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Emerging Privacy Torts in Canada and New Zealand:  
An English Perspective

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Introduction

Establishing legal protections for privacy interests has long been a controversial endeavour. In recent years, it has become more so, particularly in common law jurisdictions where it falls to judges to undertake this endeavour. The passing of the Human Rights Act 1998, which incorporated the European Convention on Human Rights (ECHR) into English law, spurred English courts to adapt the common law in order to protect informational privacy interests (under Article 8).<sup>1</sup> The doctrinal developments flowing from this adaptation have attracted the attention of courts across the common law world.<sup>2</sup> Scrutiny of two recent developments, however, in Canada and New Zealand, indicates that whilst the English jurisprudence has received judicial attention abroad, it has not provided a basis upon which other jurisdictions have been inclined to develop their own privacy laws. In particular, English common law's (virtually exclusive) focus on the informational aspects of privacy preclude it providing much in the way of guidance for judges concerned to advance protection for other privacy interests (such as "intrusion upon seclusion"). For whilst there has been growing public and judicial awareness of the importance of personal privacy, the notion of developing a privacy tort of general application has remained seemingly unpalatable across much of the common law world until very recently.<sup>3</sup>

In the last two years, new privacy torts for "intrusion upon seclusion" have been recognised in Canada and New Zealand for the first time. In January 2012, the Court of Appeal for the Canadian province of Ontario recognised such a tort in *Jones v Tsige*.<sup>4</sup> In August 2012, the

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<sup>1</sup> *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22; [2004] 2 AC 457. See also *Vidal Hall and Ors v Google Inc* [2014] EWHC 13 (QB) in which Tugendhat J identifies the cause of action developed in *Campbell* (known as "misuse of private information") as tortious rather than equitable (at [70]). Until *Vidal Hall*, English courts had been equivocal on whether the basis of misuse of private information was tortious or equitable.

<sup>2</sup> See, for example, the Australian High Court's decision in *Lenah Game Meats Pty Ltd v Australian Broadcasting Corp* [2001] HCA 63; (2001) 185 ALR 1 and the New Zealand Court of Appeal's decision in *Hosking v Runting* [2004] NZCA 34; [2005] 1 NZLR 1.

<sup>3</sup> The USA has long had four common law privacy torts including an "intrusion upon seclusion" tort (see the *Restatement (Second) of Torts* (1977, §652); also W Prosser, "Privacy" (1960) 48 *Cal L Rev* 383 at 389) but this model has – until recently – been avoided by Commonwealth countries. See, for example, *Lenah* and *Hosking*, *ibid*. Opportunities to recognise privacy torts of general application (as opposed to those which respond only to a discrete aspect of privacy, such as the publication of private information) have consistently been rejected by the English courts (see *Kaye v Robertson* [1991] FSR 62 at 66; *Wainwright v Home Office* [2003] UKHL 53; [2004] 2 AC 406 at [18-19]; *Campbell*, n.1, above, at [133]).

<sup>4</sup> 2012 ONCA 32 (hereafter "*Jones*"). For a more detailed analysis of the decision in the context of private law judicial method, see TDC Bennett, "Privacy, Corrective Justice and Incrementalism: Legal Imagination and the Recognition of a Privacy Tort in Ontario" (2013) 59:1 *McGill Law Journal* (forthcoming).

New Zealand High Court followed suit, recognising a very similar tort in *C v Holland*.<sup>5</sup> These two cases share substantial similarities. Both represent sizeable and controversial steps forward for the protection of privacy interests in their respective jurisdictions. Moreover, both purport to develop tort law on a merely incremental basis – both judgments deny overstepping the boundaries of the court’s legitimate role and usurping the function of the legislature.<sup>6</sup> They both also contrast sharply with the state of English privacy law, which has developed more slowly and along different, confidence-based lines.<sup>7</sup>

Both *Jones* and *Holland* arise out of particularly “shocking”,<sup>8</sup> although quite different, violations of the plaintiffs’ privacy by way of intrusions into the private sphere. Both cases respond to these violations with the strongest judicial action possible – the recognition of new heads of liability to provide redress. Both also feature the same justificatory factors expounded by the respective judges: both (by implication) draw on an ideal of “corrective justice” (a key component of tort law<sup>9</sup>), and on the “value” of privacy (which we might describe as a “significant interest” deserving of the protection of tort law<sup>10</sup>). Also highly significantly, both cases exhibit an express sensitivity to the countervailing interest most often cited as a reason against expanding privacy protections: freedom of expression. Both judges are at some pains (particularly in *Holland*) to assuage concerns about the impact of the decisions on free speech.

This essay will first set out and contextualise the decisions in *Jones* and *Holland*, and the formulation of the newly recognised torts. We will then be in a position to draw some comparisons with the “other” way of doing things – the English confidence-based approach to privacy protection.

### *Jones* and *Holland*

The case of *Jones* concerned a plaintiff whose banking records had been surreptitiously accessed by the defendant 174 times over a four-year period. Both parties were employees of the bank at which the plaintiff held the account that the defendant accessed. The accessing began when the defendant entered into a relationship with the plaintiff’s former husband. The defendant accessed the plaintiff’s accounts to obtain knowledge as to the plaintiff’s financial information.<sup>11</sup> However, the defendant did not put the information gleaned to any particular

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<sup>5</sup> [2012] NZHC 2155 (hereafter “*Holland*”).

<sup>6</sup> See *Jones*, n.4, above, at [49] and [54]; *Holland*, n.5, above, at [88].

<sup>7</sup> “Confidence-based” means, in this context, that the law relating to privacy expounded in the common law of England in the last decade has its roots in the older, equitable doctrine of confidence (although it has now been judicially recognised as having morphed into a tort – see n.1, above). This is returned to in the section: “A contrast with England”, below.

<sup>8</sup> *Jones*, n.4, above, at [69].

<sup>9</sup> See, *inter alia*, E Weinrib, “The Special Morality of Tort Law” (1989) 34:3 *McGill LJ* 403; S Perry, “The Moral Foundations of Tort Law” (1992) 77(2) *Iowa L Rev* 449.

<sup>10</sup> L Dolding and R Mullender, “Tort Law, Incrementalism, and the House of Lords” (1996) 47(1) *NILQ* 12 at 12.

<sup>11</sup> “Tsige ... maintains in this action[] that she was involved in a financial dispute with [Jones’] former husband and accessed the accounts to confirm whether he was paying child support to [Jones]. Jones does not accept that

use. At no point was the information disseminated more widely. The plaintiff brought an action for invasion of privacy that was dismissed at first instance when the motions judge held that Ontario law contained no such cause of action.<sup>12</sup>

The case of *Holland* concerned a plaintiff who had been the victim of covert video-taping by the defendant whilst she had been showering. The defendant had recorded the plaintiff in states of partial and complete undress on two occasions and had transferred the recordings to his personal computer's hard disk. Upon discovering the existence of the videos, the plaintiff brought an action for invasion of privacy. In the New Zealand High Court, the defendant agreed that he had, as a matter of fact, invaded the plaintiff's privacy, but averred that no cause of action existed in tort which provided relief.

In both cases, novel torts were recognised: on appeal in *Jones* and at first instance in *Holland*. The torts recognised are both broadly similar to, and seemingly take their lead from, the USA's "intrusion upon seclusion" tort identified in the *Second Restatement of Torts*.<sup>13</sup>

The domestic legal background to both cases is remarkably similar. In both jurisdictions there was scant authority for the recognition of an intrusion-type privacy tort. In *Jones*, however, Sharpe JA pointed out that:

[whilst] [i]n Canada, there has been no definitive statement from an appellate court on the issue of whether there is a common law right of action corresponding to the intrusion on seclusion category[,] ... where the courts did not accept the existence of a privacy tort, they rarely went so far as to rule out the *potential* of such a tort.<sup>14</sup>

In *Holland*, Whata J was faced with a situation where "[t]here [was] no existing authority in New Zealand for the proposition that an intrusion upon an individual's seclusion ... [gave] rise to an actionable tort".<sup>15</sup> In fact, New Zealand case law had, in terms reminiscent of the House of Lords in *Wainwright v Secretary of State*,<sup>16</sup> expressly rejected the possibility of a *general* tort of privacy in *Hosking v Runting*, when constructing a tort aimed solely at guarding against the publication of private facts.<sup>17</sup> (Albeit the court in *Hosking* had not expressly ruled out the possibility of recognising, at some point in the future, further discrete privacy torts.<sup>18</sup>) As such, in both cases, the judges involved could not provide a tortious remedy to the plaintiffs without making significant developments in the common law.

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explanation as she says it is inconsistent with the timing and frequency of Tsige's snooping" (*Jones*, n.4, above, at [5]).

<sup>12</sup> 2011 ONSC 1475.

<sup>13</sup> *Restatement*, n.3, above.

<sup>14</sup> *Jones* n.4, above, at [25] and [31].

<sup>15</sup> *Holland*, n.5, above, at [8].

<sup>16</sup> *Wainwright*, n.3, above.

<sup>17</sup> [2004] NZCA 34; [2005] 1 NZLR 1.

<sup>18</sup> *Ibid* at [118].

The formulation of the torts ultimately recognised in both cases is remarkably similar. In *Jones*, Sharpe JA (giving the lead judgment, with which Winkler CJ and Cunningham J (*ad hoc*) agreed) formulated the new privacy tort in the following terms:

[F]irst ... the defendant's conduct must be intentional, within which I would include reckless; second, ... the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, ... a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish.<sup>19</sup>

In *Jones*, Sharpe JA was clearly moved by the “deliberate, prolonged and shocking” actions of the defendant. He remarked that Ontario law “would be sadly deficient if we were required to send Jones away without a legal remedy”.<sup>20</sup> Moreover, he focused on the harm that the plaintiff suffered and the cause of that harm (i.e. the defendant's wrongful conduct). This led him to award Jones C\$10,000 in damages. Sharpe JA was also particularly concerned by the threats to privacy posed by “the internet and digital technology”.<sup>21</sup> We might surmise that he was motivated to engage in this development of an apparently deficient common law by a commitment to the pursuit of corrective justice.<sup>22</sup>

In *Holland*, Whata J, explaining that “the most appropriate course is to maintain as much consistency as possible with the North American tort”, formulated the New Zealand intrusion action in very similar terms:

[I]n order to establish a claim based on the tort of intrusion upon seclusion a plaintiff must show:

- (a) An intentional and unauthorised intrusion;
- (b) Into seclusion (namely intimate personal activity, space or affairs);
- (c) Involving infringement of a reasonable expectation of privacy;
- (d) That is highly offensive to a reasonable person.<sup>23</sup>

Whata J cited *Jones* several times in his judgment. He was clearly of the view that Ontario's new intrusion tort was formulated virtually identically to the United States' one (hence his assertion that there is, in essence, a single “North American” model for such torts).<sup>24</sup> He was similarly concerned by threats to privacy which are “increasing with technological advances”.<sup>25</sup> He also expressed a concern – doubtless familiar to those judges who take cognisance of relevant overseas authority whilst engaging in significant common law

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<sup>19</sup> *Jones*, n.4, above, at [71].

<sup>20</sup> *Ibid* at [69].

<sup>21</sup> *Ibid* at [67]. See also S Warren and L Brandeis, “The Right to Privacy” (1890) 4 *Harv L Rev* 193.

<sup>22</sup> On this assertion, see Bennett, n.4, above. Corrective justice, broadly speaking, is an ideal which demands that wrongdoers (those who are culpable) are required to compensate those to whom their wrongdoing occasions harm. As such, it is often (though not universally) considered a key principle underpinning tort law. On corrective justice generally, see E Weinrib, “Legal Formalism: On the Immanent Rationality of Law” (1988) 97 *Yale LJ* 949 and S Perry, “The Moral Foundations of Tort Law” (1991-2) 77 *Iowa L Rev* 441.

<sup>23</sup> *Holland*, n.5, above, at [94].

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid* at [86].

development – that citizens of his jurisdiction (New Zealand) ought not to “be afforded [lesser protection than Ontarians] from unwanted intrusions”.<sup>26</sup>

Another noteworthy theme in Whata J’s judgment is the “value” of privacy.<sup>27</sup> He described privacy as having “value” (or being a “value” recognised within domestic or foreign law) no less than 27 times in his judgment. He linked the “value” of privacy to “the protection of personal autonomy”.<sup>28</sup> In so doing, he enjoys a wide range of judicial and academic support, not least from Sharpe JA.<sup>29</sup>

Given the value placed by both Sharpe JA and Whata J on privacy, there are reasons to conclude that both judgments are primarily informed by deontological impulses. Both judges are, however, alive to the potential for conflict between privacy rights and other interests such as free speech considerations.<sup>30</sup> Moreover, this is reflected in the adoption (in both instances) of the “highly offensive to a reasonable person” threshold for liability (which can be traced back to the United States’ First Amendment-sensitive version of the tort<sup>31</sup>). The prima facie deontological focus of the torts is, then, clearly qualified by some powerful, consequentialist concerns.<sup>32</sup>

Finally in this section, it is worth considering the impact which both *Jones* and *Holland* have for the maintenance of legal certainty. Both torts are novel, and thus might be said to have in essence imposed liability retrospectively on the defendants involved. However, we have reason to suggest that taking the step of recognising these torts actually advanced the cause of legal certainty in these jurisdictions. For, having modelled the novel torts closely on the US intrusion tort, both Canada and New Zealand will be able to draw on a rich volume of case law from the United States as to the torts’ application.<sup>33</sup> The torts recognised in each case are, essentially, complete – they are unlikely to require substantial further refinement.<sup>34</sup> The only parties who have suffered from a brief lack of certainty in these jurisdictions are the two defendants themselves. Yet each admitted their wrongdoing and, in any event, can have been in little doubt whilst committing their respective privacy-invading acts that they were engaging in wrongful behaviour, in the sense that they caused anguish and distress to the plaintiffs and failed to respect their reasonable expectations of privacy.<sup>35</sup> Below, we will

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<sup>26</sup> *Ibid* at [87].

<sup>27</sup> Unfortunately, the question of damages was reserved in *Holland* and the amount ultimately awarded has not been made public.

<sup>28</sup> *Ibid* at [86].

<sup>29</sup> See *Jones*, n.4, above, at [66-7]. See also *Griswold v Connecticut* 381 US 479 (1965); E Bloustein, “Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser” (1964) 39 *New York University Law Review* 962, 971 and S Benn, “Privacy, Freedom and Respect for Persons”, in J Roland Pennock & JW Chapman eds, *Nomos XIII: Privacy 2* (New York: Atherton, 1971).

<sup>30</sup> See *Jones*, n.4, above, at [53]; *Holland*, n.5, above, at [97].

<sup>31</sup> See Prosser, n.3 above.

<sup>32</sup> On the argument that tort law is informed by a moral principle identified as “qualified deontology” see R Mullender, “Tort, Human Rights and Common Law Culture” (2003) 23(2) *OJLS* 301 at 308.

<sup>33</sup> See Prosser, n.3, above, at 389-392.

<sup>34</sup> C.f. “A contrast with England”, below.

<sup>35</sup> In other words, the acts of the defendants caused harm to the plaintiff’s “significant interests”. See Dolding and Mullender, n.10, above, at 12.

contrast the legal certainty promoted by these two torts with the uncertainty that English law's more narrowly drawn informational tort has engendered in recent years.

### A contrast with England

In England, privacy interests have long been accorded some protection by a rather bewildering assortment of legal mechanisms, as opposed to a single cause (or even a small number of discrete causes) cause of action.<sup>36</sup> The extent to which this assortment of mechanisms is comprehensive in its protection of privacy interests remains debatable.<sup>37</sup> Certainly, in contrast to Ontario and New Zealand, judges in English cases have resolutely refused to start afresh by formulating a broad, generally applicable tort of "invasion of privacy" (or some such similar moniker).<sup>38</sup>

Instead, protection for privacy interests in England has been built into (or added onto) these existing legal mechanisms – most notably the equitable doctrine of confidence. This particular doctrine has "mutat[ed] at an exponential rate".<sup>39</sup> It has generally operated under the name "misuse of private information" since Lord Nicholls coined the phrase in *Campbell v MGN*.<sup>40</sup> This expanded cause of action provides relief for violations of informational privacy in a range of circumstances – including those in which there was no pre-existing relationship of confidence between the parties (e.g. *Douglas*<sup>41</sup> and *Mosley*<sup>42</sup>).

As such, at present it is not entirely clear what the doctrinal basis of misuse of private information is. Despite its equitable roots, it has also been suggested that the doctrine is no longer equitable in nature but has become tortious.<sup>43</sup> Moosavian, writing in 2012, has argued

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<sup>36</sup> These mechanisms include, *inter alia*: data protection legislation, protection from harassment legislation, common law actions for trespass to the person and property, nuisance and the equitable doctrine protecting confidences.

<sup>37</sup> See R Mullender, "Privacy, Imbalance and the Legal Imagination" (2011) 19(2) *Tort L Rev* 109, in which Mullender suggests that a narrow focus by lawyers and judges on informational privacy has stymied the development of legal mechanisms to protect a greater range of privacy-related interests.

<sup>38</sup> See, for example, *Wainwright* n.3, above, at [19], also *Campbell*, n.1, above, at [43].

<sup>39</sup> B Markesinis, "Concerns and Ideas About the Developing English Law of Privacy (And How Knowledge of Foreign Law Might Be of Help)" (2004) 52 *Am J Comp L* 133 at 182.

<sup>40</sup> *Campbell*, n.1 above, at [14]. It should be noted that the rise of "misuse of private information" has not heralded the end of "breach of confidence". The equitable doctrine of confidence remains actionable in its original form. See R Moosavian, "Charting the journey from confidence to the new methodology" (2012) *EIPR* 324, and T Aplin, "The Future of Breach of Confidence and the Protection of Privacy" (2007) 7 *Oxford University Commonwealth LJ* 137.

<sup>41</sup> *Douglas v Hello! Ltd* [2005] EWCA Civ 595; [2006] QB 125. In *Douglas*, the claimants, a celebrity couple, sought damages in respect of the publication of photographs taken by an undercover reporter who gained access to their wedding. An exclusive agreement had been reached with another magazine (*Ok!*) for publication of official photographs of the wedding. Nevertheless, the Court of Appeal held that the event was still one in respect of which the claimants had a reasonable expectation of privacy (see [95]).

<sup>42</sup> *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB); [2008] EMLR 20. In *Mosley*, the Formula 1 racing supremo, Mr Max Mosley, obtained damages for misuse of private information in respect of pictures, video footage (online) and accompanying articles of a sexual nature, published by the defendant's (now defunct) tabloid *The News of the World*.

<sup>43</sup> See H McGregor, *McGregor on Damages*, 18th edn (London: Sweet & Maxwell, 2009) at 1712.

Alternatively, the view that the cause of action remains equitable finds expression in AM Dugdale, MA Jones & M Simpson, eds, *Clerk & Lindsell on Torts*, 19th edn (London: Sweet & Maxwell, 2006) at 1173.

that there is “slightly stronger” evidence that misuse of private information *is* tortious, but that it retains certain equitable elements.<sup>44</sup> Alternatively, it has been posited that it might be a “new creature” entirely, developed from the rights-balancing method espoused by the European Court of Human Rights.<sup>45</sup> One High Court judge has recently considered directly the question of the nature of misuse of private information, concluding that it is a tort and not an equitable action.<sup>46</sup> The attempt to clarify the situation is both long overdue and welcome. However, the judgment is only at first instance and on a purely procedural matter and so may not be conclusive of the question. The defendant (Google Inc) has also indicated that the decision will be appealed.

Whatever the solution to this conundrum, however, it is clear that misuse of private information has evolved significantly from its origins as a protector of information confided within a particular relationship. Yet the lack of a tort in English law specifically designed to deal with intrusion-type scenarios is somewhat anomalous. It certainly has been out of kilter with the position in the United States since the *Second Restatement*.

The uncertainty surrounding misuse of private information that has been engendered by the confusion as to its doctrinal roots is compounded by a further issue. In terms of methodology, there has been a lack of clarity in recent years as to what precisely the elements of misuse of private information are. Some commentators proffer the view that it involves two elements,<sup>47</sup> these being those identified by Eady J in the *Mosley* case:

If the first hurdle can be overcome, by demonstrating a reasonable expectation of privacy, ... the court is required to carry out the next step of weighing the relevant competing ... rights [of the parties] in the light of an “intense focus” upon the individual facts of the case.<sup>48</sup>

This two-element approach, however, is silent on the need for a “misuse” of the information. This is strange, since – especially if the cause of action is now tortious – the law would seem to say nothing about the wrongful act for which the doctrine provides relief. This silence results in a worrying lack of clarity: what conduct exactly will attract liability for the defendant? It may well be that the reason why the “misuse” stage of the method has failed to be significantly elaborated upon is that, in general, in the cases which have come before the English courts, the “misuse” has been very obvious. The vast majority of such cases have involved publication of private information, often about celebrity claimants, by the media.<sup>49</sup> The objectionable conduct is clear in these cases: it is the act of publishing the information.

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<sup>44</sup> Moosavian, n.37, above, at 327.

<sup>45</sup> Eady J, “Protecting Freedom of Expression in the Context of the European Convention of Human Rights” (unpublished), a public lecture given at City University, London, 10th March 2010. The transcript is available at: <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/eady-j-city-university-10032010.pdf>.

<sup>46</sup> See *Vidal Hall*, n.1, above.

<sup>47</sup> See Moosavian, n.37, above at 330; also R Wacks, *Privacy and Media Freedom* (Oxford: OUP, 2013) 114.

<sup>48</sup> *Mosley*, n.39, above, at [10].

<sup>49</sup> See, for example: *Campbell*, n.1, above; *Mosley*, *ibid*; *McKennitt v Ash* [2006] EWCA Civ 1714, [2007] 3 WLR 194; *Murray v Express Newspapers* [2008] EWCA Civ 446, [2009] Ch 481.



Breaking down the methodology into three elements (separating the reasonable expectation question from the misuse question) would have significant advantages for clarity.<sup>50</sup> It would thus be more accurate to say that there must be information about which the claimant has a “reasonable expectation of privacy” *and* some sort of “misuse” of that information by the defendant. Once *both* of those elements are made out, then the court will consider the only applicable defence: publication in the public interest based on a Strasbourg-inspired test of proportionality.

However, most recently there have been signs that there is not necessarily any need for publication in order to trigger liability under misuse of private information. The mere *acquisition* of private material may be sufficient to trigger liability under this doctrine. The Court of Appeal first pronounced misuse of private information (or “breach of confidence”) capable of providing relief in the absence of a “misuse” of the information in *Imerman v Tchenguiz*.<sup>51</sup> *Imerman* involved the unlawful accessing and copying of confidential computer files. The Court of Appeal stated that:

If confidence applies to a defendant who adventitiously, but without authorisation, obtains information in respect of which he must have appreciated that the claimant had an expectation of privacy, it must, a fortiori, extend to a defendant who intentionally, and without authorisation, takes steps to obtain such information. ... [I]ntentionally obtaining such information, secretly and knowing that the claimant reasonably expects it to be private, is itself a breach of confidence.<sup>52</sup>

[I]t would be a breach of confidence for a defendant, without the authority of the claimant, to examine, or to make, retain, or supply copies to a third party of, a document whose contents are, and were (or ought to have been) appreciated by the defendant to be, confidential ....<sup>53</sup>

The Court of Appeal observed that simply because the cause of action has come to be known by the name “misuse of private information”,<sup>54</sup> it “does not mean that there has to be such misuse before a claim for breach of confidentiality can succeed”.<sup>55</sup> But this leaves open the question of what exactly needs to be proven in lieu of “misuse”. Here, the Court of Appeal

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<sup>50</sup> The author first argued in favour of understanding “misuse of private information” as comprising three distinct elements in TDC Bennett, “Corrective Justice and Horizontal Privacy: A Leaf out of Wright J’s Book” (2010) 7 *J Juris* 545 at 555.

<sup>51</sup> See *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] Fam 116 at [68-9]. *Imerman* was an interlocutory appeal in ancillary relief proceedings. Tchenguiz was divorcing Imerman. Keen to prevent Imerman concealing any of his assets from the court, Tchenguiz’s brother accessed Imerman’s computer files at his (Imerman’s) place of work without his knowledge, and downloaded a substantial quantity of these files to be passed to Tchenguiz’s solicitors. The Court of Appeal held that the act of *obtaining* the information could constitute a breach of confidence, even in the absence of any wider dissemination of it. See also *CTB v NGN Ltd* [2011] EWHC 1326 (QB) at [23]; and *Goodwin v NGN Ltd* [2011] EWHC 1437 (QB); [2011] EMLR 27 at [85].

<sup>52</sup> *Imerman, ibid*, at [68].

<sup>53</sup> *Ibid* at [69].

<sup>54</sup> *Ibid* at [65].

<sup>55</sup> *Ibid* at [71].

could have spoken with greater precision. The real question was not *whether* a misuse of the information is required, but what act *constitutes* such a misuse at law. In *Imerman*, the Court decided that, in surreptitiously obtaining confidential information, the defendant acted in a manner which was essentially inequitable. Thus, since equitable concepts originally underpinned the breach of confidence doctrine from which misuse of private information has emerged (whatever its current classification – equitable, tortious or otherwise), the defendant’s conduct could properly be regarded as wrongful.

The Court of Appeal, in *Imerman*, perhaps sought to plug a gap in protection for privacy rights, thereby bringing English privacy law closer to the more developed US scheme. The Court’s reasoning was, essentially, this: since the defendant knew that the information he was seeking to obtain was confidential/private, and since he needed to act surreptitiously in order to obtain it, the act was wrongful as it robbed the claimant of the ability to control who had access to the information.

In another recent privacy decision (concerning interim injunctive relief), *CTB v NGN*, Eady J pronounced that “[i]t is important always to remember that the modern law of privacy is not concerned solely with information or ‘secrets’: it is also concerned importantly with *intrusion*”.<sup>56</sup> This echoed comments from the same judge in *Mosley*, that “the very fact of clandestine recording may be regarded as an intrusion”.<sup>57</sup> Indeed, in *Mosley*, Eady J uses the term “intrusion” sixteen times in relation to the violation of the claimant’s privacy. At this point in my analysis, it might be objected that I overstate the significance of Eady J’s use of the term “intrusion”; that he may simply be using it as a synonym for “violation” or “breach” of privacy. However, there is evidence that Eady J does attach normative significance to this particular term. For despite the fact that *Mosley* was pleaded on the basis that the wrongful act of the defendant was the *publication* of private information, Eady J’s frequent and consistent use of the term “intrusion” suggests a greater concern with the *nature* of the defendant’s conduct. Moreover, he defends this concern, stating: “obviously the nature and scale of the distress caused [by publication] is in large measure due to the clandestine filming and the pictures acquired as a result”.<sup>58</sup> Notably, the extent to which he focuses on intrusion in *Mosley* has not gone unnoticed. In *Jones*, Sharpe JA identifies *Mosley* as an example of an intrusion tort, stating that it is one of a class of claims “that would easily fall within the intrusion upon seclusion category”.<sup>59</sup>

Despite these pronouncements from the (English) Court of Appeal and the High Court, it is important to note that neither amounts to the domestic recognition of an intrusion upon seclusion-type privacy tort (of the sort found in the US, Canada or New Zealand). Assuming, *arguendo*, that *Imerman* is correct, misuse of private information is now actionable upon

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<sup>56</sup> [2011] EWHC 1326 (QB) at [23] (emphasis is original). *CTB* involved a famous Premier League footballer who sought an injunction to prevent disclosure in the media of the fact of an extra-marital affair in which he had engaged.

<sup>57</sup> *Mosley*, n.39, above, at [17]. The facts of *Mosley* are outlined at n.39, above.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Jones*, n.4, above, at [62].

proof merely of the wrongful acquisition of private information. Yet some uncertainties remain regarding this. For example, it is unclear whether an unsuccessful *attempt* to acquire private information would also be actionable. Moreover, it becomes unclear just what is “wrong” about the wrongful act of *acquiring* private information; where is the tortious harm?<sup>60</sup> Clearly these points require more academic and judicial work before they can be satisfactorily answered, but this of itself provides some evidence of the uncertainty now prevailing in this field.

In any event, we can at least conclusively state that nothing in *Imerman*, *Mosley* or *CTB* has established a stand-alone cause of action focusing on the intrusive nature of the defendant’s conduct as the sole basis for liability. Misuse of private information retains at least one vital aspect of the equitable doctrine of confidence: it is based around informational rights. The intrusive nature of the defendant’s actions may be relevant, but only insofar as it sheds light on the extent of the harm which the claimant suffers. No English court has yet ruled that intrusion *alone* can found a tortious cause of action in privacy.<sup>61</sup>

English law may then already contain a cause of action that is apt to guard against some (informational) intrusion-type privacy violations (as opposed to wrongful publication-type violations). But, crucially, English law has arrived at that state of affairs only by taking small, narrow steps to develop the common law on a case-by-case basis. By contrast, both Ontario and New Zealand may each be said to have taken much bigger steps.

All three jurisdictions purport to have developed the doctrines on which we have dwelt on a merely “incremental” basis.<sup>62</sup> Clearly, however, there are some differences in the concepts of “incrementalism” being espoused by these courts. Some clarity can be offered by making use of Dolding and Mullender’s notion of “narrow” and “wide” models of incrementalism.<sup>63</sup> They suggest that both models have found support from the English judiciary in the 20<sup>th</sup> century in various tort cases. Under a “narrow” model, courts regard themselves bound to apply existing doctrine rigidly and narrowly. This can preclude, for example, the adoption of novel categories of torts: novel claims must be fitted into the existing schema.<sup>64</sup> By contrast, courts operating under a “wide” model are less “doctrine-bound”,<sup>65</sup> and may work up novel heads of liability in order to give effect to the “protective purpose” underpinning tort law

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<sup>60</sup> In basing its decision on equitable principles, the Court of Appeal did not engage with the question of whether the mere acquisition of private information was sufficiently harmful to trigger liability in tort. However, given the uncertainty as to whether misuse of private information is equitable, tortious or falls within some other category yet to be identified, this (the Court of Appeal’s) has not provided a satisfactory answer.

<sup>61</sup> Though, of course, certain intrusive acts would be actionable *per se* under other causes of action such as the statutory torts under the Protection from Harassment Act 1997, and common law assaults and trespasses.

<sup>62</sup> *Jones*, n.4, above, at [65] *Holland*, n.5, above, at [74-75] and [80]; *Campbell*, n.1, above, at [51].

<sup>63</sup> Dolding and Mullender, n.10, above.

<sup>64</sup> *Ibid* at 16-17: “One way of expressing this difference between narrow and wide incrementalism is to note that while judges operating in the wide incrementalist mode look to presently existing doctrine for *guidance* as to the nature of the wrongful transactions comprehended by the law, they do not exhibit the degree of *doctrine-boundness* manifested by judges engaged in the practice of narrow incrementalism.”

<sup>65</sup> *Ibid* at 17.

generally.<sup>66</sup> On the analysis offered in this paper, it can be said (at a level of generality) that whilst the English courts have preferred a “narrow” model of incremental development of privacy law in recent years, the Canadian and New Zealand courts, in *Jones* and *Holland* respectively, have adopted “wide” approaches.<sup>67</sup> Both approaches are thus legitimately classifiable as “incremental” in nature, but clearly yield significantly different results.

## Conclusions

In the English common law landscape, a particular mantra has become familiar: there is no tort of privacy.<sup>68</sup> But because Article 8 ECHR cannot be ignored,<sup>69</sup> the judiciary have found ways to protect some discrete aspects of privacy (in particular, informational privacy). They have done so by tinkering with the doctrine of confidence. In some respects, the tinkering looks quite substantial – almost to the point where the term “tinkering” might seem to fail to encapsulate depth of the exercise. For instance, a whole new (three-part) test for liability has been expounded. Also, the need for “circumstances importing an obligation of confidence” has been dispensed with. And information may now be significantly widespread within the public domain yet still be regarded as “private”.

But it remains mere tinkering, for the aspect of privacy attracting protection is the same, and is still fairly narrow: private information. Thus the shoehorning of privacy interests into an ill-fitting doctrine that Phillips LJ bemoaned in *Douglas* is still very much the English way of doing things.<sup>70</sup> Moreover, *Imerman* illustrates that this tinkering is ongoing: the tort of misuse of private information remains, therefore, in a state of flux. This is not particularly desirable, for it undermines legal certainty. England may thus be paying a high price for the ability to protect individuals from what is only a narrow range of purely informational privacy violations.

By contrast, Canada and New Zealand have managed to advance the cause of privacy protection *and* legal certainty. They have advanced the cause of privacy protection by responding to gross intrusions upon the private lives of the two plaintiffs involved, and by fashioning a novel head of liability to provide redress. Moreover, the courts have ensured legal certainty by formulating torts which are unlikely to need further refinement – their elements are clear and unambiguous and draw on a well-established body of American case law.<sup>71</sup> And in so doing, they have expressly shown sensitivity to the importance of freedom of expression, recognising novel privacy torts that are clear and set a fairly high bar for

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<sup>66</sup> *Ibid* at 14.

<sup>67</sup> For a more detailed analysis of the “wide” incrementalism present in the *Jones* case, see Bennett, n.4, above.

<sup>68</sup> See n.35, above, and accompanying text.

<sup>69</sup> Section 6(3) of the Human Rights Act 1998 requires courts, as public bodies, to act compatibly with Convention rights and, therefore, to act compatibly when elaborating the common law. For a recent analysis of this form of indirect horizontal effect, see G Phillipson and A Williams, “Horizontal Effect and the Constitutional Constraint” (2011) 74(6) *MLR* 878.

<sup>70</sup> *Douglas*, n.38, above, at [53]: “We cannot pretend that we find it satisfactory to be required to shoe-horn within the cause of action of breach of confidence claims for publication of unauthorised photographs of a private occasion.”

<sup>71</sup> See n.31, above, and accompanying text.

plaintiffs to clear: the intrusion must be “highly offensive to a reasonable person” and, in New Zealand, relate to a “reasonable expectation of privacy”.

The claim for justice (for the protection of privacy interests) may have been aided in the *Jones* and *Holland* cases by the deeply sympathetic nature of the plaintiffs. Both were wholly innocent parties whose privacy had been intruded upon in “shocking” and “disturb[ing]” ways.<sup>72</sup> By contrast, the English cases in which misuse of private information has been slowly developing often involve “a particular type of claimant, generally a public figure or celebrity ... who cannot be conveniently described as ‘vulnerable’”,<sup>73</sup> or who might, in some way, be thought to be (at least partially) the architect of their own misfortune.<sup>74</sup> This may go some way to explaining why the English judiciary in particular have inclined towards a more piecemeal approach to developing the law in privacy cases.

The impetus for recognition of common law intrusion-type privacy torts comes from the confluence of several factors: an increased use of advances in technology to invade individuals’ privacy in novel ways (including the abuse of communications technology by the mass media, through telephone and email hacking, and the public outrage caused thereby), the reluctance of legislatures to create statutory privacy laws,<sup>75</sup> and the appearance before courts of deeply sympathetic victims who have suffered outrageous intrusions upon their privacy.

It is also significant that this most recent development (*Holland*) has taken place in New Zealand – a jurisdiction in which such large common law developments are relatively rare. Indeed, the jurisdiction’s approach for the last seven years has been broadly similar to England’s – guarding informational privacy interests against non-consensual publication. When formulating the wrongful publication privacy tort in *Hosking*,<sup>76</sup> the New Zealand Court of Appeal stated that “the introduction of any high-level and wide tort of invasion of privacy” ought to be left to Parliament.<sup>77</sup> Yet this apparently did not preclude the High Court from recognising a discrete, novel head of tortious liability.

In *Holland*, Whata J noted that “[a]cceptance [of an intrusion tort] in some parts of North America is not an international trend”.<sup>78</sup> But, given the outcome of the case, it might quite readily be said that – in the light of *Jones* and its reasoning subsequently being adopted half the world away – there is now growing evidence of an “international trend” worthy of significantly greater academic and judicial attention.

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<sup>72</sup> *Jones*, n.4, above, at [69].

<sup>73</sup> P O’Callaghan, “Monologism and Dialogism in Private Law” (2010) 7 *J Juris* 405 at 432.

<sup>74</sup> See, for example, *Mosley, Campbell and CTB*, above; also *Terry (formerly LNS) v Persons Unknown* [2010] EWHC 119 (QB); [2010] EMLR 16.

<sup>75</sup> The reluctance to engage in legislative reform of privacy laws may be due, at least in part, to the political pressure placed on governments by the press, as has been seen particularly in England in the aftermath of Lord Leveson’s report into the ‘Culture, Practice and Ethics of the Press’.

<sup>76</sup> *Hosking*, n.2, above.

<sup>77</sup> *Holland*, n.5, above, at [110].

<sup>78</sup> *Ibid* at [87].

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