THE COMMON LAW PROTECTION OF PRIVACY*

By GERALD DWORKIN†

I. INTRODUCTION

Most American States now recognise that there is a right of privacy which is protected by the law of torts. This so-called right, formulated by Warren and Brandeis in their pioneer article,[1] has also been described as 'the right of a person to be let alone'[2] and the right of 'inviolate personality.'[3] The earlier concern as to whether or not such a right exists is lessening and attention is now being directed to its contents.

In England and Australasia, there is an entirely different picture: in these jurisdictions it is generally accepted that no such legally protected right of privacy exists.[4] However, most persons concerned with civil liberties deplore this gap in our law. As Orwell's *1984* is rapidly turning from fantasy to fact the demands for greater protection of privacy are becoming more vocal. The Attorneys-General of the Commonwealth and the States recently affirmed the inviolable right of every citizen to the privacy of his home. In England, in the last few years, two attempts have been made to introduce legislation designed to protect privacy,[5] and one of the most recent calls for legal reform was an international one which came in May 1967 from the International Commission of Jurists, which described the concept in the following terms:

1. The Right to Privacy, being of paramount importance to human happiness, should be recognised as a fundamental right of mankind. It protects the individual against public authorities, the public in general and other individuals.
2. The Right to Privacy is the right to be let alone to live one's own life with the minimum degree of interference.[6]

When one considers that the Warren and Brandeis thesis, which played such a prominent part in the introduction of the right to privacy

---

* *This paper was delivered at a Torts Seminar in Canberra in August 1967. It was not possible to follow through in detail the suggested lines of development, particularly in the latter part of the paper.*

† Professor of Law, University of Southampton.

1 Warren & Brandeis, 'The Right to Privacy' (1890) 4 *Harv. L. Rev.* 193.

2 *Roberson* v. *Rochester Folding Box. Co.* 171 N.Y. 538 (1902).

3 Warren and Brandeis, *supra*, at p. 205.

4 *Victoria Park Racing Co. Ltd.* v. *Taylor* (1937) 58 C.L.R. 479; *Tolley* v. *Fry* [1930] 1 K.B. 467 at p. 478 per Greer L.J.

5 *Infra* p. 15.

6 International Commission of Jurists. Conclusions of the Nordic Conference, May, 1967, on 'The Right to Privacy.' The conclusions of this Conference will be dealt with later in this paper.

in the U.S.A., was based almost entirely upon early English authorities, it seems surprising that neither the courts in England nor Australasia have been encouraged or prepared to consider the development of similar principles based upon the same authorities. Indeed, it is curious that there has been such a dearth of judicial discussion of a legally protected right of privacy.

The object of this paper is to examine briefly the so-called right of privacy as it is being developed in the U.S.A.; to look at the position in England and Australasia to see to what extent, if at all, our legal system is defective in not recognising such a general right; and to examine the desirable and possible development of the Common Law in this area.

II. The American Development

(a) From Warren and Brandeis to Prosser.

The great success of the Warren and Brandeis article and its influence on American law were probably due to the very attractive presentation of the argument. The article did not, for the most part, deal with philosophical and moral abstractions, of interest to the legal philosopher but apparently unrelated to the everyday remedies available in the courts. Instead, there was developed a simple, yet skilful argument, working through case law and drawing conclusions capable of being understood and accepted by the most practical of lawyers.

The argument, of course, was that the existing case-law already contained the ingredients which are necessary to make up a general concept of privacy, but the courts had not then seen the wood for the trees. Working inductively through a limited number of cases in the areas of contract and industrial property it was shown how damages for invasion of privacy were awarded parasitically. Existing nominate heads of liability were being used to protect incidental interests of privacy which, more logically, ought to be isolated from existing remedies and re-classified as a separate and independent head of liability. In this way it would be possible to understand more clearly the concept involved and to protect privacy in a wider range of situations.

Thus an action for invasion of privacy was then available if there was an existing peg on which to hang a remedy. The property cases, which Warren and Brandeis considered, illustrated their argument. In the famous case of *Prince Albert* v. *Strange*,[7] the publication of the etchings of Queen Victoria and of her Consort, regarded by the court as an invasion of privacy,[8] was restrained on the grounds of breach of copyright and breach of trust. The notion of property was (and is) a very broad one, and covered breaches of implied terms in contracts, breaches of trust and breaches of confidence. Thus the unauthorised

[7] (1849) 1 McN. & G. 23.
[8] *Ibid.* at p. 43 per Lord Cottenham L.C.

publication of the hitherto unpublished lectures of a distinguished surgeon was restrained on the ground of breach of confidence,[9] and the unauthorised publication of a photograph was restrained on the ground of breach of an implied term in a contract.[10] The property rights protected could, it was argued, also be enforced against third parties.[11]

All these situations, it was maintained, really concerned the problem of privacy, and the process of separating the privacy element from the property element was not very difficult.

> So long as these circumstances happen to present a contract upon which such a term can be engrafted by the judicial mind, or to supply relations upon which a trust or confidence can be erected, there may be no objection to working out the desired protection through the doctrines of contract or of trust. But the court can hardly stop there. . . . We must therefore conclude that the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world; and . . . the principle which has been applied to protect these rights is in reality not the principle of private property, unless that word be used in an extended and unusual sense. The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise.[12]

Thus, in a smooth way and by using familiar common law tools is was demonstrated that the principle of privacy existed. The application of an existing principle to a new state of facts, it was argued, was not judicial legislation.

The argument of Warren and Brandeis was not accepted immediately. Thus, in 1902, the New York Court of Appeals rejected the concept of a specific right of privacy when refusing to give a remedy to a young beauty whose likeness was used, without her authority, in a flour advertisement.[13] The arguments accepted by the court, those of novelty and the fear of a flood of litigation, were in themselves sufficient to indicate that 'privacy' had a bright future! The immediate effect of this decision in New York was the introduction of legislation designed to protect individuals against unauthorised use of their names and portraits for advertising and trade purposes.[14]

The initial judicial set-back, however, was eventually overcome and, in the last thirty years, a general right of privacy has been recognised in most American States.

(b) The Prosser Classification.

By 1960 there were over 300 reported American cases on privacy and a great deal of confusion. The state of the law was described as

---

9 *Abernethy* v. *Hutchinson* (1825) 3 L. J. Ch. 209.

10 *Tuck* v. *Priester* (1887) 19 Q.B.D. 639; *Pollard* v. *Photographic Co.* (1888) 40 Ch. D. 345.

11 Cf. *Yovatt* v. *Winyard* (1820) 1 J. & W. 394. See also: *Ashburton* v. *Pape* [1913] 2 Ch. 469; *Argyll* v. *Argyll* [1965] 2 W.L.R. 790.

12 Warren & Brandeis, *supra*, at pp. 210 and 213.

13 *Roberson v. Rochester Folding Box Co.* 171 N.Y. 538 (1902). A narrow 4: 3 majority.

14 N.Y. laws 1903, chap. 132, ss. 1 and 2.

'still that of a haystack in a hurricane.'[15] In that year Dean Prosser took stock of the law and his article on 'Privacy'[16] has been hailed as being as important in many ways as that of Warren and Brandeis, since it classified the various types of privacy protected by the law of torts.

Prosser demonstrated that, for many years, the courts were so preoccupied with the question whether the right of privacy existed at all that little consideration was given to what the right really amounted to. The examination of the contents of the right, the interests being protected and the conduct guarded against, has only taken place in recent years, and it was only now possible to draw some definite conclusions on privacy.

The conclusions of Prosser were, in a sense, surprising. In his view there has emerged from the cases not one tort but a complex of four.

> The law of privacy comprises four distinct kinds of invasion of four distinct interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff . . . 'to be let alone.'[17]

The four torts were described as follows:—

1. *Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.*

The interest primarily protected here is the freedom from mental distress. 'It has been used chiefly to fill in the gaps left by trespass, nuisance, the intentional infliction of mental distress, and whatever remedies there may be for the invasion of constitutional rights.'[18]

2. *Public disclosure of embarrassing private facts about the plaintiff.*

3. *Publicity which places the plaintiff in a false light in the public eye.*

In each of these two cases the interests protected are those of reputation and mental distress and they both either overlap or extend the laws of defamation.

4. *Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.*

In this group the interest protected is not a mental but a proprietary one: an interest in the exclusive use of the plaintiff's name and likeness.

The reason for the surprise at Prosser's conclusion is that, in one sense, the three hundred cases have shown not the single concept of privacy which Warren and Brandeis sought so anxiously to establish, but instead have indicated that the situation is, apart from the acceptance of the word 'privacy,' fundamentally very much the same as it

---

15 *Ettore* v. *Philco Television Broadcasting Co.* 229 F2d, 481 (3rd Cir.) (1956) per Biggs J.
16 (1960) 48 *Cal. L. Rev.* 383.
17 *Ibid.* at p. 389.
18 *Ibid.* at p. 392.

was before 1890. To be sure, the present rules give greater protection than those of 75 years ago, but this would happen in any modern legal system whether the development is haphazard and piecemeal or whether a general formula is created. There are separate torts and separate interests protected; but the grand design of Warren and Brandeis has been reduced to common law proportions!

Prosser's classification has been so widely accepted that most of the American privacy judgments since then have referred to and been influenced by it. It is also likely that when the second edition of the *Restatement on Torts* is completed this analysis will be substituted for the very generalised treatment now to be found in section 867.[19]

III. What are the Alleged Gaps and Defects in the Common Law?

In order to identify and assess the extent of the problem which exists in English and Australasian law it is necessary to find out what gaps appear to exist: in other words it is necessary to look at areas where it is generally recognised that the law ought to intervene but where the territorial boundaries of existing legal remedies appear to exclude that possibility. As the Prosser classification is the generally accepted analysis of the legal concept of Privacy, this will be the most convenient starting place; after that it may be desirable to look a little further afield.

(a) A Closer Look at the Prosser Classification.

(i) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.

Most of the cases which Prosser places in this category can be dealt with under existing heads of liability. For example, wrongfully entering a person's home, or the illegal search of a shopping bag usually fall within the tort of trespass. Even pestering or making threats from the highway may constitute assault and so be actionable,[20] and the well known cases of *Harrison* v. *Duke of Rutland*[21] and *Hickman* v. *Maisey*[22] establish that unreasonable use of a public highway can involve trespass to the land of an adjoining owner. A recent Queensland decision presents an interesting example of trespass to land and invasion of privacy. In *Coles-Smith* v. *Smith*[23] the plaintiff, who was separated from his wife, was awoken in the early hours of the morning in his house (which had been the matrimonial home) by the defendant and his wife who were aiming to intimidate him so that he would offer no defence to future divorce proceedings.

---

19 Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser,' (1964) 39 *N.Y. Univ. L.R.*, 962 at p. 964.

20 Cf. *Adams* v. *Rivers* 11 Barb. 390 (N.Y.S. 1851); *Ward* v. *Holman* [1964] 2 Q.B. 580.

21 [1893] 1 Q.B. 142.

22 [1900] 1 Q.B. 752.

23 [1965] Qd. R. 494.

It was held that although the wife had authority to invite persons to enter the house where the invitation was given in furtherance of the matrimonial consortium, the defendants were trespassers because their activities could not be covered by the cloak of the wife's right of consortium and damages were awarded.

Nuisance, too, is a tort which ought to be available in many situations. Thus Winfield[24] refers to a 1904 unreported decision where a Balham family, by placing in their garden an arrangement of large mirrors, were enabled to observe all that passed in the study and operating room of a neighbouring dentist, who sought in vain for legal protection against the 'annoyance and indignity' to which he was thus subjected. Winfield's suggestion that there should have been a nuisance action available is difficult to oppose.[25] The same remedy ought to have been available in *Perera* v. *Vandiyar*[26] where the defendant landlord who had cut off the plaintiff tenant's services to the upstairs flat from his own premises below was held not liable as there was no trespass and there was no nominate tort of eviction.

The very narrow approach which has sometimes been adopted by the courts in nuisance cases is exemplified by the leading Australian decision, *Victoria Park Racing and Recreation Co. Ltd.* v. *Taylor*,[27] where the High Court held that if a broadcasting company arranged to spy on the land of a racecourse owner, the owner has no remedy, even if he can show financial loss due to falling attendances, as he has no property in the spectacle. Even if the High Court was right to hold that there was no right of privacy at Common Law, it is submitted that the majority of the court was wrong in holding that nuisance had not been committed. Like negligence, the catergories of nuisance are not closed. The historical basis of the tort is the adjustment and balancing of the competing interests of adjoining landowners, and the emphasis is on the reasonableness of the activities and behaviour of the parties. If the court, in weighing up all the relevant factors, genuinely felt that there was nothing unreasonable or unobjectionable in the defendant's behaviour, then the decision may well be justified. However, the court's task here is to reflect the attitudes of society. If, therefore, it can be shown that society does not approve of such behaviour, then the findings of the court can be challenged. Two points can be made to show that such conduct may be regarded as unreasonable. First, there is an American decision which, on similar facts, gave a remedy against such an activity.[28] Secondly, and of more importance, such practices (as regards television) are now prohibited in Australia.[29] It is submitted, therefore,

---

24 'Privacy' (1931) 47 *L.Q.R.* 23 at p. 27.
25 Cf. *Lyons & Sons* v. *Wilkins* [1899] 1 Ch. 255.
26 [1953] 1 W.L.R. 672.
27 (1937) 58 C.L.R. 479.
28 *Pittsburgh Athletic Club* v. *K.Q.V. Broadcasting Co.* (1938) 24 F.Supp. 490.
29 Broadcasting and Television Act, 1942-56, s. 115, Cf. Television Act, 1954, s. 3(1)(U.K.); see Fleming, *The Law of Torts*, 3rd. ed., p. 570.

that a much more realistic approach to the scope and flexibility of the tort of nuisance ought to be adopted.[30]

The more conventional peeping toms have been committing common law and statutory crimes for centuries;[31] and probably torts, too, if trespass or nuisance have been committed. Now that these problems have been overtaken by much more serious problems of eavesdropping by the use of ultra-modern scientific equipment, legislation has been introduced, which no doubt will be widened in scope, to make such invasions of privacy illegal.[32] The existing torts may be available in some of these cases. Thus in *Grieg* v. *Grieg*,[33] where a microphone had been installed in the plaintiff's flat for the purposes of eavesdropping, damages were awarded in trespass to cover the plaintiff's 'hurt feelings' as a result of his privacy being invaded. It has been claimed recently that even the American common law right of privacy in this field has never become an effective remedy to control the wiretapping, microphone eavesdropping and photographic surveillance that have been adopted and utilised by police and private investigators this century. Between 1890 and 1950 only two of the 300 or more reported cases involving the common law right of privacy were actions for damages against private parties for using surveillance devices, and there were no recoveries against government intrusions, even when police acted without authority or for illegal purposes such as extortion. However, many more actions have been brought since then for invasion of privacy by using electronic surveillance.[34] Whether scientific advances have now made it desirable for the criminal law to play the predominant role in safeguarding the individual will be referred to later in this paper.

Torture by telephone is also often remediable at Common Law. Thus a debtor who is unreasonably hounded for a considerable length of time with telephone calls at his home and his place of employment,[35] may have a common law remedy in nuisance. In *Stoakes* v. *Brydges*[36] a perpetual injunction was granted against a defendant who, feeling aggrieved at the nocturnal noises made by a milkman, retaliated by dialling the plaintiffs' telephone numbers in the middle of the night.

Although there are very few situations in this category which are not protected under existing heads of liability, there are some apparent

30 Cf. *Thompson-Schwab* v. *Costaki* [1956] 1 W.L.R. 335; see also Paton, 'Broadcasting and Privacy' (1938) 16 *Can.B.Rev.* 425.

31 See Blackstone, IV *Commentaries on the Law of England,* 168; *Haisman* v. *Smelcher* [1953] V.L.R. 625.

32 Telephonic Communication (Interception) Act 1960 (Cth). See Barry, 'An End to Privacy' (1960) 2 *Melb. L. Rev.* 443; *Harvey* v. *Baumgart* [1965] V.R. 632.

33 [1966] V.R. 29. There are many unusual features of this case which are not directly relevant to this discussion. Cf. *Rhodes* v. *Graham* 37 S.W. 2d 46 (1931).

34 Westin, 'Science, Privacy and Freedom,' (1966) 66 *Col. L. Rev.* 1205 at pp. 1236 and 1249.

35 *House* v. *Peth* 133 N.E. 2d 340 (1956); cited Prosser, (1960) 48 *Cal. L. Rev.* 383 at p. 390 n. 70.

36 [1958] Q.W.N. 5. See also *Alma* v. *Nakir* [1966] N.S.W.R. 1173.

gaps in the scope of legal protection: for example, where a person does not have a sufficient interest in property to be able to sue in trespass or nuisance.

(ii) Public Disclosure of Embarrassing Private Facts about the Plaintiff.

The type of problem which falls within this category is exemplified by the well-known case of *Melvin* v. *Reid.*[37] The plaintiff had been a prostitute and also a defendant in a notorious murder trial. She had been acquitted, had changed her way of life, married and led a respectable existence in a society which was unaware of her past. Seven years later the defendants made a film, 'The Red Kimono,' dealing with her life and revealing her present identity and whereabouts, thus ruining her existing way of life. An action for invasion of privacy succeeded. Another typical case where an action was successful occurred where a garage owner placed a notice in the window of his garage stating: 'Dr. Morgan owes an account here of $49.67. And if promises would pay an account this account would have been settled long ago. This account will be advertised as long as it remains unpaid.'[38]

It is clear that these cases involve the interest in reputation, but that, at Common Law, justification would be a complete defence. There could, conceivably, be a cause of action if some other head of liability existed. Thus in *Williams* v. *Settle*[39] the defendant was a professional photographer who had been engaged to take photographs at the plaintiff's wedding. Some time later, the plaintiff's father-in-law was murdered and two newspapers, seeking a story, persuaded the photographer to sell them a picture of the wedding group, and this was published. In an action which, in America, would have been a privacy action, the plaintiff succeeded in England on the basis of breach of copyright.

Although justification is a complete defence to defamation in England, it is not so in some of the Australian States where it is also necessary to show that the publication was for the public benefit.[40] Such a provision would bring many of the cases in this class within the scope of defamation and the class would again be reduced to negligible proportions. Thus *Melvin* v. *Reid* and *Brents* v. *Morgan* would be covered. There seems to be no good reason for not extending this provision to all the jurisdictions in England and Australasia. The arguments that the provision would unduly restrict freedom of speech,

37 112 Cal. App. 285, 297 Pac. 91 (1931).
38 *Brents* v. *Morgan* 299 S.W. 967 (1927).
39 [1960] 1 W.L.R. 1072.
40 N.S.W.: Defamation Act, 1958, s. 16; Qld.: Criminal Code, 1899, s. 376; Tasmania, Defamation Act, 1957, s. 15; A.C.T.: Defamation Act, 1901, s. 6. The position is doubtful in W. Australia; see Brett, 2 *Annual Law Review*, 43; McCall, *Logan* v. *West Australian Newspapers* (1966) 7 *U. West. Aust. L. Rev.* 543. Victoria, South Australia and New Zealand have the same provisions as in England.

and that it would place too heavy a burden on the press, which would often have to make difficult judgments are, as Fleming points out,[41] exaggerated, since the arguments apply with equal force to other indeterminate criteria such as 'public interest' in fair comment.

However, even if the 'public benefit' requirement were to be introduced in all jurisdictions, not all cases within this class would be covered. In the *Williams* v. *Settle* situation the disclosure of private acts, no matter how embarrassing, might not be defamatory. Thus, if the copyright in the photographs had not been vested in the plaintiff, or if the wife had wanted to sue, there would presumably have been no available cause of action.

This category is, of course, the one with which Warren and Brandeis were primarily concerned.

(iii) Publicity which places the plaintiff in a false light in the public eye.

Practically all the cases in this category are covered by the existing remedies of defamation and injurious falsehood, and it seems as if the American concept of privacy has been grafted on to these traditional causes of action *ex abundanti cautela.* The dangers which arise from this were pointed out by Prosser:

> It is here, however, that one disposed to alarm might express the greatest concern over where privacy may be going. The question may well be raised, and apparently still is unanswered, whether this branch of the tort is not capable of swallowing up and engulfing the whole law of public defamation; and whether there is any false libel printed, for example, in a newspaper, which cannot be redressed upon the alternative ground. If that turns out to be the case, it may well be asked, what of the numerous restrictions and limitations which have hedged defamation about for many years, in the interest of freedom of the press and the discouragement of trivial and extortionate claims? Are they of so little consequence that they may be circumvented in so casual and cavalier a fashion?[42]

(iv) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

The privacy remedy here is used when there is not merely the appropriation of the plaintiff's name, but the appropriation of some aspect of his identity.

> It is when he makes use of the name to pirate the plaintiff's identity for some advantage of his own, or by impersonation to obtain credit or secret information, or by posing as the plaintiff's wife or by providing a father for a child on a birth certificate that he becomes liable.[43]

New York and a few other States have legislation covering appropriation for advertising and purposes of trade; the common law right of privacy in many of the other States is somewhat wider.

In England, once again, a remedy may be available if an appropriate peg exists. Thus, as has been seen, in *Pollard* v. *Photographic*

41 Fleming, *The Law of Torts,* 3rd ed. p. 523.
42 Prosser, 'Privacy' (1960) 48 *Cal. L. Rev.* 383 at p. 401.
43 *Ibid.* at p. 403.

Co.[44] the defendant photographer was restrained from selling the plaintiff's photograph on the basis of a breach of an implied term in the contract and also that it was a breach of confidence. In the famous case of *Tolley* v. *Fry*[45] the plaintiff golfer was able to recover against the defendant who, without authority, used his name for advertising, in the tort of defamation, as there was an innuendo that he had prostituted his amateur status by allowing his name to be used for that purpose. Where there is no such innuendo, for example, if the plaintiff had been a professional golfer, then defamation will not lie.

Where a particular aspect of a name or likeness has the characteristics of 'property' then an action in the tort of passing off may be available.[46] In *Sim* v. *Heinz*,[47] however, it was held that the defendants, who had arranged for the plaintiff actor's distinctive voice to be impersonated for advertising purposes, were not liable in passing off.

> I am not at this stage going to rule on the question whether, in any circumstances, an action of passing off would lie for the unauthorised use of a man's voice be he actor or not an actor, though it would seem to be a grave defect in the law if it were possible for a party, for the purpose of commercial gain, to make use of the voice of another party without his consent.[48]

The boundaries of passing off, on one view,[49] are certainly too narrow to cover all unjustifiable activities in that area.

(b) The Nordic Conference of the International Commission of Jurists.

Another attempt at a comprehensive coverage of invasion of privacy situations was made by the Nordic Conference of the International Commission of Jurists. The preamble to the Conclusions of the Conference recites the grandiloquent aims of the International Community and the purpose of the Conference.

> *Whereas* Article 12 of the Universal Declaration of Human Rights and Article 17 of the United Nations Covenant on Civil and Political Rights of December 1966 have provided that 'no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation' and that 'everyone has the right to the protection of the law against such interference or attacks'
> *And whereas* Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms has provided that 'everyone has the right to respect for his private and family life, his home and his correspondence'
>
> *And recalling* that the International Commission of Jurists has at its first international Congress held at Athens in 1955 stressed that the Rule of Law requires that the private lives of individuals be inviolable

---

44 (1888) 40 Ch. D. 345; see also *Stedall* v. *Houghton* (1901) 18 T.L.R. 126; *Prince Albert* v. *Strange* (1849) 1 McN. & G. 23.

45 [1931] A.C. 333.

46 E.g. *Byron (Lord)* v. *Johnston* (1816) 2 Mer. 29 (Defendant published advertised poems as Byron's which were in fact written by somebody else).

47 [1959] 1 W.L.R. 313 C.A.

48 *Ibid.* at p. 317 per McNair J.

49 Cf. Hart, *The Concept of Law*, (1961) at p. 160. 'The crudest case of . . . unjust refusal of redress would be a system in which no one could obtain damages for physical harm wantonly inflicted. . . . Few instances of anything so crude can be found, but the failure of English law to provide compensation for invasion of privacy, often found profitable by advertisers, has often been criticised in this way'.

> *And considering* that the increasing complexity of modern society makes it desirable to protect the Right to Privacy with greater particularity than hitherto . . . .

After setting out what it considers to be the nature of the Right to Privacy and the limitations necessarily affecting it, the paper then went on to deal with the question of the protection available in respect of the various invasions of privacy. Inevitably there is an overlap with the Prosser Classification, but it is worth looking at the matters considered by the Conference. Although the consideration of privacy problems was general and not made in connection with any one jurisdiction, an interesting division was made between cases where there is some protection under existing rules and cases where there is no protection under existing rules.

With regard to the first group, the Warren and Brandeis argument was stressed that there are in most countries legal rules in other fields which provide civil remedies or criminal sanctions against certain forms of invasion of privacy. Some of these remedies or sanctions have not the protection of privacy as their primary object and it may therefore be necessary to strengthen or modify the provisions in question in order to secure the more effective protection of privacy aspects involved. Within this category were placed the following:— (a) Entry on and search of premises and other property; (b) search of the person; (c) compulsory medical examination and other tests; (d) interception of correspondence and other communications; (e) disclosure of information given to public authorities and professional advisers; and (f) defamation.

The second group comprised forms of invasion of privacy, other than those just mentioned, infringing interests which cannot be adequately protected by straining the existing legal rules devised mainly to meet other problems in other fields. These, it was suggested, naturally fall within a Law of Privacy and should be protected by such a law. Within this category were placed the following:—

> (*a*) *Intrusion upon a person's solitude, seclusion or privacy.*
> An unreasonable intrusion upon a person's solitude, seclusion or privacy, which the intruder can foresee will cause serious annoyance, whether by the intruder's watching and besetting him, following him, prying on him or continually telephoning him or writing to him or by any other means, should be actionable at civil law; and the victim should be entitled to an order restraining the intruder. In aggravated cases, criminal sanctions may also be necessary.
>
> (*b*) *Recording, photographing and filming.*
> The surreptitious recording, photographing or filming of a person in private surroundings or in embarrassing or intimate circumstances should be actionable at law. In aggravated cases, criminal sanctions may also be necessary.
>
> (*c*) *Telephone-tapping and concealed microphones.*
>
> (i) The intentional listening into private telephone conversations between other persons without consent should be actionable at law.
>
> (ii) The use of electronic equipment or other devices—such as concealed microphones—to overhear telephone or other conversations should be actionable both in civil and criminal law.

(*d*) *The use of material obtained by unlawful intrusion.*

The use, by publication or otherwise, of information, photographs or recordings obtained by unlawful intrusion should be actionable in itself. The victim should be entitled to an order restraining the use of such information, photograph or recording, for the seizure thereof and for damages.

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

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

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

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

These matters in some ways go beyond the Prosser Classification, but not to any significant extent. In spite of the nature of this catergory the existing remedies, already discussed, will apply fairly extensively.

(c) The Apparent Situation.

From this very brief examination of the various forms invasion of privacy may take, it is clear that they go beyond the commonly recognised scope of the Common Law. On the other hand, however, it ought also to be emphasised that many forms of invasion of privacy are already within the scope of existing heads of liability, whether the damages awarded for the invasion are parasitic or not. To what extent the defects are more apparent than real will be discussed later.

Since most of us recognise the need for the law to be capable of protecting these interests in privacy, the question to be answered is how can such comprehensive protection be obtained. There are several ways of effecting this. First, a general right of privacy can be introduced by legislation; secondly, a general right of privacy can be introduced by the courts; thirdly the existing heads of liability can be stretched and developed, as necessary, to provide the appropriate remedies in all cases. These different methods will be discussed in turn.

IV. Legislation—A Statutory Right of Privacy?

There are, in most common law jurisdictions, legislative provisions making certain types of behaviour, which may be regarded as aspects of invasion of privacy, criminal offences. Legislation dealing with peeping toms is a very old example; existing or projected legislation on wire-tapping and other forms of electronic surveillance are modern examples. There will always be a need to consider whether or not certain types of invasion of privacy should be regulated by the criminal law in addition to or in substitution for the civil remedies available to the victim. There are some activities which clearly ought to be criminal offences, yet it does not necessarily follow that an individual thereby deserves to have a cause of action in the civil law.

Apart from the legislation in New York and a few other American States dealing with the appropriation of a person's name, portrait or picture for advertising or trade purposes, there has been no legislation in the Common Law world creating a general right of privacy.

The most noteworthy attempt to obtain legislation was that of Lord Mancroft who, in 1961, introduced a Right of Privacy Bill in the House of Lords. The first clause proposed that a person should have a right of action against any other person who without his consent published of or concerning him in any newspaper or by means of any cinematograph exhibition or any television or sound broadcast any words relating to his personal affairs or conduct. A subsequent amendment provided that the action would only be available if such publication was calculated to cause the plaintiff distress or embarrassment. Various defences were then provided to balance the competing interests of the individual and the public. The right of privacy proposed by Lord Mancroft did not cover the whole of the Prosser Classification but related mainly to the third head, which was the area dealt with by Warren and Brandeis. The Bill, as one would expect, received a warm public welcome, but was condemned by the Press. For example, the London Times,[50] while acknowledging that there was a gap in the law and a mischief, felt that the amount of distress involved was exaggerated and certainly not sufficient to justify the creation of the impenetrable legal thickets that the Bill would cultivate. The Second Reading of the Bill was carried 74:21. Two judges, Lords Goddard and Denning, spoke in favour of the Bill, but the third judge in the Debate, Viscount Kilmuir L.C., speaking for the government, opposed the Bill. While expressing sympathy for its aims he felt that the difficulties involved in creating a new legal right, which would restrain the improper invasion of privacy without at the same time interfering with proper reporting of matters which ought to be reported, were such as to outweigh the merits of the proposal. What is of considerable interest is that both Lord Denning and Viscount Kilmuir adverted to the possibility of the Common Law creating a right of privacy. Before the Bill was withdrawn the Lord Chancellor stressed that there is all the difference in the world between developing a rule of Common Law by the gradual and empirical method of judicial decision, on the one hand, and establishing it by 'ready-made' legislation on the other.

A much more general principle was canvassed in the most recent attempt to introduce a statutory right of privacy in England. In February 1967 a Private Member's Right of Privacy Bill, this time in the House of Commons, obtained a First Reading. It was described as a Bill to protect a person from any unreasonable and serious interference with the seclusion of himself, his family or his property from the public. This action would be heard by a judge sitting alone and

50 March 13, 1961.

various defences were to be provided: that the alleged offender 'did not knowingly infringe the right of privacy;' that the infringement was 'reasonably necessary to comment fairly upon a subject of reasonable public interest' in a newspaper, periodical, book or television or sound broadcast, or that it was 'reasonably necessary for the conduct of the business of the defendant and he neither knew nor ought to have known that the plaintiff would object,' or that the infringement was consented to by the plaintiff 'expressly or by his conduct.' The provision concerning damages was interesting: they were to be assessed with particular regard to the effects on 'the health, welfare and financial position of the plaintiff or his family' and 'any financial gain which the defendant made' as a result of it. Any person deriving such financial benefit, other than the original offender, would be liable 'to the same extent as the original offender.' It is unlikely that this Bill will become law. Its very width creates uncertainties and opposition in those who, while welcoming the general aims of the Bill, are anxious lest it affect their own interests. This, of course, applies especially to the Press. Further, although Viscount Kilmuir, in 1961, was against referring the matter to the Law Reform Committee on the curious ground that is was a question which could become politically controversial, it is unlikely that the Government would accept legislation in this area without the prior consideration of the Law Commission.

It seems, therefore, that the statutory introduction of a general right of privacy may be a long way off in England and even further away in Australasia.

V. A General Right of Privacy at Common Law?

Two questions must be answered here. First, is it possible or probable that the courts could or would introduce a general concept? Secondly, is it desirable that they should do so?

(a) The Possibility of a General Concept.

With regard to the possibilities, it is quite clear that the Common Law is capable of creating a general concept of privacy. After all, that is what the American courts thought they were doing when following the Warren and Brandeis article and the English authorities quoted therein. Further, although our judges are usually far more conservative in outlook than those in America, it is not unknown for principles, which most people would regard as new, to appear in modern judgments. Thus, in *Rookes* v. *Barnard* the House of Lords, for all its reliance on ancient authorities, introduced a new concept of intimidation. Lord Evershed was prepared to justify this development in the law:

> I agree . . . that there has been established . . . as part of English law the tort of intimidation. I am willing to concede that the tort is one of relatively modern judicial creation and that its full extent and scope have not (at least before the present case) been authoritatively determined . . . and may well still have not been finally stated. But that is, after all, in accordance with

> the well-known principles of our law . . . that its principles are never finally determined, but are and should be capable of expansion and development as changing circumstances require, the material subject matter being 'tested and re-tested' in the law's laboratories, namely, the courts of justice. . . . Moreover, the tort of conspiracy, as now understood, is also one of relatively modern exposition differing from the ancient tort of conspiracy . . . and has arisen out of the circumstances of modern industrial relations. So also, as I conceive, has the tort of intimidation.[51]

Another principle which appears to be developing as a creature of modern conditions is the right to work. If one may, with respect, doubt the accuracy of the remarks of Lord Denning M.R. in *Nagle* v. *Feilden*[52] that the 'common law of England has for centuries recognised that a man has a right to work at his trade or profession without being unjustly excluded from it,' one cannot fail to recognise his justification for supporting the principle in modern society: ' . . . a man's right to work at his trade or profession is just as important to him as, perhaps more important than, his rights of property. Just as the courts will intervene to protect his rights of property, they will also intervene to protect his right to work.[53] Salmon L. J., in the same case, was even more explicit: 'One of the principal functions of our courts is, whenever possible, to protect the individual from injustice and oppression. It is important, perhaps today more than ever, that we should not abdicate that function.[54]

If conspiracy, intimidation and the right to work are concepts created or developed to deal with modern problems, it is clear that a general concept of privacy could also be introduced in the same way. The same technique of relying on past, not entirely relevant, authority, together with a justification based on the need to protect the individual against the new horrifying encroachments upon his private life, would suffice.

(b) The Desirability of a General Concept.

Assuming that it is possible for the courts to introduce a general principle, is it desirable? In order to answer this, it is worth returning to the American scene to consider various views of the general concept of privacy as it has developed there.

Prosser's closing remarks in his 1960 article gave expression to some of the problems which the relatively new tort of privacy had created. He pointed out that the so-called independent right of privacy, which is a complex of four distinct and only loosely related torts, has been expanded by slow degrees to invade, overlap and encroach upon a number of other fields.

---

51 [1964] A.C. 1129 at pp. 1184-5. Cf. *Campbell* v. *Ramsay* [1966] 2 N.S.W.R. 431.

52 [1966] 2 Q.B. 633.

53 Cf. the similar argument of Warren and Brandeis, (1890) 3 *Harv. L.Rev.* at p. 193.

54 The next sentence uses the same kind of historical justification for a wide principle as did Warren and Brandeis: 'The principle that Courts will protect a man's right to work is well recognised in the stream of authority relating to contracts in restraint of trade.'

> So far as appears from the decisions, the process has gone on without any plan, without much realization of what is happening or its significance, and without any consideration of its dangers. . . . One cannot fail to be aware . . . of the extent to which defences, limitations and safeguards established for the protection of the defendant in other tort fields have been jettisoned, disregarded or ignored.[55]

Nonetheless, Prosser was by no means suggesting that the developments in the law of privacy were wrong. These were completely desirable as long as it was realised what was happening and some consideration was given to the question of where, if anywhere, we are to call a halt.

The concept of a single right of privacy, so carefully built up by Warren and Brandeis and so carefully analysed and broken down by Prosser, was not deserted completely. There are advantages in having a wide general principle capable of covering all types of unforeseeable fact situations, and efforts were made to resuscitate the general privacy concept.

(i) Bloustein.

Thus in 1964 Professor Bloustein[56] claimed that Prosser was wrong to separate privacy into distinct categories and he set out to propose a general theory of individual privacy which would reconcile the divergent strands of legal development. In a careful critique he compared the articles of Warren and Brandeis and Prosser, analysed the Prosser Classification and attempted to show that the principle of 'inviolate personality' put forward in the former article was still a common factor to all private cases. In his words, however, all the cases are concerned with blows to 'human dignity and integrity.' While admitting that 'the words we use to identify and describe basic human values are necessarily vague and ill-defined' Bloustein finds that definitions of privacy as an aspect of the pursuit of happiness are most illuminating, as also is the realisation that the interest served in the privacy cases is a spiritual interest rather than an interest in property or reputation. 'The injury is to our individuality, to our dignity as individuals, and the legal remedy represents a social vindication of the human spirit thus threatened rather than a recompense for the loss suffered.'[57]

Although the article is in some ways valuable in that it emphasises that the Prosser Classification cannot be taken for granted, and that there may well be a single concept of privacy, the conclusions, it is submitted, are of little help. It is rather like trying to explain the notion of 'trespass' by defining 'law.' The explanation is so wide as to be meaningless.

---

55 (1960) 48 *Cal. L. Rev.* 383 at p. 422.
56 Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser,' (1964) 39 *N.Y. Univ. L.R.* 962.
57 *Ibid.* at p. 1003.

(ii) Gross.

The attack on the Prosser Classification was continued, however, by Hyman Gross in 1967.[58] In complete contrast to the Warren and Brandeis article, the approach of Gross is that of a legal philosopher. Starting with Professor Hart's observation that 'in law as elsewhere, we can know and yet not understand'[59] he attempts to demonstrate that the concept of privacy is infected with pernicious ambiguities because the word has been used in different senses. While acknowledging that Prosser's article has contributed much to our understanding of the development of the law in this area, he believes that the thesis that an interest in privacy 'may be reduced without remainder to one of several other interests protected in other areas of the law of torts . . . [rests] squarely on a conceptual fault regarding privacy.'[60] He criticises Bloustein's article because, although the latter argues that there is indeed a separate interest in privacy and indicates why privacy is valuable, he does not tell us what privacy is, and so the true issue with Prosser is never joined. The notions of both Prosser and Bloustein lead, though by different paths, to a conceptual indeterminancy regarding privacy. Although the main concern of Gross is to clarify the issues and to combat a case of 'the bewitchment of our intelligence by means of language'[61] he does explain what he understands by privacy: it 'is the condition of human life in which acquaintance with a person or with affairs of his life which are personal to him is limited.'[62] This, he admits, is not the legal concept of privacy, for the law does not determine what privacy is, but only what situations of privacy will be afforded legal protection, or will be made private by virtue of legal protection.

(iii) Kalven.

Passing quickly from the philosophical musings of Gross, we come to a more down-to-earth article by Professor Harry Kalven Jr.[63] who, while accepting that privacy is deeply linked to individual dignity and the needs of human existence, suggests that tort law's effort to protect the right of privacy has been a mistake. 'I suspect that fascination with the great Brandeis trademark, excitement over the law at a point of growth, and appreciation of privacy as a key value have

---

58 Gross: 'The Concept of Privacy,' (1967) 42 *N.Y.U.L.Rev.* 34.
59 Hart, 'Definition and Theory in Jurisprudence,' (1953) 70 *L.Q.R.* 37.
60 (1967) 42 *N.Y.U.L.Rev.* 34 at p. 35.
61 *Ibid.* at p. 53.
62 *Ibid.* at p. 35-36.
63 Kalven, 'Privacy in Tort Law—Were Warren and Brandeis Wrong?' (1966) *L. and C.T.* 326.

combined to dull the normal critical sense of judges and commentators and have caused them not to see the pettiness of the tort they have sponsored.'[64]

Kalven dismisses quickly three of Prosser's four categories. A remedy for the appropriation of the plaintiff's name or likeness makes sense as it prevents unjust enrichment for the theft of goodwill. The intrusion category is of little importance for, as has been seen, there are very few cases which would not be covered by trespass. The false light category is so like defamation that the overlap might have been thought substantial enough to make an approach via privacy superfluous.

It is the mass-communication tort—public disclosure of embarrassing private facts about the plaintiff—that Kalven castigates. He finds conceptual and practical difficulties in the Warren and Brandeis tort and believes that it has no legal profile. 'We do not know what constitutes a *prima facie* case, we do not know on what basis damages are to be measured, we do not know whether the basis of liability is limited to intentional invasions or includes also negligent invasions and even strict liability.'[65] If, in order to create a *prima facie* case, the disclosure must be 'one which would be offensive and objectionable to a reasonable man'[66] then every unconsented reference in the press creates a possible cause of action. This, apparently, is only half the difficulty;

> the other half is that since Warren and Brandeis wrote, it has been agreed that there is a generous privilege to serve the public interest in news. . . . What is at issue, it seems to me, is whether the claim of privilege is not so overpowering as virtually to swallow the tort. What can be left of the vaunted new right after the claims of privilege have been confronted?[67]

It is, no doubt, doing less than justice to Kalven's argument to suggest that these difficulties, when looked at together, tend to a large extent to cancel each other out.

The last major complaint of Kalven is directed towards the current tendency of privacy actions to move into the traditional field of defamation He cites statements of Dean Wade that 'the great majority of defamation actions can now be brought for the invasion of the right of privacy' and that Warren and Brandeis would have been amazed to be told in the 1960's that 'the action for the invasion of the right of privacy may come to supplant the action for defamation.'[68] In conclusion he remarks wryly that 'it would be a notable thing if

---

64 *Ibid.* at p. 328. Kalven cites, in support of his view, Davis, 'What do we mean by "Right to Privacy"?' (1959) 4 *S.D.L.Rev.* 1 at pp. 18-20: 'Indeed, one can logically argue that a concept of a right to privacy was never required in the first place, and that its whole history is an illustration of how well-meaning but impatient academicians can upset the normal development of the law by pushing it too hard.' Cf. the development of the law of negligence since *The Wagon Mound (No. 1).*

65 *Ibid.* at p. 333.

66 Prosser, *Torts* 837 (3rd ed. 1964).

67 Kalven, *supra,* at pp. 335-336.

68 *Ibid.* at pp. 339-340, citing Wade, 'Defamation and the Right of Privacy,' (1962) 15 *Vand.L.Rev.* 1093 at p. 1121.

the right of privacy, having, as it were, failed in three-quarters of a century to amount to anything at home, went forth to take over the traditional torts of libel and slander.'[69]

The views which have been summarised are necessarily incomplete and it may be that the writers concerned would feel that their arguments have been distorted or misrepresented. It is clear, however, that there is at present a considerable amount of controversy about the nature of privacy, ranging from the conceptual difficulties at the philosophical level to the more mundane practical difficulties about the details of the tort itself and the defences available. It is not an object of this paper to discuss these controversies, to take sides or to suggest the true answers. The main purpose in collecting these views of lawyers who have immersed themselves in these problems is to demonstrate that there is at present no ready made, intellectually satisfying, workable concept of privacy law which can be taken from America and transplanted into the English-Australasian Common Law systems.

The concept of privacy in the States is only now being analysed deeply and it may take some time before its final shape is determined. If the courts of either England or Australasia introduce a general, and necessarily vague, concept of privacy, they will be beset with fundamental problems for years to come. The problems which arise from the introduction of a broad general principle of torts law which incidentally cuts across the boundaries of other torts and clashes with them, may be seen from an examination of the recent 'Action upon the Case' principle introduced by the High Court in *Beaudesert Shire Council* v. *Smith.*[70]

It may well be that our legal system is not yet mature enough, or the general concept of privacy not sufficiently clear, for it to be introduced by way of judicial utterance. Even Dixon C.J., one of the greatest of judges, was wary of the wide principle.

> The law of tort has fallen into great confusion, but, in the main, what acts and omissions result in responsibility and what do not are matters defined by long established rules of law from which judges ought not wittingly to depart and no light is shed upon a given case by large generalisations about them.[71]

This statement is much too narrow; nevertheless consolidation and gradual development may be more sensible than radical reform.

VI. The Expansion and Development of Existing Remedies?

If it were possible to fit all acts which are generally regarded as undesirable invasions of privacy within existing heads of liability, then the problem of a general privacy principle could be left at present. At this stage, it may not matter unduly whether the boundaries

---

69 *Ibid.* at p. 340.

70 (1966) 40 A.L.J.R. 211. See Dworkin and Harari, (1967) 40 *A.L.J.* 296 and 347.

71 *Victoria Park Racing Co.* v. *Taylor* (1937) 58 C.L.R. 479 at p. 505.

of existing heads of liability are stretched slightly or are made to bulge. These developments have been experienced before in the Common Law, although occasionally with the assistance of statutory modifications in limited areas.

Existing heads of liability and remedies are, in general, capable of such development. A few of the remedies will be discussed to illustrate this, and then it will be suggested that there are two broad heads of liability which can, without any major conceptual difficulties, encompass most grievances in the privacy field.

(a) Specific Areas.

(i) Passing Off etc.

It will be remembered that *Sim* v. *Heinz*[72] was a case where a remedy was not granted to an actor when his voice was impersonated for advertising purposes. The tort of passing off and analgous remedies dealing with unfair business competition were not available to remedy this genuine grievance. The tort was thought to be of fairly limited scope, particularly as it appeared to apply only between business competitors.[73] However, it is now recognised that this tort or associated torts are capable of much wider application and this branch of the law is still developing and expanding to comprehend new business techniques and trading devices.[74]

A recent illustration of the way in which the tort of passing off may be expanded can be seen from the judgments of the Full Court of New South Wales in *Henderson* v. *Radio Corporation Pty. Ltd.*[75] where a married couple, who were well-known professional ballroom dancers, successfully applied for an injunction to restrain a record company from selling or distributing copies of a record cover which displayed them on it in a dancing pose. The court rejected both the argument that no damage had been suffered by them such as to justify an injunction and the argument that it was necessary for a common field of activity to exist between the parties. It was sufficient that the defendant had used the business or professional reputation or identity of the plaintiff's who were engaged in *some* business, to sell his product. In a recent article[76] Dr. Pannam, in discussing this decision, states:

> This is all very heady wine. The . . . Court . . . has opened up a whole new field of legal protection. It has taken the tort of passing-off, stripped it of a technical limitation and used it to protect a new form of legal right. This right is based on a recognition of the fact that a person's reputation or identity often has a high commercial value. The decision will no doubt be attacked for its novelty. It is to be hoped that the attack fails. The exten-

72 *Supra.* p. 427.

73 *McCulloch* v. *May* [1947] 2 All E.R. 845.

74 Street, *The Law of Torts,* 3rd ed. 370, see also at pp. 377-381; Fleming, *The Law of Torts,* 3rd ed. at p. 676 ff; Morison, 'Unfair Competition and Passing Off' 2 *Sydney L.Rev.* 50.

75 [1960] S.R. (N.S.W.) 576.

76 Pannam, 'Unauthorised Use of Names or Photographs in Advertisements,' (1966) 40 *A.L.J.* 4 at p. 8.

> sion of the reach of a well-established tort remedies an unjustifiable gap in the law. It is outrageous to think that a person could appropriate the business reputation of another and then thumb his nose at all legal attempts to restrain him.

The New South Wales decision certainly seems to be more desirable than that of *Sim* v. *Heinz* and is the type of development which can be made without any great difficulty.

(ii) Extension of the Property Concept.

(iii) The Use of the Injunction.

(iv) Constructive Trust and Unjust Enrichment.

The arguments relating to these three topics interrelate and can be dealt with together.

The law of torts is usually available to protect a person's property rights. Indeed, it is the view of some that its province and functions are inseparably connected with the notion of property.[77] It follows therefore, that if new types of property interests arise or the notion of what is property is widened, then the scope of the law of torts is widened.[78] Similarly, the courts have maintained that an injunction is a remedy which is only available where there is a violation of an enforceable right.[79] New enforceable rights have a habit of appearing from time to time. Insofar as the judicial understanding of 'property' and 'enforceable rights' differ,[80] it is possible for the courts to grant an injunction to protect the violation of a legal or equitable right independently of property rights. However, the very fact that a remedy is given by the courts tends to bring the enforceable right closer to the concept of a right of property, and thus the law imperceptibly moves forward. It is, in many ways, a variation of an old theme that where there is a remedy there is a right. 'Equity is no exception to the general rule that the adjective part of the law is developed before the substantive.'[81]

The interaction of property rights and the injunction may be seen in the area of confidential information, touched upon by Warren and Brandeis. As they there pointed out, equity has for a long time recognised that it will intervene to protect certain abuses of confidence. Initially abuses of confidential information were restrained on the basis that there was the breach of an express, and later an implied,

---

77 Harari, 'On the Province and Function of the Law of Torts.' Paper delivered at a Torts Seminar in Canberra in August 1967.

78 'What is property? One man has property in lands, another in goods, another in a business, another in skill, another in reputation; and whatever may have the effect of destroying property in any one of these things (even in a man's good name) is, in my opinion, destroying property of a most valuable description.' *Dixon* v. *Holden* (1869) L.R. 7 Eq. 488 at p. 492 per Malins V.C. Cf. Noyes, *The Institution of Property*, 1936 pp. 536-537.

79 *Day* v. *Brownrigg* (1878) 10 Ch.D. 294; *Cowley v. Cowley* [1901] A.C. 450.

80 Cf. *J. C. Williamson Ltd.* v. *Lukey* (1931) 45 C.L.R. 293.

81 Holdsworth, *History of English Law*, Vol. 9 p. 335. See also Lord Evershed, 'The Influence of Remedies on Rights' (1953) 6 *C.L.P.* 1.

term of a contract between the parties.[82] Gradually, confidential information began to be regarded as a form of property in itself, and in *Saltman Engineering Co. Ltd.* v. *Campbell Engineering Co.*[83] Lord Greene M.R. stated that

> the obligation to respect confidence is not limited to cases where the parties are in contractual relationship. . . . If a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without the consent, express or implied, of the plaintiff, he will be guilty of an infringement of the plaintiff's rights.

In addition to the availability of an injunction to restrain further breaches, a plaintiff is entitled to either an account of the profits made by the defendant or damages for the breach of confidence.

Presumably, if there is an account of profits it is justified on the basis of a constructive trust. A constructive trust arises, in English and Australasian law at least, only where a profit has been made by a person in a fiduciary or quasi-fiduciary position.[84] No doubt, when seeking an account for profits which have been made from misusing confidential information, some pre-existing relationship usually can be shown between the plaintiff and the defendant.[85] However, Lord Greene's remarks in *Saltman Engineering Co. Ltd.* v. *Campbell Engineering Co. Ltd.* appear to suggest that a fiduciary relationship may arise from the mere receipt of confidential information in the knowledge that it is confidential.[86] The English concept of the Constructive Trust as a substantive institution is descending the slippery slope from 'fiduciary relationship' to 'quasi-fiduciary relationship'[87] possibly to 'special relationship'[88] and may, with some gentle, but well directed, prodding, acquire some of the characteristics of the American constructive trust which is a wide and last-resort restitutionary remedy based on unjust enrichment.[89]

In this development three different trends emerge: first, the attempt to expand the notion of property; secondly, the attempt to widen the availability of the injunction; and, thirdly, very faintly, the possibility that there might be an action for unjust enrichment even in situations where the parties have not had a pre-existing relationship.

Professor Lloyd, when discussing *Sim* v. *Heinz* and the problem of whether it is possible for a person's voice to be a kind of property, has questioned generally the tendency of the law to try at all costs to find an existing remedy, or extend an existing remedy slightly,

---

82 E.g. *Caird* v. *Sime* (1887) 12 App. Cas. 326.
83 [1963] 3 All E.R. 413n. at p. 414.
84 E.g. *Peter Pan Manufacturing Co.* v. *Corsets Silhouette Ltd.* [1964] 1 W.L.R. 96.
85 E.g. *Boardman* v. *Phipps* [1966] 3 W.L.R. 1009.
86 See Goff and Jones, *The Law of Restitution,* 1966, p. 456.
87 '. . . the prefix "quasi" is nearly always a sign of the lawyer's last desperate attempt to preserve his respectability.' Lloyd, 'The Recognition of New Rights' (1961) *C.L.P.* 39 at p. 54.
88 Cf. *Hedley Byrne* v. *Heller* [1964] A.C. 465.
89 See generally, Waters, *The Constructive Trust,* 1964.

rather than create a new principle. This attitude, in his view, may be harmful to both the scientific development of our legal system and also to the social functions that it is concerned to fulfil.

> My present purpose is not to argue either for or against the recognition of any particular new class of right, but merely to plead for a sounder juristic form of legal development than that displayed in the cases which discuss whether there can be a right of property, a special or qualified property, or a quasi-proprietary interest in this or that. For such discussion rarely attempts to analyse or examine the meaning of these concepts in their particular context, and perhaps for the very good reason that they are frequently meaningless and used as a way of dodging rather than facing, the real issue.[90]

These remarks are, of course, sound. However, as has been shown in the previous section, where the wider concept is indeterminate, the present method may be justified, provided that there is some conscious direction in the slow expansion of existing ideas.

The extended use of the injunction may be seen from the very interesting recent decision in *Argyll* v. *Argyll*.[91] There, the plaintiff applied for an injunction to restrain her former husband and publishers from publishing confidential matters relating to their private life when they were married. It is immediately apparent that the claim deals with an entirely different kind of confidential relationship than that which has so far been discussed. Invasion of privacy there may well be, but it is difficult to see what property right exists or whether there is any 'enforceable right' a court of equity can seize upon. The court held that confidential communications between spouses made during marriage are within the scope of the court's protection against breach of confidence. The reasons for the decision contained the right blend of authority and creativity. Working through the authorities, Ungoed-Thomas J. held, first, that a contract or obligation of confidence need not be expressed but can be implied; secondly, that a breach of confidence or trust or faith can arise independently of any right of property or contract, other, of course, than any contract which the imparting of the confidence in the relevant circumstances may itself create; and, thirdly, that the court in the exercise of its equitable jurisdiction will restrain a breach of confidence independently of any right at law. The element of creativity of the learned judge is indicated in his remarks as to whether such matrimonial confidences should be protected.

> If this were a well-developed jurisdiction doubtless there would be guides and tests to aid the court in exercising it. If, however, there are communications which should be protected and which the policy of the law recognises should be protected . . . then the court is not to be deterred merely because it is not already provided with fully developed principles, guides, tests, definitions and the full armament for judicial decision. It is sufficient that the court recognises that the communications are confidential and their publication within the mischief which the law as its policy seeks to avoid, without further defining the scope and limits of the jurisdiction. . . .[92]

---

90 Lloyd, 'The Recognition of New Rights' (1961) *C.L.P.* 39 at p. 53.
91 [1965] 2 W.L.R. 790.
92 *Ibid.* at p. 808.

Thus the right of privacy was enforced against both the husband and the third party publishers, and to many observers it would appear that the court has extended the notion of existing rights which may be protected by equity.

The injunction is a potent weapon and its range of application is not yet fully determined. In the field of public law, recent developments have enabled courts to grant injunctions 'to protect benefits or advantages . . . that could not be regarded as having any resemblance at all to proprietary rights. . . .'[93]

An argument has been put forward that there is a much wider right lurking in present authorities capable of being protected by the injunction. D. L. Mathieson has suggested[94] that by reasoning from a body of case law quite outside the boundaries of either defamation or passing off, a principle is obtainable which would cover all the cases which Prosser would place in his third and fourth categories. The suggested principle is that

> Where A, without B's consent, makes an unconscionable use of B's name, or any essential and identifiable part of B's personality for any purposes of his own and A's act has caused, or will probably cause, injury to B's reputation, or loss to him in his property, business or profession, the court will restrain A by injunction.

This, clearly, goes much further than even the previous discussion of passing off suggests. The rather slender body of authority is based on a so-called *'Routh* v. *Webster*[95] equity' which creates a general right in connection with unconscionable appropriation.

Even if the above principle were not accepted,[96] the other matters so far discussed in this section are capable of comprehending at least all those cases of appropriation within Prosser's fourth category. Further, the *Argyll* case illustrates the use of the injunction to restrain public disclosure of embarrassing private facts.

(v) Defamation.

With a widespread statutory requirement of 'public benefit' as an adjunct to the defence of justification, many existing problems would be solved. This matter has been discussed earlier.[97]

(vi) Action for Breach of Statutory Duty.

One of the issues which is now being faced in many countries is whether or not various modern, sophisticated methods of invasion of privacy ought to be controlled by the creation of new criminal pro-

---

93 *Cooney* v. *Ku-Ring-Gai* (1963-64) 37 A.L.J.R. 212 at p. 220 per Menzies J. See also: *A.G.* v. *Harris* [1961] 1 Q.B. 74.

94 (1961) 39 *Can. Bar Rev.* 409.

95 (1847) 10 Beav. 561; 50 E.R. 698.

96 Cf. *Jagger* v. *Stevens Press* The Times, July 30, 1966. The plaintiff pop-singer consented to have his photograph taken by the defendants for a feature article but not for the purposes of advertising. An injunction was refused on the ground, inter alia, that as the plaintiff had passed no confidential information to the defendant there was no breach of confidence. This decision is doubtful.

97 *Supra* p. 10.

visions.[98] It seems clear that the unreasonable use of many such devices ought to be criminal offences. If such statutory steps are taken, it should be imperative to consider whether a victim of such a criminal offence ought to have a civil remedy for breach of statutory duty. The common law development of the remedy for breach of statutory duty has been artificial and restrictive. In general, as most legislation is silent on the point, it has been assumed that such remedies were only intended by the legislature in industrial legislation. There is absolutely no reason why consideration ought not to be given to this matter when such legislation is drafted. If it is considered desirable that an individual should have a civil remedy, then this can be expressly created. Although provisions expressly conferring a civil action for breach of statutory duty are rare, they do occur.[99] In some of the American States, statutes which control electronic eavesdropping do in fact also provide private rights of action. Thus, in Pennsylvania, a person whose telephone conversations are tapped may recover treble damages from the wiretapper and anyone who uses the recordings.[100] Illinois provides an even broader right of action against any electronic eavesdropper, his employer or superior, or any landlord or building operator who assists in the eavesdropping enterprise.[101]

(b) General Remedies.

Apart from the development and expansion of existing specific heads of liability, those previously discussed being the more obvious examples, it is also possible to argue that there are two torts which, together, are perfectly able to provide remedies for all forms of unjustifiable invasions of privacy which cause damage in a broad sense. These torts are first, the tort of negligence and secondly, the tort associated with the decision in *Wilkinson* v. *Downton*:[102] a wilful act or statement calculated to cause physical harm to the plaintiff and which does in fact cause him physical harm.

(i) Negligence.

The place of negligence in the law of torts is something which, deservedly, had engendered a great deal of concern. It is clear that, whatever may be the future role of negligence, it has been, and is, the modern successor of the action on the case in that most remedies for unintentional conduct which have developed in the law of torts in the twentieth century have developed through the medium of the

---

98 For a comprehensive discussion of many of these issues, see Westin, 'Science, Privacy and Freedom: Issues and Proposals for the 1970's' (1966) 66 *Col.L.Rev.* 1002 and 1205.

99 E.g. Consumer Protection Act, 1961, s. 3 (England); Mines Act, 1958 s. 411(1)(Victoria); various forms of industrial property, such as registered trade marks, patents, copyright etc. which are protected by special legislation often confer a civil remedy against persons who infringe the provisions.

100 Pa. Stat. Ann. tit. 15 s. 2443 (1958).

101 111. Ann. Stat. ch. 38 ss 14-1 to -7 as amended 111. Ann. Stat. ch. 38 ss. 14-3 to -5.

102 [1897] 2 Q.B. 57; approved *Janvier* v. *Sweeney* [1919] 2 K.B. 316.

tort of negligence.[103] Rather like radio astronomy, the spectacles which the courts have now donned enable them to classify as reasonably foreseeable in the eyes of the law that which once might have been regarded as beyond the realms of visible perception. There is nothing to prevent all forms of interference with the solitude of the individual coming within the scope of the tort. Why should not a newspaper which publishes without authority an embarrassing private picture of an individual reasonably be able to foresee that such publication might cause damages and distress? In *Furniss* v. *Fitchett*[104] a doctor was held liable to a wife who suffered nervous shock as a result of his giving an *accurate* certificate of the wife's condition to her estranged husband, which was used in court proceedings.

A duty of care presents few problems. It is recognised, of course, that one of the frequent difficulties of a privacy action is to effect a correct balance between the public and private interest. This, too, ought to present no new problem to the courts. It is merely a question of determining whether or not there has been a breach of a duty to take care. In doing this a court always has to weigh up a number of competing factors, such as the utility of the conduct, the social justification, the risk of injury, etc. The standard of care required of the reasonable man is flexible.

Damage is a necessary condition of liability in negligence and this may, in some cases, fetter the power of the court to award damages. However, in the case of threatened damage likely to result from a negligent act, an injunction should generally be available.

Now that the tort of negligence has crossed the barrier from physical damage to person and property to purely economic damage, most of the cases of unintentional appropriation of an interest of the plaintiff can be covered. The safeguards which are necessary in a general privacy action could be made available in the defences to negligence. Thus the defence of *volenti non fit injuria* would be available to prevent a public personality recovering in a case where only information of reasonable public interest has been published. Contributory negligence could also serve a number of useful purposes.

Negligence is available for the asking. If a court is doubtful about a general concept of privacy, the nominate but indefinite tort of negligence is a practical solution. The categories of negligence are open.

(ii) Wilkinson v. *Downton.*

Most forms of invasion of privacy occur, however, as the result of intentional acts. Even though there is authority to allow the tort of negligence to be available for intentional acts[105] the modern attitude favours the view that it should only lie for negligent con-

103 See Milsom, 'Reason in the Development of the Common Law,' (1965) 81 *L.Q.R.* 496 at p. 516.
104 [1958] N.Z.L.R. 238.
105 *Williams* v. *Holland* (1833) 10 Bing. 112.

duct.[106] Therefore, apart from those limited areas where an action for malicious falsehood will lie, it is necessary to establish a tort which imposes liability for intentional conduct. That tort is the one created by *Wilkinson* v. *Downton.*

Although it has been pointed out that the principle laid down in that case is of great significance in that it is capable of being regarded as creating a general theory of liability in tort for all intentional infliction of physical harm,[107] the principle has been little used. If one accepts, as in *Wilkinson* v. *Downton* itself, that an intentional act also covers reckless conduct—a man must be presumed to have intended the natural consequences of his conduct[108]—then, with two minor modifications, this principle would be available in all cases of intentional unjustifiable interference with privacy.

The first step is to relax the requirement that there must be physical damage (including nervous shock) so that any type of grief or inconvenience to the plaintiff would be capable of being within the scope of the principle provided the courts recognise the injury as a real one. This would fit in with the statement of Dixon C.J. in *Bunyan* v. *Jordan*: 'He may have intended to frighten those surrounding him, but, if so, it was only for the purpose of sensationalism. The shock he intended to give or the emotions he intended to arouse could not in a normal person be more than transient.'[109]

The second modification would be to allow a person to recover in some cases when the damage is economic. It is true that there are many cases where the intentional infliction of economic loss is regarded as lawful, since the law refrains from imposing a moral code upon business competitors. It is logically untenable to assume that, because there is no cause of action for some kinds of intentionally inflicted economic loss, there is therefore no cause of action for all kinds of intentionally inflicted economic loss. The courts are well able to justify and distinguish between cases where they are prepared to give a remedy and those cases where they are not.

Such a development of the *Wilkinson* v. *Downton* principle has consequences which extend beyond the area of privacy cases. It would be a movement towards the so-called '*prima facie* tort' theory, which imposes *prima facie* liability for the unjustifiable infliction of harm.[110] The court then has to deal with the issue of justification and has the opportunity of evaluating the relevant competing social, public and private interests.

---

106 E.g. *Letang* v. *Cooper* [1965] 1 Q.B. 232.
107 E.g. Fleming, *The Law of Torts*, 3rd ed. at pp. 35-36.
108 Cf. *Moorgate Mercantile Co.* v. *Finch and Read* [1962] 1 Q.B. 701.
109 (1937) 57 C.L.R. 1 at p. 17. Cf. the interpretation of 'damage' in *Berry* v. *British Transport Commission* [1962] 1 Q.B. 306.
110 See *Mogul Steamship Co.* v. *McGregor* (1889) 23 Q.B.D. 598 at p. 613 per Bowen L.J. Holmes, 'Privilege, Malice and Intent' (1894) 8 *Harv.L.Rev.* 1; *Aikens* v. *Wisconsin* (1904) 195 U.S. 194 at p. 204; 'An Analysis of the "Prima Facie Tort" Cause of Action,' (1957) 42 *Cornell L.Q.* 465.

It may well be that, in shying away from a general concept of privacy, we have moved towards a far wider general principle. Nonetheless it is submitted that it is one which is easier to understand and apply.

VII. Conclusions

Privacy is now becoming a public issue. More and more people are becoming aware of the threats to their security, and the demands for protection are increasing correspondingly. In this atmosphere of concern we must accept that if the law is at present unable to provide the type of protection which society demands then it must be made to do so.

Legislation, no matter how desirable, is likely to be sporadic and will occur mainly in the sphere of criminal law. The reluctance to introduce wide and unlimited remedies is understandable. The Common Law is still capable of rebutting the presumption that it is past the age of child-bearing, but, as has been shown, it is problematical whether it is desirable to give birth to a general privacy concept now. It may be better to continue to study the American scene and, when the concept is clearer, benefit from the American experience.

The problems which are are raised by invasion of privacy straddle both the criminal and the civil law. Most complaints which deserve the consideration of the Common Law are, it is submitted, capable of being dealt with under existing and expanding heads of liability. The very nature of the complaints indicates that the Australian attitude favouring the retention of punitive damages in the law of torts is better than the English.[111] In some areas it may be that the development will have to be slightly more radical than usual, but this is merely a question of degree and desirability. Lord Devlin, when referring to a statement of Dr. Glanville Williams that the defence of necessity was lying 'ready to hand,' remarked that he overestimated the length of the judicial stretch.[112] What has been suggested in this paper is that the judicial stretch can be lengthened to encompass the field of privacy. All that is required is the will to do so and regular exercise.

111 Cf. *Rookes* v. *Barnard* [1964] A.C. 1129; *Uren* v. *Fairfax* (1967).
112 Devlin, *Samples of Lawmaking* (1962) p. 95.