newspaper, so that they could have avoided the necessity for a hearing in the first place.

What I am even less sure about, however, is after nearly 12 years whether Gordon Kaye would have a remedy in respect of the intrusions into his hospital room.

Until those questions are addressed and answered, I fear that we are falling short of the European Court's requirements of clarity and predictability. Until they are answered positively, we are failing to accord the requisite respect for private lives.

12 December 2002