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‘You say tomato ...’: A Comparison of English and US Privacy Law Principles

Robert Balin and Yuli Takatsuki

From remote sensing satellites to hidden ‘bra-cams’, technology is revealing all; and, with the click of a mouse, intimate details (and, of course, photographs) of Royals, celebrities, politicians and sportspeople are launched on news sites and social media platforms to millions across the globe. Privacy issues regularly crop up in more serious news fare as well. Witness the so-called Vatileaks scandal in May 2012, where the Vatican complained bitterly that books and news reports disclosing the details of leaked church records, including the Pope’s private correspondence, were a ‘violation of the Pope’s privacy’.¹ The law races to catch up, with legislatures and jurists around the world trying to find an appropriate – and often elusive – balance between the individual’s right to be left alone and the public’s right to know.

In this chapter, we will explore how the privacy/free speech balance has been struck quite differently under English law and US law. While both jurisdictions recognise a ‘privacy’ tort, their differences in approach go well beyond mere pronouncement.

On paper at least, the developing law of privacy in England and Wales looks somewhat similar to the American cause of action for public disclosure of private facts. In both countries, the claimant must show a ‘reasonable expectation of privacy’ to maintain an action. Yet, while the two jurisdictions may use similar words, they imbue them with very different meaning. Under English and European Court of Human Rights jurisprudence, even public figures photographed in public (for example Princess Caroline von Hannover grocery shopping or on the ski slopes) are deemed to have a ‘legitimate expectation’ that the ‘social dimension’ of their private

1 ‘Pope’s butler arrested after leaked church documents revealed allegations of corruption and power struggles with Vatican Bank’, Mail Online, 25 May 2012, available at www.dailymail.co.uk/news/article-2150076/Vatican-leaks-scandal-Pope-Benedicts-butler-Paolo-Gabriele-arrested-leaked-documents.html.

lives will be protected – protection that may extend even to their activities in wholly public spaces.² This European formulation of the ‘privacy’ envelope is fundamentally broader than the American view of protectable privacy interests. Under US privacy principles, informed as they are by First Amendment values, ‘[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.’³ As a result, revelations deemed private and actionable in England and Europe, particularly if they occur in public venues, or concern non-intimate facts (yes, the Princess does dress down while grocery shopping), would often not make it out of the starting blocks in the United States.

So too, recognising the vital role that a free press plays in democracy, both the English privacy tort and the American private facts claim mandate inquiry into whether publication of the private facts at issue serves a ‘legitimate public interest’ – or, to use American parlance, is ‘newsworthy’. Yet, once again, this seeming similarity ends at the water’s edge – with newsworthiness trumping private fact claims in the US (but not necessarily in England, where privacy and free speech are accorded equal weight); and with the courts in the two countries taking markedly different approaches in analysing whether publication of private facts is indeed in the public interest. Lastly, in addition to inherent doctrinal differences, English and US law also differ in the remedies provided in privacy actions: pre-publication injunctions are available (and not uncommon) in English privacy suits, but are exceedingly rare under US First Amendment principles, which prohibit prior restraints on the press in all but the most exceptional circumstances.

Ultimately, these differences in English and US law represent inherently differing views about the relative value to be accorded privacy and free expression in a democratic society. Some complain that free speech rides roughshod over important privacy concerns in the US, and just as many decry English privacy law as too claimant-friendly and under-protective of the press. Our purpose in this chapter is not to resolve that debate, but to provide some clarity on where the battle lines have been drawn.

2 *Von Hannover v Germany (No. 1)* (2005) 40 EHRR 1, [69].

3 *Time, Inc. v Hill*, 385 US 374, 388 (1967); see also Restatement (Second) of Torts § 652D cmt b (1977) (‘there is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye. Thus he normally cannot complain when his photograph is taken while he is walking down the public street and is published in the defendant’s newspaper.’); J McCarthy, *The Rights of Publicity and Privacy*, § 5:80 at 5-162 (2nd edn, 2003) (‘it is not an actionable disclosure for the press to publish a photograph of a person in a public place’). Compare *Von Hannover (No. 1)* (n. 2) at [75] (rejecting the distinction between ‘secluded places’ and public places as determinant of privacy rights).

Historical background

The US perspective

While the rebellious American colonies long ago severed allegiance to Albion, they nonetheless eagerly adopted English common law in many areas. Privacy, however, was never one of them. Instead, privacy law developed first in the United States, with England and Wales only recently joining the fray.

Almost 125 years ago, Boston lawyers Samuel Warren and Louis Brandeis (later a US Supreme Court Justice), in their famous 1890 Harvard Law Review article, 'The Right to Privacy', cautioned that, without a sensitive legal balancing of public and private interests, 'what is whispered in the closet shall be proclaimed from the house-tops'.⁴ Complaining (with eerie prescience) that '[i]nstantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life', Warren and Brandeis called for the creation of a common law right of privacy.⁵ The courts eventually responded, and by the early 1900s privacy law was born in the United States. *Pavesich v New England Life Ins. Co.*⁶ is often cited as the first US decision expressly to recognise a right of privacy by that name, though the Georgia Supreme Court cited even earlier decisions by US courts that – if not using the 'right of privacy' moniker – nonetheless extended protection to privacy interests.

As developed over the last century, privacy law in the US has crystallised into four distinct and well-recognised torts:

1. publication of embarrassing private facts;
2. unwarranted intrusion upon seclusion;
3. false light (a relative of defamation); and
4. commercial misappropriation of name or likeness (also called the right of publicity).⁷

4 S Warren and L Brandeis, 'The Right to Privacy', 4 Harv L Rev 193, 195 (1890–91).

5 *Ibid.* As one leading commentator notes, 'frequently cited but seldom read', the Warren/Brandeis article 'single-handedly started a new field of law in the United States': J McCarthy, *The Rights of Publicity and Privacy*, § 1:11 at 1-12 (2nd edn, 2003).

6 50 SE 68 (Ga 1905).

7 See Restatement (Second) of Torts §§ 652A–652E (1977); William L Prosser, 'Privacy', 48 Cal L Rev 383, 389 (1960). These privacy torts are created by state law, and not all of the 50 US states recognise all four privacy torts. For example, New York recognises only a claim for non-consensual use of a person's name or picture for advertising or trade (NY Civil Rights Law §§ 50–51), and New York courts have repeatedly held that, other than this one narrow statutory prohibition of commercial misappropriation, there is no common law right of privacy in New York (*Messenger v Gruner + Jahr Printing and Publishing*, 94 NY2d 436, 441 (2000)). See also *Cain v Hearst Corp.*, 878 SW2d 577, 578 (Tex 1994) (recognising torts of 'intrusion upon seclusion' and 'publicity given to private facts', but declining to recognise a 'false light' privacy tort).

Of these four torts, it is the first two – the private facts claim and the intrusion upon seclusion claim – that most resemble the privacy right that is now developing under English and European Court of Human Rights jurisprudence (at least in terms of the interests sought to be protected).

While the formulation of a private facts claim may vary slightly from state to state, generally a media defendant who publishes truthful private facts about a person will be held liable only if revelation of those facts would be ‘highly offensive to a reasonable person’ and ‘is not of legitimate concern to the public’.⁸ Since lack of legitimate public interest (or newsworthiness) is an essential element of the tort, US courts have repeatedly held that where the published private facts relate to a newsworthy matter this serves as ‘a complete bar to liability’.⁹ Moreover, this bar to liability for publication of newsworthy truthful information is not only a common law limitation, but is compelled by First Amendment principles as well.¹⁰

Whereas the private facts tort focuses on speech (i.e. *publication* of embarrassing private facts), the intrusion upon seclusion tort is concerned with conduct – and, specifically with respect to the press, conduct during the course of newsgathering. Of the four privacy torts, the intrusion claim perhaps best epitomises the ‘right to be left alone’.¹¹ The tort prohibits unconsented-to physical intrusions into traditionally recognised private spaces (such as home or hospital room) as well as unwarranted sensory intrusions into private areas, matters and conversations through eavesdropping, wiretapping or photographic spying.¹² To prevail, the claimant must

8 Restatement (Second) of Torts § 652D.

9 *Schulman v Group W Productions, Inc.*, 18 Cal 4th 200, 215 (Cal 1998). Indeed, in their article inviting adoption of a common law right of privacy, Warren and Brandeis noted as their very first limiting principle that ‘[t]he right to privacy does not prohibit any publication of matter which is of public or general interest’ (‘The Right to Privacy’ at 214); see also Restatement (Second) of Torts § 652D cmt d (‘The common law has long recognized that the public has a proper interest in learning about many matters. When the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy.’)

10 *Cox Broadcasting Corp. v Cohn*, 420 US 469 (1975) (holding that the First Amendment barred a private facts claim, arising from publication of a rape-murder victim’s name obtained from indictment, since criminal proceedings are a matter of ‘legitimate concern to the public’); Restatement (Second) of Torts § 652D cmt d (a newsworthiness bar to a private facts claim ‘has now become a rule not just of the common law of torts, but of the Federal Constitution as well’) (citing *Cox*); *Prince v Out Publishing, Inc.*, No. B140475, 2002 WL 7999 at *8 (Cal Ct App Div 4, Jan 3, 2002) (‘newsworthiness is a constitutional defense to, or privilege against, liability for publication of truthful [private] information’); *Virgil v Time, Inc.*, 527 F2d 1122, 1129 (9th Cir 1975) (newsworthiness defence ‘is one of constitutional dimension delimiting the scope of the tort’), *cert. denied*, 425 US 998 (1976). See generally *Florida Star v BJJF*, 491 US 524, 533 (1989) (‘if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need ... of the highest order’) (citation omitted).

11 *Cooley on Torts* (2nd edn, 1888), 29.

12 See Restatement (Second) of Torts § 652B cmt b; *Schulman*, 18 Cal 4th at 230–32.

establish that he or she had an 'objectively reasonable expectation of privacy' in the place, conversation or data source, and that the intrusion would be 'highly offensive' to a reasonable person.¹³

Importantly, in stark contrast to developing English and European privacy principles, US law imposes a spatial limitation on the 'zone of privacy' protected by the intrusion tort. Thus, US courts have frequently held that merely photographing a person (whether a public or private figure) in a public place is not an actionable intrusion, 'since he is not then in seclusion, and his appearance is public and open to the public eye'.¹⁴ And this 'public space' limitation on the intrusion tort is applied even if the person's presence or activities in public might otherwise be embarrassing. For example, in *United States v Vasquez*,¹⁵ the court held that videos of women patients entering and leaving an abortion centre were not actionable since they were taken on a public street, and 'no one walking in this area could have a legitimate expectation of privacy'.

On the flip side, however, if the press invades a truly secluded conversation or space (such as filming in an emergency ward without consent or peeping through bedroom windows), intrusion liability typically follows. Unlike the publication of private facts tort (where newsworthiness serves as a complete bar under First Amendment principles), the fact that a reporter secures 'newsworthy material' through commission of an intrusion tort does not generally serve as a defense to intrusion claims. As one court has explained, '[t]he reason for the difference is simple: the intrusion tort, unlike that for publication of private facts, does not subject the press to liability for the contents of its publication'.¹⁶ As a general rule, the press in its newsgathering activities receives no special First Amendment immunity or exemption from generally applicable laws that govern conduct – such as trespass or wiretap laws for example.¹⁷ ('The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the

13 *Ibid.*

14 Restatement (Second) of Torts § 652B cmt b (Illustrations); see also J McCarthy, *The Rights of Publicity and Privacy*, § 5:88 (citing cases); *Stonum v US Airways, Inc.*, 83 F Supp2d 894, 906 (SD Ohio 1999) ('Photographing an individual in plain view of the public eye does not constitute an invasion of privacy ...').

15 31 F Supp2d 85 (D Conn 1998)

16 *Schulman*, 18 Cal 4th at 240. See also Nimmer, Melville B, 'The Right to Speak from Times to Time', 56 Cal L Rev 935, 957 (1968) (asserting that '[i]ntrusion does not raise first amendment difficulties since its perpetration does not involve speech or other expression').

17 *Cohen v Cowles Media Co.*, 501 US 663, 669 (1991); *Deitman v Time, Inc.*, 449 F2d 245, 249 (9th Cir 1971).

precincts of another's home or office.¹⁸). Nonetheless, the US Supreme Court has also observed that 'without some protection for seeking out the news, freedom of the press could be eviscerated'.¹⁹ Accordingly, even though newsworthiness does not of itself bar intrusion claims, some courts – in deciding whether a reporter's alleged intrusion was 'highly offensive' (a required element of the tort) – will take into consideration 'the extent to which the intrusion was, under the circumstances, justified by the legitimate motive of gathering the news'²⁰ (noting that, in considering 'offensiveness' of the intrusion, 'routine ... reporting techniques, such as asking questions of people with information (including those with confidential or restricted information) could rarely, if ever, be deemed an actionable intrusion', whereas 'trespass into the home or tapping a personal telephone line ... could rarely, if ever, be justified by a reporter's need to get the story') (citations omitted).

At bottom, American privacy law, built up over decades, recognises that 'in this sphere of collision between claims of privacy and those of the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society'.²¹ Nonetheless, given the central constitutional role that public discourse plays in the US, even the very court that first adopted the common law privacy right more than a century ago recognised that '[t]he right to privacy is unquestionably limited by the right to speak and print' on 'every matter in which the public may be legitimately interested'.²² That principle has remained a polestar of American privacy jurisprudence ever since.

The English experience

Privacy law in England and Wales has had a chequered past. In contrast to privacy's longstanding jurisprudential foundations in the US, a free-standing right to privacy was not recognised in English law until October 2000, with the entry into force of the Human Rights Act 1998 (HRA 1998).

Prior to that, there were one-off cases showing how the courts imperfectly sought to use existing causes of action to engineer some protection for privacy in clear cases of injustice. This approach is epitomised by the case of *Kaye v Robertson*²³ – which law school professors and lecturers in England cite to illustrate privacy's troubled past. In that case, the claimant

18 *Dietman v Time, Inc.*, 449 F2d 245.

19 *Branzburg v Hayes*, 408 US 665, 681 (1972).

20 *Schulman*, 18 Cal 4th at 237.

21 *Cox Broadcasting*, 420 US at 491.

22 *Pavesich*, 50 SE at 74.

23 [1991] FSR 62.

was a well-known actor recovering in hospital from serious head and brain injuries after a piece of wood had pierced his car windscreen during a gale. Ignoring numerous notices in the ward, two journalists from the *Sunday Sport* gained access to his private room, took photographs and conducted an 'interview'. Medical evidence showed Mr Kaye was in no fit condition to be interviewed or to give informed consent – amply evidenced by the fact that a quarter of an hour after the journalists had left, Mr Kaye had no recollection of the incident. In its judgment, the Court of Appeal had to accept, reluctantly, that it was powerless to protect Mr Kaye's privacy as there was no basis on which to do so in English law. It had to find instead that the publication would amount to a malicious falsehood insofar as it implied that Mr Kaye had consented to an interview; but this only meant the *Sunday Sport* was free to publish the article simply by omitting that implication. Glidewell LJ stated: 'It is well-known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy.'²⁴ This one sentence is said to have stultified the development of privacy law in England for many years to come.

Following a long period of patchy attempts to piece together protection through other causes of action, the HRA 1998 marked a watershed in English law. The Act incorporated the rights enshrined in the European Convention on Human Rights (ECHR) by providing a mechanism for enforcing them in the English courts and for obtaining remedies for their violation. Among those rights is the right to respect for private and family life (Article 8). The ECHR also recognises the right to freedom of expression (Article 10), and the European Court of Human Rights has frequently recognised the 'essential' role that freedom of expression plays in democratic society.²⁵ It is the tension between these two contrasting rights which has formed the basis of privacy cases in England and Wales ever since.

However, it was not the case that the HRA 1998 immediately brought clarity to English law. Following the coming into force of the Act in October 2000, the state of privacy law continued to be the subject of uncertainty and serious controversy. First, there was a 'teething period' of several years in which it was not even clear whether invasions of privacy were actually actionable between private parties and, if so, how. This somewhat fundamental issue was not wholly clarified until *Campbell v MGN Ltd*²⁶ in which the House of Lords confirmed the 'horizontal effect' of the HRA 1998.²⁷ It

²⁴ *Ibid.* p. 66.

²⁵ See e.g. *Axel Springer AG v Germany* [2012] ECHR 227, [78].

²⁶ [2004] 2 AC 457.

²⁷ See, e.g., *Rio Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB) at 39 ('Although at first sight, Article 8 [of the ECHR] appears to be directed at interference by the State in a person's private life, it is now beyond argument that it also encompasses a positive

further outlined the new action for 'misuse of private information' and interpreted it as an extension (and renaming) of the old cause of action for breach of confidence.

Even after *Campbell*, legal certainty did not follow suit. A flood of litigation followed, in which the essential principles emerged and the battle lines of Articles 8 and 10 were argued, and reargued, drawn and redrawn. From this welter of lawsuits has emerged an impressive compendium of English privacy decisions.

As to the controversy this area of law has generated, there are few areas of English law that have been the subject of greater scandalisation and public debate. Many in the UK will recall the spring of 2011 in which the British press became absolutely consumed by the issue of the rich and famous using interim injunctions to suppress publication of information about their personal lives. The issue was brought into sharp focus when an anonymous Twitter user claimed to reveal details of a number of injunctions and 'super-injunctions' sought by celebrities, including footballers and actors, which the UK press was absolutely prohibited from disclosing. A super-injunction is a type of injunction that prohibits the press and others from revealing, not only the facts of the case, but even that an injunction has been issued. Editorials in UK newspapers decried privacy injunctions as an oppressive restraint on freedom of expression and denounced the creation of privacy law by judicial precedent. Politicians also got involved. Prime Minister David Cameron said publicly that he felt 'uneasy' about judges granting injunctions to protect the privacy of powerful individuals.

A report by a judicial committee led by the Master of the Rolls, Lord Neuberger, on the issue of super-injunctions reported in May 2011, concluding that really very few actual super-injunctions had probably ever been granted. Yet the report did not get the public coverage it merited considering the furore that had preceded it.

Since the 'super-injunction spring' of 2011, the unrest has not abated and the issue of privacy continues to be ever-present. In the summer of 2012 it was the turn of the press to come into the firing line, with the closure of the *News of the World* following the scandal over voicemail interceptions by its reporters (or, as more colloquially etched in the public mind, the 'phone-hacking scandal'). The Leveson Inquiry ensued, the terms of reference of which were to scrutinise the culture and ethics of the press as a whole, but Leveson LJ in his Part 1 Report raised clear concerns about the attitude of the press toward celebrities, observing, for example, that, 'Where

obligation [by the State] to put in place a system to protect an individual's private life from interference by non-state entities such as the media ...').

there is a genuine public interest in what they are doing, that is one thing; too often, there is not.' He recommended a further tightening of the Data Protection Act 1998 and a review of the damages available in data protection, privacy and breach of confidence cases.

So where does this leave the development of privacy law in England and Wales? In some ways it can be said that the law of privacy is in fairly stable condition considering the quite radical changes it has endured in its relatively short lifetime. There has tended to be a 'wait and see' attitude by English lawyers to privacy law, but the law is in fact relatively well established now and unlikely to see dramatic change. The key tests and legal principles to be applied are very settled. As has been the case for some time in the US, English privacy law may finally have grown up.

Never the twain shall meet?

As Oscar Wilde once observed of the former colonies, 'we really have everything in common with America nowadays except, of course, language.'²⁸ When it comes to privacy law, however, it may be just the opposite. While the courts of both countries use virtually identical terminology in adjudicating privacy claims – a 'reasonable expectation of privacy' versus a legitimate 'public interest' in disclosure – this similarity in legal lexicon masks a real divide in philosophical approach. Some of these differences are obvious, others less so. But they are ultimately outcome determinative in many cases.

Notions of privacy

Even at the starting point, the US and the UK do not set off from the same foot. Notions of what is considered 'private' are considerably broader in England and Europe than in the United States. Several cases exemplify this. Notably, in *Von Hannover v Germany (No. 1)*,²⁹ the European Court of Human Rights held that the Article 8 privacy rights of Monaco's Princess Caroline (a darling of European gossip magazines) had been breached by the failure of the German courts to prohibit publication of photographs showing her engaged in quite ordinary activities in public and 'semi-public' places (shopping, in a restaurant, playing sports, visiting a horse show). Rejecting the German courts' view that privacy rights do not ordinarily extend beyond 'secluded places', the European Court of Human Rights held that, 'anyone, even if they are known to the general public, must be able to

²⁸ Oscar Wilde, *The Canterville Ghost* (1882).

²⁹ (2005) 40 EHRR 1.

enjoy a “legitimate expectation” of protection of and respect for their private life’.³⁰ Underlying the Court’s ruling was the expressed concern that ‘photos taken in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution’.³¹ So too, in England, the Court of Appeal in *Murray v Big Pictures (UK) Ltd*³² held that it was at least arguable that JK’s Rowling’s infant son had a reasonable expectation of privacy in respect of photographs of him being pushed down a public street in a pram, noting that:

the law should indeed protect children from intrusive media attention, at any rate to the extent of holding that a child has a reasonable expectation that he or she will not be targeted in order to obtain photographs in a public place for publication.³³

These and other decisions reflect the prevailing view in England and Europe that privacy law protects not only intimate facts and activity in secluded places, but a broader right ‘to control the dissemination of information about one’s private life’ as an inherent aspect of ‘human autonomy and dignity’.³⁴

In English law, the preliminary question of whether the claimant has a ‘reasonable expectation of privacy’ (the ‘first-stage test’) is essentially fact-sensitive. Although there is a notional ‘threshold of seriousness’ (see for example *Wood v Commissioner of Police for the Metropolis*³⁵), it has not been applied consistently by the courts. For instance, in *Trimingham v Associated Newspapers Ltd*,³⁶ which involved news reports about Cabinet Minister Chris Huhne’s extramarital affair with Carina Trimingham (his election campaign press officer), Ms Trimingham – who had herself been in a civil partnership with a woman and had deceived her civil partner – complained about press disclosures of her sexual orientation and publication of photographs from her civil partnership ceremony. The court, however, held that she had no reasonable expectation of privacy with respect to her sexual orientation, given her public civil partnership and her affair with Mr Huhne, and that the photos likewise disclosed no private information. By

30 *Ibid.* at [69].

31 *Ibid.* at [59].

32 [2008] 3 WLR 1360.

33 *Ibid.* at [57].

34 *Campbell v MGN Ltd* [2004] 2 AC 457 at [51] (per Lord Hoffman). See also *ibid.* at [124] (publication of a photograph showing Naomi Campbell on a public street outside a drug addiction therapy clinic constituted a ‘gross interference with her right to respect for her private life’) (per Lord Hope).

35 [2010] 1 WLR 123 at [22]–[23].

36 [2012] EWHC 1296 (QB).

contrast, in *AAA v Associated Newspapers Ltd*,³⁷ the court found that even though there was, on balance, a public interest in allegations that a well-known politician had fathered a child out of wedlock, press publication of photos of the child infringed the child's Article 8 privacy rights and damages of £15,000 were ordered against the defendant. The AAA decision echoes an earlier ruling by the European Court of Human Rights that, even where an infant's photo reveals no private information, nor anything potentially embarrassing, that does not prevent there being an infringement of the child's Article 8 right of privacy.³⁸

It is clear that a great deal of information which would pass the threshold of Article 8 in European and English law would simply not be deemed private under US law. An example of these contrasting approaches can be seen in the factually similar cases of *RocknRoll v News Group Newspapers*³⁹ and *Prince v Out Publishing, Inc.*⁴⁰ In the former English case, the claimant, who was married to the actress Kate Winslet, brought a privacy claim over photographs taken at a private party, some of which showed him partially naked. The photographs could be viewed by his approximately 1,500 'friends' on Facebook. The English courts nonetheless held that the claimant had a reasonable expectation of privacy in respect of the photographs and that his Article 8 rights were 'plainly engaged'. In the US case, the plaintiff brought an intrusion upon seclusion claim based on publication of photographs showing him dancing naked from the waist up at a private dance club in Los Angeles, which was attended by at least 1,000 people. Affirming the lower court's dismissal of the suit, the California appeals court ruled that Mr Prince simply could not establish an 'objectively reasonable expectation of seclusion or solitude in the place' necessary for an intrusion claim.⁴¹

In the United States, as in England, 'seclusion' and the expectation of privacy are relative, not absolute concepts. This notion of 'limited privacy' recognizes that although an individual may be visible or audible to some limited group of persons, the individual may nonetheless expect to remain secluded from other persons and particularly from the world at large.⁴² Thus, for example in *Sanders v American Broadcasting Co.*,⁴³ the California Supreme Court ruled that an employee could have a reasonable expectation

37 [2013] EMLR 2 (upheld by the Court of Appeal [2013] EWCA Civ 554).

38 *Reklos and Davourlis v Greece* [2009] ECHR 200. On the issue of infant photographs, see also *Murray v Express Newspapers* [2009] Ch 481.

39 [2013] EWHC 24 (Ch).

40 2002 WL 7999.

41 *Ibid.* at [59].

42 *Medical Laboratory Management Consultants v American Broadcasting Companies, Inc.*, 306 F3d 806, 815 (9th Cir 2002).

43 20 Cal 4th 907 (Cal 1999).

of privacy from undercover news filming of his conversations at his private workplace even though he could be overheard by others in the vicinity. Yet, unlike the much broader Article 8 principles that extend an individual's expectations of privacy into *public* settings, American courts have consistently held that the press 'is subject to no liability for giving further publicity to that which plaintiff leaves open to the public eye'.⁴⁴

It is clear that, in both England and the United States, the law seeks to protect individuals from 'the invasion of some "zone of privacy" which is entitled to be immune from the prying of others'.⁴⁵ It is equally clear that the two jurisdictions define that 'zone of privacy' very differently.

Legitimate public interest

Both English law and the American private facts tort also compel consideration of whether disclosure of private information furthers a 'legitimate public interest'. But it is particularly here where the two legal systems are separated by a common language.

To balance or not to balance? That is the question

Perhaps the most fundamental distinction between the English and American approach is the relative weight courts in the two nations accord to free expression rights in privacy litigation – a difference that flows in part from their different constitutional charters.

Under the European Convention of Human Rights (ECHR), *both* privacy (Article 8) and free expression (Article 10) are recognised as fundamental rights. Neither right has priority over the other. In English privacy actions, once the claimant has established that he or she has a 'reasonable expectation of privacy' in the material at issue (thereby engaging Article 8), the media may raise as a defence that publication of that private material is nonetheless 'in the public interest', thereby engaging their Article 10 freedom of expression rights (what English courts call the 'second stage'). But even if the defendant shows that publication is in the public interest, that does not end the inquiry. Instead, the court must then balance these two conflicting rights, with an 'intense focus' on the facts of the particular case, to determine which right should prevail in that case.⁴⁶

44 *Machleder v Diaz*, 801 F2d 46, 59 (2d Cir 1986) (citation omitted); see also *Wilkins v National Broadcasting Co.*, 71 Cal App 4th 1066 (1999) (the plaintiff had no reasonable expectation of privacy where undercover reporters videotaped him on the open patio of public restaurant).

45 J McCarthy, *The Rights of Publicity and Privacy*, § 5:88 at 5-192.

46 *In re S (A Child)* [2004] UKHL 47, [17]; *Ferdinand v MGN Ltd* [2011] EWHC 2454 at [61]; *McKennitt v Ash* [2008] QB 73 at [46].

Unlike Article 8 of the ECHR, the US Constitution does not set forth a 'privacy' right that may be invoked by privacy claimants in civil tort litigation.⁴⁷ While long protected under American common law, privacy simply does not have the same constitutional pedigree as free speech does under the First Amendment. Thus, if a US court finds that publication of private facts relates to a matter of legitimate public concern (i.e. is newsworthy), that serves as a First Amendment (as well as common law) privilege mandating dismissal of the privacy claim.⁴⁸ In other words, in contrast to the approach taken in Europe and England, 'under the federal Constitution [in the US] newsworthiness is a complete bar to liability, *rather than merely an interest to be balanced against private ... interests*'.⁴⁹

Nonetheless, as one US court has noted, 'a certain amount of interest-balancing *does* occur in deciding whether material is of legitimate public concern'.⁵⁰ For example, in determining whether truthful private facts are newsworthy (thus privileging their publication), California courts have traditionally considered 'a variety of factors, including the social value of

47 The US Supreme Court has in a few cases applied the term 'privacy' as a short-hand reference for a cluster of various constitutional rights of citizens against unwarranted governmental intrusion – for example, government intrusion into a woman's reproductive and contraceptive decisions, or unreasonable searches and seizures in the home. See, e.g., *Griswold v Connecticut*, 381 US 479, 484 (1965) (Douglas, J). But courts have consistently observed that this constitutional right of privacy applies only against government intrusion, and may not be invoked by tort claimants in invasion of privacy litigation against the press or other private-party defendants. See, e.g., *Rosenberg v Martin*, 478 F2d 520, 524 (2d Cir 1973) (Friendly, J); *Polin v Dun & Bradstreet, Inc.*, 768 F2d 1204, 1207 (10th Cir 1985); *Hall v Post*, 323 NC 259, 372 SE2d 711, 713 (NC 1988); *Delan by Delan v CBS, Inc.*, 91 AD2d 255, 260, 458 NYS2d 608, 614 (2d Dept 1983); see also J McCarthy, *The Rights of Publicity and Privacy*, § 5:54; Felcher and Rubin, 'Privacy, Publicity and the Portrayal of Real People by the Media', 88 Yale LJ 1577, 1584, n. 42 (1979).

Unlike the federal constitution, some state constitutions have been held to create a civil invasion of privacy claim between private parties. See J McCarthy, *The Rights of Publicity and Privacy*, § 5:54 at 5-96 (citing cases). But, because the national Constitution is supreme under principles of American federalism, a finding that speech is newsworthy and, hence, protected under the First Amendment trumps private facts claims *regardless* of whether those privacy claims arise under state common law, the state constitution or both. See, e.g., *Schulman*, 18 Cal 4th at 227.

48 See, e.g., *Nobels v Cartwright*, 659 NE2d 1064, 1075 (Ind App 1995) ('If a matter is determined to be of legitimate public interest, the disclosure or publication of information about that matter is said to be privileged under the First Amendment. ... [T]he public's legitimate interest in the individual to some reasonable extent includes publicity given to facts about the individual that would otherwise be purely private.');

Schulman, 18 Cal 4th at 227 ('the publication of truthful, lawfully obtained material of legitimate public concern is constitutionally privileged and does not create liability under the private facts tort'); *Campbell v Seabury Press*, 614 F2d 395, 397 (5th Cir 1980) ('[t]he First Amendment mandates a constitutional privilege'); *Prince*, 2002 WL 7999 at *9 ('[t]he newsworthiness defense applies to bar a plaintiff's cause of action for invasion of privacy based on publication of private facts'); see also cases cited in notes 10 and 11 above.

49 *Schulman*, 18 Cal 4th at 227.

50 *Ibid.* (emphasis in original).

the facts published, the depth of the article's intrusion into ostensibly private affairs, and the extent to which the [claimant] voluntarily acceded to a position of public notoriety [i.e. is a public figure]'.⁵¹

It could be argued that the *same* balancing of privacy and speech interests takes place in the UK and US, merely at a different level of abstraction. But we believe that would be a mistaken view. The very formulation of competing first principles indicates that, from the outset, the two jurisdictions assign *different* weight to freedom of expression. Thus, in England and Wales, 'it has to be accepted that any rights of free expression, as protected by Article 10, ... must no longer be regarded as simply "trumping" any privacy rights that may be established';⁵² while, in the US, '[w]hen the subject matter of the publicity is of legitimate public concern, there is no invasion of privacy'.⁵³ Freedom of expression is thus accorded greater weight in the US than in the UK. Indeed, this fundamental difference of approach is highlighted by the fact that, in privacy actions in the UK, publication on a matter of public interest is a 'defence' (with the burden of proof on defendant), whereas, in the US, it is typically referred to as a First Amendment 'privilege' (with the burden on the claimant, as an element of the private facts tort, to establish lack of newsworthiness).⁵⁴

In short, under the English approach, even disclosures on matters of great public importance may not necessarily prevail over privacy rights if those privacy interests are particularly weighty. In the US, by contrast, '[n]ewsworthiness is the rock on which most privacy claims founder'.⁵⁵

Defining 'legitimate public interest': Of vapid tittle-tattle and deference to editorial judgement

In addition to taking different approaches to the fundamental question of how to strike the balance between privacy and free expression interests, English and US courts also differ in how they define and determine matters of 'legitimate public interest' – though there are surely similarities as well.

How to assess whether publication of intimate private facts is in the 'public interest' (or, in American lexicon, is 'newsworthy') is a notoriously

51 *Kapellas v Kofman*, 1 Cal 3d 20, 36 (1969); see also *Schulman*, 18 Cal 4th at 215–16 ('It is in the determination of newsworthiness—in deciding whether published or broadcast material is of legitimate public concern—that courts must struggle most directly to accommodate the conflicting interests of privacy and press freedom.').

52 *Mosley v News Group Newspapers Ltd* [2008] EMLR 20, [10].

53 Restatement (Second) of Torts § 652D cmt d.

54 See, e.g., *Diaz v Oakland Tribune, Inc.*, 139 Cal App 3d 118, 126 (Cal Ct App 1983); *White v Fraternal Order of Police*, 707 F Supp 579, 587 (D DC 1989), *aff'd*, 909 F2d 512 (DC Cir 1990).

55 Zimmerman, Diane L, 'Book Review: Secrets and Secretiveness: Patterns in the Fabric of the Law?', 78 Cal L Rev 515, 533, n. 51 (1990).

difficult question that has bedevilled courts around the world. As one court has noted, if newsworthiness is completely 'descriptive' – if all coverage that sells papers or boosts ratings is deemed newsworthy – then 'it would seem to swallow the publication of private facts tort' since 'it would be difficult to suppose that publishers were in the habit of reporting occurrences of little interest'.⁵⁶ At the other extreme, if newsworthiness is viewed as a purely normative concept (with courts picking and choosing what is and is not meritorious reporting), 'the courts could become to an unacceptable degree editors of the news and self-appointed guardians of public taste'.⁵⁷

Inevitably, the very task of determining whether publication of private facts furthers a legitimate public interest 'does involve courts to some degree in a normative assessment'.⁵⁸ Yet, in the US, two important principles apply to limit the risk that assessments of newsworthiness will be dictated by the individual tastes of judges or jurors. First, 'newsworthiness' is not limited to 'news' in the narrow sense of just reports of current events involving issues of public debate. 'It also extends to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement, or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published.'⁵⁹ Thus, in American invasion of privacy litigation, 'the constitutional guarantees of freedom of expression apply with equal force to the publication whether it be a news report or an entertainment feature'.⁶⁰ Articulating the American approach, former Supreme Court Justice Sandra Day O'Connor has noted that '[c]ourts should be chary of deciding what is and what is not news'.⁶¹

In addition to broadly defining the types of uses deemed 'newsworthy', US courts also typically give 'considerable deference' to the editorial judgments of reporters and editors.⁶² United States courts require that, for the newsworthiness privilege to apply, there must be a 'logical nexus' between publication of the private facts at issue and a matter of legitimate public concern (what English courts call 'proportionality').⁶³ But sensitive to the

56 *Shulman*, 18 Cal 4th, at 218 (quoting, in part, Comment, 'The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness', 30 U Chi L Rev 722, 734 (1963)).

57 *Shulman*, 18 Cal 4th at 219.

58 *Ibid.* at 222.

59 Restatement (Second) of Torts § 652D cmt j.

60 *Gill v Hearst Publishing Co*, 40 Cal 2d 224, 229 (Cal 1953) (no invasion of privacy from publication in a magazine showing a couple embracing at the Los Angeles Farmers' Market).

61 *Harper & Row Publishers v Nation Enterprises*, 471 US 539, 561 (1985) (quoting Judge Meskill).

62 *Shulman*, 18 Cal 4th at 224.

63 See, e.g., *Shulman*, 18 Cal 4th at 224; *Campbell*, 614 F2d at 397; *Cinel v Connick*, 15 F3d

need to avoid unconstitutional interference with editorial judgment, US courts have consistently stated that '[t]he constitutional privilege to publish truthful material "ceases to operate only when an editor abuses his broad discretion to publish matters that are of legitimate public interest"'.⁶⁴ Or, as one jurist more succinctly put it, except for extreme cases involving morbid prying for its own sake, 'it is not for a court or jury to say how a particular story is best covered'.⁶⁵

These limiting principles in the United States stand in stark contrast to the English approach. Unlike the deference given to editorial judgment in the US, in England and Wales the assessment of whether publication of private information constitutes a matter of public interest is very much an issue solely in the hands of the judge – with English jurists taking a decidedly more sceptical view of the press. The concept of 'proportionality' is key under the European Convention on Human Rights, and it is not uncommon for an English judge to dissect an article post-publication to determine which parts of it 'overstepped' the mark. Yet this can lead to unpredictability and a divergence in opinion between judges as to where the precise line should be drawn. This is best exemplified by the *Campbell* case, in which a majority of the House of Lords held that the defendant newspaper was entitled to publish the *fact* of Naomi Campbell's drug addiction and treatment as a matter of public interest, but that the newspaper had overstepped the bounds of what could legitimately be published by disclosing additional details about her treatment and publishing a photograph of her coming out of a Narcotics Anonymous meeting. Lord Nicholls and Lord Hoffmann (dissenting), however, found that these additional details were 'peripheral' and did not materially add to the level of intrusion. Lord Nicholls also thought that the details added important colour and conviction to the story and were well within the bounds of editorial discretion – a position not shared by the majority.

1338, 1346 (5th Cir 1994) ('substantially related'); *Ross v Midwest Communications, Inc.*, 870 F2d 271, 274 (5th Cir 1989) ('logical nexus'); *Gilbert*, 665 F2d at 308 ('substantial relevance'); *Haynes v Alfred A Knopf, Inc.*, 8 F3d 1222, 1233 (7th Cir 1993) (facts 'germane' to story); *Vassiliades v Garfinckel's Brooks Bros, Inc.*, 492 A2d 580, 590 (DC Ct App 1985) ('logical nexus').

64 *Shulman*, 18 Cal 4th at 225 (quoting, in part, *Gilbert v Medical Economics Co.*, 665 F2d 305, 308 (10th Cir 1981).

65 *Ibid.* at 225; see also *Howard v Des Moines Register & Tribune Co.*, 283 NW2d 289, 302 (Iowa 1979) ('In determining whether an item is newsworthy, courts cannot impose their own views about what should interest the community.');

Heath v Playboy Enterprises, 732 F Supp 1145, 1149, n. 9 (SD Fla 1990) ('[T]he judgment of what is newsworthy is primarily a function of the publisher, not the courts.');

Glickman v Stern, 19 Media L Rep. 1769, 1776 (Sup Ct NY Co 1991) ('It is well-settled that the courts will not endeavour to supplant the editorial judgment of the media in determining what is "newsworthy" or of "public interest".').

The close scrutiny which English courts pay to issues of proportionality can also be seen in *Browne v Associated Newspapers Ltd*,⁶⁶ a case in which the ex-partner of Lord Browne of Madingley, the then Group Chief Executive of BP, sought to sell his story to the *Mail on Sunday*. In considering whether an injunction should be granted, the Court of Appeal separated out and carefully examined each category of information to be published by the newspaper. The Court made a distinction between reporting the 'bare fact' of a sexual relationship and information as to the contents and detail of that relationship.⁶⁷ The result was that the Court of Appeal upheld an injunction which closely dictated which categories of information could and could not be published. This type of 'blue-pencilling' of news articles by judges is quite different from the US approach, under which 'courts do not, and constitutionally could not, sit as superior editors of the press'.⁶⁸

So too, in contrast to the broad First Amendment definition of 'newsworthiness' in the United States (encompassing, as it does, entertainment features as well as political news), English and European courts take a decidedly narrower view of when publication of private information is 'in the public interest'. Under the European approach – laid down by the European Court of Human Rights in *Von Hannover (No. 1)* and adopted by the UK Court of Appeal in *Ntuli v Donald*⁶⁹ – the 'decisive factor' is 'the contribution that the published photos and articles make to a debate of general interest'. Following the *Von Hannover (No. 1)* decision, there was concern among many that the 'debate of general interest' standard would preclude assertion of a public interest defence in all but a small class of privacy cases involving information mainly about crimes or about politicians in the exercise of their official functions. However, in more recent decisions, such as *Von Hannover v Germany (No. 2)*,⁷⁰ the European Court of Human Rights has indicated that, depending on the circumstances of the case, a debate of general interest may also be found where publication of private information concerns 'sporting issues or performing artists'.⁷¹ In *Von Hannover (No. 2)* – Princess Caroline's second outing at the Court over gossip magazine photos – the Court held that photos of Princess Caroline on holiday, which were accompanied by an article reporting that her father Prince Rainier III was severely ill at home, contributed 'to some degree' to a 'debate of general

66 [2008] QB 103.

67 *Ibid.* at [67].

68 *Shulman*, 18 Cal 4th at 229; see also *Ross*, 870 F2d at 275 ('Exuberant judicial blue-pencilling after-the-fact would blunt the quills of even the most honourable journalists.').

69 [2011] 1 WLR 294 at [20].

70 [2012] ECHR 228.

71 *Ibid.* at [109].

interest' involving her father's illness and her reaction to, and conduct during, that illness. At the same time, however, the Court commented favourably that '[i]t is worth mentioning' that the German courts had upheld an injunction forbidding publication of two other photos of Caroline 'precisely on the ground that they were being published for entertainment purposes alone'.⁷² Thus, while the *Von Hannover (No. 2)* decision does indicate that the European Court of Human Rights may be willing to grant a bit more latitude for entertainment reporting than originally thought, it does not mark a fundamental shift away from the 'debate of general interest' requirement that the Court has required for reporting on private matters.

In the English courts as well, there has long been a judicial distaste towards celebrity gossip which is perceived to serve no public interest purpose. For example, Baroness Hale in *Jameel v Wall Street Journal Europe Sprl*⁷³ distinguished between a 'real public interest' and information which merely interests the public, stating that 'the most vapid tittle-tattle about the activities of footballers' wives and girlfriends interests large sections of the public but no one could claim any real public interest in our being told all about it'. So too, in *Campbell v MGN*, Lord Hope made clear that 'newsworthiness' – the touchstone of US law – was not a criterion that was applicable in English law, stating that it was 'not enough to deprive Miss Campbell of her right to privacy that she is a celebrity and that her private life is newsworthy'.⁷⁴

In sum, in assessing 'public interest' in privacy litigation, English and US courts follow very different rules of the road.

Injunctions and damages

The differences in the US/UK approach to privacy also carry over into the remedies available for alleged privacy violations. Pre-publication injunctions are almost never granted in the US. Under First Amendment principles,

72 *Ibid.* at [118].

73 [2007] 1 AC 359 at [147].

74 [2004] 2 AC 457 at [120]. Notwithstanding these general pronouncements, English courts have extended the boundaries of 'public interest' in a few sporting figure and celebrity cases. For example, in *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB), Nicol J found after a full trial that a 'kiss and tell' story published in the *Sunday Mirror* was justified in the public interest because it showed that the wholesome image the claimant footballer had projected to the public about himself was false and that there was an ongoing public interest in his suitability for the role of England captain. In *McClaren v News Group Newspapers Ltd* [2012] EWHC 2466 (QB) – a controversial decision – the judge found that there was a legitimate interest in publishing information about the extramarital affair of the claimant, a manager for a Dutch football team and a former England manager, as he was a public figure from whom higher standards of conduct could reasonably be expected.

'[p]rohibiting the publication of a news story ... is the essence of censorship', is presumptively unconstitutional and is theoretically permissible only under the most extraordinary circumstances involving irreparable injury to national security (such as reporting troop movements in time of war) or other interest of similar magnitude.⁷⁵ As a result, the remedy of a claimant alleging publication of private facts is invariably confined to post-publication damages.⁷⁶

In contrast, pre-publication injunctions are more commonly granted in England and Wales to provide protection for privacy rights. The availability of this remedy is considered by English claimants to be a key advantage of privacy claims over libel, where it is far more difficult to obtain interim injunctions due to the age-old hurdles in *Bonnard v Perryman*,⁷⁷ by which an injunction will not be granted unless the court is satisfied that a defence of justification (or other defence) cannot succeed. This advantage has been exploited in several cases where complaints that were plainly about damage to reputation have been 'squeezed' into actions for breach of privacy/confidence in an attempt to circumvent the *Bonnard v Perryman* roadblocks. English courts, however, have become more astute to this tactic and in some cases have refused injunctions partly for this reason.⁷⁸

Damages in the UK for breaches of privacy are fairly modest, especially when compared to the awards granted to successful privacy claimants in the US. The highest recorded award was £60,000 in *Mosley*,⁷⁹ a case in which the trial judge, Eady J, stated that the scale of the claimant's distress and indignity was 'difficult to comprehend' and 'probably unprecedented', after the *News of the World* famously published photographs and video footage of the claimant engaging in sexual acts with five prostitutes. Other privacy awards have not come nearly as high, with most remaining in the £2,000–£15,000 bracket.

75 *Procter & Gamble Co. v Bankers Trust Co.*, 78 F3d 219, 225 (6th Cir 1996) (citation omitted). See also *New York Times Co. v United States*, 403 US 713, 726 (1971) (Brennan, J, concurring) ('Pentagon Papers case'); *Nebraska Press Ass'n v Stuart*, 427 US 539, 559 (1976) (prior restraints against the media constitute 'the most serious and the least tolerable infringement on First Amendment rights'); *In re Providence Journal Co.*, 820 F2d 1342, 1348 (1st Cir 1986) ('In its nearly two centuries of existence, the Supreme Court has never upheld a prior restraint on pure speech'), modified on reh'g en banc, 820 F2d 1354 (1st Cir 1987), cert. dismissed on other grounds, 485 US 693 (1988).

76 In a handful of cases where the claimant was seeking to stop harassing intrusion conduct, and not seeking to enjoin publication, US courts have on occasion granted injunctions against harassing, paparazzi-type behaviour. See *Galella v Onassis*, 487 F2d 986 (2d Cir 1973) (injunction against intrusion and harassment of Jackie Onassis by photographer); *Wolfson v Lewis*, 924 F Supp 1413 (ED Pa 1996) (preliminary injunction issued against the intrusive behaviour of TV investigative reporters).

77 [1891] 2 Ch 269.

78 See, e.g., *Viagogo v Myles & Others* [2012] EWHC 433 (Ch); *Terry v Persons Unknown* [2010] Fam Law 453.

79 [2008] EMLR 20.

A final word on the different rules on costs in the two jurisdictions – a topic worthy of a paper itself. The English rule that costs are paid by the losing party does not apply in the United States, where the governing rule is that each party is responsible for its own attorneys' fees. This has a significant impact on the way that litigation is played out in the respective jurisdictions. Legal fees in English cases in most cases dwarf damages, and the prospect of having to pay hefty fee awards on top of damages is likely to form the key incentive for many media defendants in the UK to settle privacy claims (rather than defend them), especially if the defendant has few assets.

Conclusion

English and US courts, influenced by non-identical history, legal tradition and values, surely differ in where they draw the line between the right to privacy and the right to freedom of expression. The First Amendment gives the press in the United States more latitude to publish (and the public more scope to receive) truthful newsworthy information that the rich and powerful would prefer remain private. On the other side of the Atlantic, the enshrinement of a constitutional privacy right in Article 8 provides individuals in England and Europe – even celebrities and politicians – with a greater ability to control public discussion of their private lives. Each system carries its own virtues and shortcomings, its own quirks and preconceptions, its own imperfect balance of inherently conflicting rights. As an American lawyer and an English barrister, we unquestionably have our own views on which country's laws more appropriately strike the right balance. But, as Judge Cardozo succinctly put it almost a century ago, 'We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.'⁸⁰

80 *Loucks v Standard Oil Co.*, 224 NY 99, 110–11 (1918).

