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# Judicial Activism and the Nature of “Misuse of Private Information”

Thomas DC Bennett\*

## Introduction

Writing in this issue, the former High Court judge, Sir Michael Tugendhat, sets out to correct a popular misunderstanding about the creative nature of the common law judge’s role.<sup>1</sup> Those – most prominently, members of the tabloid press – who decry the judicial “activism” that they perceive as having led to the development of stronger privacy protections in English law have misunderstood what it is that common law judges do. For it is in the very nature of the common law to develop in order that it can adapt to broader social changes. This development can take place only through judicial elaboration of its doctrines and principles. Seen in this light, Tugendhat argues, the recognition and development of the cause of action known as “misuse of private information” (MPI) represents an entirely legitimate exercise of judicial creativity that is within the limits of the judiciary’s constitutional role.

In the course of making his argument, Tugendhat suggests that the case of *Campbell v Mirror Group Newspapers Ltd* – the House of Lords case that laid the foundations for the emergence of the MPI doctrine – is an instance of (entirely legitimate) judicial activism.<sup>2</sup> He is right to say that the development that takes place in that case is legitimate, since it sits well within the limits of the courts’ constitutional role. However, describing the case as “activist” is potentially problematic. For it intuitively suggests that the decision represents a fairly radical development of the law. “Activism” is an unhelpful label wherever it is applied. But insofar as it is suggestive of a radical rather than a limited development, *Campbell* is a case particularly unsuited to that label. *Campbell* involves only a limited development of the law pertaining to confidential information. As such, Tugendhat is certainly right that it is entirely defensible against criticism that it is an overly “activist” decision. But I would go further: it ought not to be considered “activist” at all.

For rather than heralding the introduction of a distinct, novel cause of action apt to protect claimants’ privacy interests, the *Campbell* decision moved the law only slightly beyond the position it had, by that time, already reached through the older, equitable doctrine of confidence. This was in preference to recognising a broad tort of “invasion of privacy”, or even a number of discrete torts protecting distinct aspects of privacy.<sup>3</sup> In making only

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\* Newcastle Law School, UK.

<sup>1</sup> [EDITOR: CROSS-REFERENCE TO TUGENDHAT ARTICLE CITATION]

<sup>2</sup> [2004] UKHL 22, [2004] 2 AC 457.

<sup>3</sup> Four discrete privacy torts are recognised in the US under the *Restatement of the Law (Second): Torts* (2d), vol 3 (American Law Institute, 1977), 376. (See also William Prosser, ‘Privacy’ (1960) 48(3) Cal LR 383, 389.) In New Zealand, a “private facts” tort was recognised in *Hosking v Runting* (n 65, below). Both Ontario, Canada and New Zealand have, in recent years, recognised “intrusion” torts similar to that contained in the US

relatively minor doctrinal changes to the position English law had already found itself in, the House of Lords threw its weight behind an unhelpful tendency to “shoe-horn” all types of privacy interests into a legal mechanism suited only to dealing with the non-consensual publication of private facts.<sup>4</sup> This has left English law with an inflexibility in respect of protecting individuals’ privacy interests that has given rise to considerable uncertainty. In this essay, I evidence and critique one particular instance of this uncertainty: the confusion surrounding the very nature of the MPI doctrine. It is unclear whether the doctrine is part of tort law, or equity, or – perhaps – something else entirely. And whilst the courts have been forced recently to grapple with this conundrum, detailed analysis of their efforts reveals that the question has not been satisfactorily settled.<sup>5</sup>

As such, *Campbell* may indeed be criticised for undermining legal certainty. But this uncertainty stems not from its activism but from its inactivism. The ambiguity surrounding the nature of MPI comes from equivocation in *Campbell* about its existence, its contours and its doctrinal roots. The House missed an opportunity to recognise, unequivocally, a distinct tort of invasion of privacy (or to delineate discrete privacy torts). Had it been less cautious and taken this opportunity, at least one of the core concerns – a lack of certainty – raised by those who (mistakenly) bemoan its activism could have been avoided.

## 1. Judicial Activism and Incrementalism

“Judicial activism” is a term that is often used pejoratively as a label for judges’ decisions that extend the law in a particular field in a manner the critic finds illegitimate, usually on the grounds of a democratic deficit in the judicial decision-making process. Dyson Heydon, for example, uses it to mean the use of judicial power

for a purpose other than that for which it was granted, namely doing justice according to law in the particular case. It means serving some function other than what is necessary for the decision of the particular dispute between the parties. Often the illegitimate function is the furthering of some political, moral or social programme: the law is seen not as the touchstone by which the case in hand is to be decided, but as a possible starting point or catalyst for developing a new system to solve a range of other cases.<sup>6</sup>

Tugendhat’s defence of judicial activism points up the historical commitment in England to the judicial development of the common law. He reminds us that English judges have been

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*Restatement*, in the cases of *Jones v Tsige* 2012 ONCA 32, 108 OR (3d) 241, and *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672, respectively. I have written elsewhere on the Ontario and New Zealand developments: see Thomas DC Bennett, ‘Privacy, Corrective Justice and Incrementalism: Legal Imagination and the Recognition of a Privacy Tort in Ontario’ (2013) 59(1) McGill Law Journal 49, and Thomas DC Bennett, ‘Emerging privacy torts in Canada and New Zealand: an English perspective’ (2014) 36(5) European Intellectual Property Review 298.

<sup>4</sup> *Douglas v Hello! Ltd* [2003] EWHC 55 (Ch), [2003] EMLR 29, [53].

<sup>5</sup> See section 2.2, below.

<sup>6</sup> Dyson Heydon, ‘Judicial Activism and the Death of the Rule of Law’ (2001-2004) 10 Otago Law Review 493, 495.

elaborating and expanding the common law for many hundreds of years without any need for the involvement of the legislature. There are those for whom the lack of legislative involvement inherent in the common law is simply wholly undemocratic, thus rendering the entire notion of common law unacceptable to them. Keith Ewing, for example, refuses to acknowledge a meaningful distinction between the sort of legitimate “judicial” law-making that Tugendhat defends and “legislative” activity. For Ewing, all law-making is legislative in character and is thus not a legitimate use of judicial power; it should always be left to an elected legislature. As a result, he takes the view that the judicial pronouncement of novel legal rules is an affront to democracy:

[T]he judicial role ought to be a limited one: it is not the job of the judicial branch to make the law, in the sense of laying down rules of general application which will apply to people other than the parties in a dispute before the courts. That is a legislative function for which the judicial process is wholly unsuited. ...

It is perhaps inappropriate that law should be made in this way, and it is perhaps obvious that there should be no role for the common law proper in a properly functioning democracy. The common law is a process of law-making developed in a pre-democratic era, and maintained by a non-democratic form. All law, public or private, should be codified with a transparent democratic root.<sup>7</sup>

This is obviously an extreme position. Ewing favours the adoption of an exhaustive civil code – along the lines of continental legal systems – in order to dispense with the need for any judicial creativity. His view is obviously incompatible with the common law system that prevails in England and Wales and, as such, it is not a view with which Tugendhat’s defence of activism can usefully engage. It does, however, usefully demonstrate just how far an absolute commitment to democratic involvement in law-making might take us down a path of highly prescriptive formalism.

Criticism of judicial activism features centrally (although not in so many words) in the attack launched by the Editor in Chief of the *Daily Mail*, Paul Dacre, on the development of the doctrine of misuse of private information. Addressing the Society of Editors in 2008, Dacre said that

the British Press is having a privacy law imposed on it ... This law is not coming from Parliament – no, that would smack of democracy – but from the ... judgements ... of one man.<sup>8</sup>

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<sup>7</sup> KD Ewing, ‘A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independent Judiciary’ (2000) 38(3) *Alberta LR* 708, 710.

<sup>8</sup> Speech by Daily Mail editor-in-chief Paul Dacre at the Society of Editors conference, 9 November 2008. The transcript can be found at <http://image.guardian.co.uk/sys-files/Media/documents/2008/11/07/DacreSpeech.pdf> (accessed 18/4/18).

The “one man” that Dacre was referring to was Mr Justice Eady, a High Court judge who, having at one time occupied the role of judge in charge of the jury list, has heard a substantial number of the MPI cases brought before the courts. Much in Dacre’s speech is not worth dignifying with a detailed reply, since one suspects – given his highly selective antipathy towards judicial creativity – that he simply objects to the development of greater legal privacy protections *per se*.<sup>9</sup> But the suggestion that only Parliament, and not judges, ought to be driving the development of privacy law is one that others have subsequently pursued. The then Prime Minister, David Cameron, indicated broad agreement with Dacre’s sentiments when, in 2011, he said that

What’s happening here is that judges are using the European Convention on Human Rights to deliver a sort of privacy law without Parliament saying so. ... The judges are creating a sort of privacy law whereas what ought to happen in a parliamentary democracy is Parliament ... should decide how much protection do we want for individuals and how much freedom of the press.<sup>10</sup>

Tugendhat is, therefore, quite right to identify this line of argument as one that needs a response. Responding to it, however, is not easy when the charge – “activism” – is an under-determinate one. Put simply, what amounts to “activism” is entirely in the eye of the beholder, and the perspective from which the beholder views it is rarely obvious to anyone else. For example, Dacre and Cameron might be read as espousing the Ewing view. However, that would hardly cohere with Cameron’s conservative instincts (which would, surely, compel him to defend Britain’s common law tradition). Nor would it sit well with Dacre’s well-known Euroscepticism (which would surely make it difficult for him coherently to argue for a continental-style civil code to be adopted in the UK). So it seems more likely that they would, unlike Ewing, accept *some* degree of judicial law-making, but it is wholly unclear where they think the line ought to be drawn.

The problem with the term “activism” is that it tries – and fails – to capture a nuanced scale of approaches to judging with a simple, black and white dichotomy (between “activism” and “inactivism”). It is a blunt instrument. The reality is that judicial creativity contains many different shades of grey. Some decisions develop the law further from its previous position than others. As Lord Goff once put it:

Occasionally, a judicial development of the law will be of a more radical nature, constituting a departure, even a major departure, from what has

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<sup>9</sup> As Tugendhat points out, Dacre has not objected to judicial developments in the law that have increased protection for the press’ free speech interests. [EDITOR: CROSS REF RELEVANT PAGE IN TUGENDHAT ART.]

<sup>10</sup> David Cameron PM, 21 April 2011, Luton. See <<https://www.independent.co.uk/news/uk/politics/cameron-uneasy-about-privacy-law-2270980.html>> (accessed 18/4/18).

previously been considered to be established principle, and leading to a realignment of subsidiary principles within that branch of the law.<sup>11</sup>

Many decisions, however, will make only piecemeal changes to existing doctrine. One way in which we might better conceive of the spectrum of activism is by utilising Lesley Dolding and Richard Mullender's notions of "narrow" and "wide" forms of incrementalism as the basis for this scale. Incrementalism is the term they (and others) use to describe the process by which the judiciary incrementally extend the law (eg in tort) to respond to novel situations. This is most obviously achieved by adopting an analogical method of reasoning – locating similarities of fact or of underlying legal principle between earlier cases and the instant case. As a mode of judging, it has its roots in the judgment of Brennan J in the Australian High Court negligence case of *Sutherland Shire Council v Heyman*, in which he stated:

It is preferable ... that the law should develop novel categories of negligence incrementally and by analogy with existing categories, rather than by massive extension of a prima facie duty of care...<sup>12</sup>

Although this approach was not actually adopted by the majority in *Sutherland*, it was seized upon by the House of Lords in the famous negligence case of *Caparo v Dickman Plc* and has become integral to the methodology of English tort law.<sup>13</sup> In recent years, moreover, the concept of incrementalism has been promoted as a way of ensuring judicial law-making throughout private law remains within the limits of the courts' constitutional role.<sup>14</sup>

The "narrow" and "wide" forms of incrementalism identified by Dolding and Mullender provide useful points on a scale of activism (though neither represent the absolute extremes). "Narrow incrementalism" is a form of adjudication that is "doctrine-bound" and tends in the direction of formalism. A judge operating in the narrow incremental mode would, for example, impose liability in novel circumstances only if a "tight analogy" with existing precedent could be drawn. One advantage of narrow incrementalism, for its proponents, is that it ensures relatively strong continuity in a given field.<sup>15</sup> As such, it promotes a degree of legal certainty – something that is frequently cited as a core element of the rule of law, particularly by those who espouse a formalistic conception of the rule of law, such as Joseph Raz.<sup>16</sup> In other words, narrow incrementalism is perceived as a recipe for legitimacy in the judicial elaboration of the common law, on the basis that it promotes a core rule of law value.

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<sup>11</sup> *Kleinwort Benson v Lincoln CC* [1998] UKHL 38, [1999] 2 AC 349, 378.

<sup>12</sup> (1985) 157 CLR 424, 481.

<sup>13</sup> [1990] 2 AC 605.

<sup>14</sup> Gavin Phillipson and Alexander Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) 74(6) MLR 878.

<sup>15</sup> Keith Stanton, for instance, prefers models of incrementalism that sit toward the narrow end of the scale. See Keith M Stanton, 'Incremental Approaches to the Duty of Care' in Nicholas Mullany (ed), *Torts in the Nineties* (North Ryde 1997).

<sup>16</sup> Joseph Raz, *The Authority of Law* (OUP 1979); *Practical Reason and Norms* (Princeton University Press 1990).

By contrast, “wide incrementalism” does not regard the absence of a tightly similar precedent as necessarily fatal to a novel claim. Instead, it treats precedent as a source of guidance as to the principles that underpin a particular field of law (such as tort) and which might indicate the direction in which the law ought to develop. Wide incrementalism is thus significantly more receptive to “strongly novel claims” than the narrow variant.<sup>17</sup>

Judicial activism is thus not an all-or-nothing concept but a matter of degree. Some decisions tend more to the wide end of the spectrum than others. But providing a decision remains plausibly connected to precedent – whether by tight factual analogy or by embracing the same underlying principle – the decision remains “incremental”. So long as this is the case then the decision remains within the constitutional limits of the judicial role.<sup>18</sup> It is Tugendhat’s argument that many English judicial decisions – particularly within the controversial field of privacy – sit defensibly within the constitutional limits on the judiciary’s law-making power. He is quite right. But for the reasons we shall consider in the next section, the case of *Campbell* is actually a case that sits towards the narrow end of the incrementalism spectrum we have identified. As such, identifying it as “activist” is potentially problematic, since it may encourage the mistaken belief that the case implemented a more radical change in the law than it really did.

## 2. When is a Tort not a Tort?

Despite considerable time having been spent analysing the intricacies of the *Campbell* ruling, academics have not really engaged with one of the biggest doctrinal questions that the case raises; whether the House of Lords actually developed a novel cause of action. Neither had judges engaged with this question until a recent case – *Vidal-Hall v Google Inc* – required them to do so.<sup>19</sup> For despite the appearance of novel nomenclature – “misuse of private information” – in that case, there is no unequivocal evidence in the judgments of an intention to recognise a new tort. The prevailing wisdom amongst most privacy academics at present is

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<sup>17</sup> Mullender identifies, for example, the negligence case of *Watson v British Board of Boxing Control* [2000] EWCA Civ 2116, [2001] QB 1134 (CA) as an instance of wide incrementalism. In that case, a duty of care was recognised for the first time in circumstances where the defendants had failed to provide resuscitation equipment ringside, the absence of which contributed to the brain damage suffered by the claimant after he was injured during a fight. See Richard Mullender, ‘English Negligence Law as a Human Practice’ (2009) 21(3) Law & Literature 321, 327-328.

<sup>18</sup> See Phillipson and Williams, n 14, 887. Phillipson and Williams do not define “incrementalism” in their article, although they do offer the qualification that it cannot embrace “large-scale” law reform (at 888), on the basis of a democratic deficit. However, they also state that it is “essential” that judicial development of the law avoids “unpredictability and uncertainty” so far as possible, on rule of law grounds. As we will see, “narrow” incrementalism can lead to unpredictability and uncertainty, and it may well be that “wide” incrementalism can, on occasion, be the best method by which to avoid them. Assuming that Phillipson and Williams would accept that there is scope in the common law for judges to stake out a range of defensible positions on any given developmental question, then it would follow that the authors would, in all likelihood, be open to the idea that legitimate incrementalism is a matter of degree.

<sup>19</sup> *Vidal-Hall v Google Inc* [2014] EWHC 13 (QB), [2014] 1 WLR 4155 (High Court), and [2015] EWCA Civ 311, [2016] QB 1003 (Court of Appeal). See pp [NUMBER TO BE INSERTED – PAGES ON THE *Vidal-Hall* CASE], below.

that, *somehow*, MPI was developed from the equitable doctrine of confidence in that case.<sup>20</sup> But a satisfactory answer to the question of just *how* this was achieved remains elusive. It is also unclear whether MPI is equitable, tortious or something else entirely. In other words, the very nature of the cause of action *Campbell* is credited with (and criticised by some for) bringing into being is unclear. This is significant because even those who criticise *Campbell* for being overly activist would have cause to be troubled by the uncertainty that this lack of clarity has engendered. This uncertainty caused some procedural problems that the courts had to grapple with in *Vidal-Hall* (to which we shall return, below). It also raises questions (which it is beyond the scope of this essay to attempt to answer) about the basis for damages awards. For instance, it is not clear whether MPI damages ought to be assessed as tortious damages or as equitable damages in lieu of injunctive relief. Traditionally, tortious damages have been based on the loss incurred by the claimant, whilst equity reacts to unjustified gain by the defendant, and so the bases for these different sorts of awards are distinct. Whilst it could be argued that the common law and equity are now effectively fused so as to make these sorts of traditional distinctions irrelevant, full fusion has never been unequivocally confirmed by the courts. Moreover, those who would oppose the judicial recognition of fusion would tend to be the same sort of formalism-inclined critics who oppose judicial activism. As we have noted, proponents of a tightly limited creative role for the courts tend to prioritise legal certainty. A failure to achieve it ought to cause such critics considerable consternation.

It is not the aim of this essay to provide the elusive answer to the question of just *how* MPI emerged in a legal system that previously recognised only equitable confidentiality as a mainstream privacy doctrine. Instead, the essay aims to achieve three more modest things in the analysis that follows. First, it will demonstrate that *Campbell* can properly be considered a decision involving only limited – narrowly incremental – activism. Second, it will evidence and highlight the fact that there is an enduring lack of clarity as to the nature of MPI. Third, the *consequences* of this lack of clarity for the legal certainty that anti-activist critics tend to prioritise will be explored. In order to achieve these aims, two elements of the *Campbell* decision must be examined. We will first consider the doctrinal changes wrought as a matter of formal law. We then need also to consider subsequent judicial statements about the implications of those doctrinal developments.

## 2.1 The Judgments in *Campbell*

*Campbell* was pleaded in breach of confidence.<sup>21</sup> Yet because both novel nomenclature and at least one novel formulation of the test for liability emerge from the House of Lords' opinions

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<sup>20</sup> See, for example, Rebecca Moosavian, 'Charting the journey from confidence to the new methodology' (2012) 34(5) EIPR 324; Patrick O'Callaghan, *Refining Privacy in Tort Law* (Springer 2013) 97ff. Raymond Wacks describes breach of confidence as having undergone a "metamorphosis" into MPI in *Privacy and Media Freedom* (OUP 2013) at 69 and 103ff.

<sup>21</sup> The case was brought by the supermodel, Naomi Campbell, who sought damages in respect of the publication of photographs taken of her in public leaving a meeting of Narcotics Anonymous, along with details of her treatment for addiction to controlled drugs.

in the case,<sup>22</sup> it is unclear whether the claim was disposed of using the same cause of action as that within which it was pleaded. As a matter of formal law, the doctrine emerging from *Campbell* is distinct from, though still reminiscent of, the law of confidence. Gavin Phillipson summarises the *Campbell* “transformation” of breach of confidence thus:

[T]he second limb of the breach of confidence action – requiring that there must, in addition to being unauthorised use of confidential information, be ‘circumstances importing an obligation of confidence’ – has been removed. Meanwhile, the first limb – that the information must have ‘the quality of confidence’ – has been transformed: the notion that the information must be ‘confidential’ has morphed into a requirement that it be ‘private’ or ‘personal’ information.<sup>23</sup>

This “transformation”, however, raises the question of just what has happened to the equitable doctrine of confidence. It is far from obvious whether that cause of action endures but with a new formulation, or whether it has been replaced by a new, tortious formulation, or whether a novel cause of action has been recognised that, whilst similar to the doctrine of confidence, exists separately from it. The first option would rule out MPI being regarded as a separate doctrine, whilst the second would rule out the possibility that equitable confidence could continue to exist in its own right along its original lines. The third option would logically permit both MPI and equitable confidence to have their own, separate existences, and so it today seems the most ostensibly plausible.<sup>24</sup> But this third option would raise further questions about the extent to which MPI is conceptually distinct from equitable confidence; whether it is a branch of the equitable tree (which, presumably, would render it equitable), whether it is a *sui generis* tort, or whether it is something entirely new (perhaps some sort of hybrid).

The opinions of their Lordships in *Campbell* are ambiguous on these points. The majority – Lord Hope (to whose judgment we will shortly return), Lord Carswell and Baroness Hale – refer to the doctrine in terms of equitable confidence. Although Baroness Hale recognises novel methodology, including the adoption of a “reasonable expectation of privacy” test, she is also adamant that the law can develop only in a very limited fashion. She is clear that “the courts will not invent a new cause of action to cover types of activity which were not previously covered” and that “our law cannot, even if it wanted to, develop a general tort of invasion of privacy.”<sup>25</sup> Lord Carswell, giving the shortest judgment in the case, believes the

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<sup>22</sup> As Nicole Moreham points out, their Lordships also equivocate on the test for liability to be adopted, whichever cause of action might be in play; the judges in the case end up proposing three distinct tests for determining whether the published information is “private”. See NA Moreham, ‘Privacy in the Common Law: A Doctrinal and Theoretical Analysis’ (2005) 121 LQR 628.

<sup>23</sup> Gavin Phillipson, ‘The Common Law, Privacy and the Convention’ in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP 2007) 217, citing the traditional formulation from *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415, 419.

<sup>24</sup> Particularly in light of the High Court and Court of Appeal’s determinations in *Vidal-Hall* that both MPI and breach of confidence exist separately. See pp [NUMBER TO BE INSERTED – PAGES ON THE *Vidal-Hall* CASE], below.

<sup>25</sup> *Campbell*, n 2, [133].

court's decision comes down to "the application of reasonably well settled principles", rather than the development of anything particularly novel or radical.<sup>26</sup>

Lord Nicholls refers to the privacy action using novel nomenclature ("misuse of private information").<sup>27</sup> However, he also talks of the existence of only *one* such cause of action.<sup>28</sup> Indeed, he is consistent in referring only to one cause of action, which he initially describes in equitable terms<sup>29</sup> before moving to "better encapsulate[]" it by calling it a "tort of misuse of private information".<sup>30</sup> He regards the old breach of confidence "nomenclature" as "misleading".<sup>31</sup> Lord Nicholls believes that the principle underpinning MPI, "however [the doctrine is] labelled", is "respect for one [informational] aspect of an individual's privacy".<sup>32</sup> This, which is distinct from the equitable principles underpinning traditional confidence doctrine, reveals the doctrine to have "changed its nature" following the earlier *Spycatcher* ruling.<sup>33</sup> The doctrine, he says, has "firmly shaken off the ... need for an initial confidential relationship".<sup>34</sup> In protecting privacy, the key question has become "whether in respect of the disclosed facts the person in question had a *reasonable expectation of privacy*".<sup>35</sup> Thus Lord Nicholls paints a picture, in *Campbell*, whereby the equitable doctrine of confidence morphs into "misuse of private information". He does not, however, explain *how* this has been achieved.

In his judgment in *Campbell*, Lord Hoffmann is not clear about how he sees the law as having developed, but there are indications that he perceives things in a different fashion from Lord Nicholls. He states that, following *Spycatcher* and the passing of the HRA, there "has been a shift in the centre of gravity of the action for breach of confidence *when it is used as a remedy for the unjustified publication of personal information*".<sup>36</sup> Thus,

[i]nstead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity – the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.<sup>37</sup>

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<sup>26</sup> Ibid, [162].

<sup>27</sup> Ibid, [14].

<sup>28</sup> Ibid. "The essence of *the* tort is better encapsulated now as misuse of private information." (Emphasis added.)

<sup>29</sup> Ibid, [13].

<sup>30</sup> Ibid, [14].

<sup>31</sup> Ibid, [13].

<sup>32</sup> Ibid, [15].

<sup>33</sup> *Attorney General v Observer Ltd (No.2)* ("*Spycatcher*") [1988] UKHL 6, [1990] 1 AC 109 (*Spycatcher*). In *Spycatcher*, Lord Goff held that "[a] duty of confidence could arise where 'an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in a public space, and is then picked up by a passer-by'", (at 281).

<sup>34</sup> *Campbell*, n 2, [14].

<sup>35</sup> Ibid, [21] (emphasis added).

<sup>36</sup> Ibid, [51] (emphasis added).

<sup>37</sup> Ibid.

In this passage (and throughout the parts of his judgment where he discusses the development of the law of privacy), Lord Hoffmann hints at the emergence of a second branch of confidence law when he uses the qualifying statement “when it is used as a remedy for the unjustified publication of personal information”, since it suggests that, when the doctrine of confidence is used for other reasons – such as the protection of trade secrets – there has *not* been a shift in its centre of gravity. This whole passage could thus be read as supporting the notion that there is just one operative cause of action (if one reads down the qualifying statement), or as tentatively suggesting that a new cause of action has emerged from (and now sits alongside) the earlier one (if one reads it up). As such, Lord Hoffmann equivocates. And, when taken in context with his judgment in the later case of *OBG*,<sup>38</sup> this equivocation indicates the presence of a disconcerting incoherence in his Lordship’s vision of the manner in which the law in this field has developed. It is also unclear (if he *is* in fact expressing some support for the notion of a new, parallel cause of action having come into being) whether he perceives the tangential line of authority dealing with private information as being tortious or equitable. For on the one hand, his discussion is rooted in confidence law and he continues to talk of “the action” in the singular sense.<sup>39</sup> But on the other hand, he gives us the tense-equivocal statement that “[b]reach of confidence *was* an equitable remedy and equity traditionally *fastens* on the conscience of one party to enforce equitable duties which arise out of his relationship with the other.”<sup>40</sup> This sentence relates equity in both the past and present tenses to either the historical shape of the doctrine or to its 2004 shape and thereby somewhat obscures his meaning.

Lord Hope’s judgment gives us a third way. He rejects Lord Hoffmann’s view that the centre of gravity within breach of confidence has shifted: “It seems to me that the balancing exercise to which that guidance is directed is essentially the same exercise, although it is plainly now more carefully focussed and more penetrating.”<sup>41</sup> He initially sets out his analysis in the manner of the traditional elements of equitable confidence, asking whether the information in question is confidential. Like the other judges, however, he then goes on to undertake a balancing exercise between “free speech” and “privacy”.<sup>42</sup> Lord Hope thus essentially applies the *Spycatcher* model of confidence to the facts of *Campbell*, with a nod to the need to balance the competing Art.8 and 10 rights when assessing the legitimacy of publication.<sup>43</sup> Whilst he uses the term “private” to describe the information later in the judgment,<sup>44</sup> Lord Hope does so in the clear belief that it is this single action for breach of confidence that is operative, having been expanded to provide a remedy for breaches of informational privacy. His approach, then, is to reject the notion that there has been any significant change to the

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<sup>38</sup> In *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1, Lord Hoffmann summed up the effect of the *Campbell* ruling in terms that seem to invoke Lord Nicholls’ approach rather than his own earlier view: “In recent years, English law has adapted the action for breach of confidence to provide a remedy for the unauthorised disclosure of personal information...” (at [118]).

<sup>39</sup> *Campbell*, n 2, [44], [46].

<sup>40</sup> *Ibid*, [44].

<sup>41</sup> *Ibid*, [86].

<sup>42</sup> *Ibid*, [103].

<sup>43</sup> *Ibid*, [82-3], [86]. *Spycatcher*, n 33.

<sup>44</sup> *Campbell*, n 2, esp. [92].

doctrine of confidence post-*Spycatcher* (and thus he implicitly rejects the idea that the operative cause of action in *Campbell* is tortious rather than equitable).

The analysis in this section gives us a basis upon which to conclude that *Campbell* is not a clear instance of significant judicial activism. The judgments within *Campbell* resemble “narrow incrementalism” more than they do its “wide” variant. First, there is no unequivocal statement of an intention to recognise a novel head of liability. Second, there is no unequivocal statement that the cause of action relied upon has changed its basis from being equitable to being tortious. Third, there is a clear rejection (in Baroness Hale’s judgment) of any suggestion that the court has recognised – or indeed that it could recognise – a general privacy tort, echoing the sentiments that Lord Hoffmann expressed just a year earlier in the case of *Wainwright*.<sup>45</sup> Instead, she insists that the courts will respond only to “types of activities” already covered by an existing head of liability; the publication of private or confidential information was, of course, already covered (to an extent) by the doctrine of confidence. Fourth, although Lord Nicholls’ nomenclature, “misuse of private information”, has subsequently become the terminology associated with the *Campbell* doctrine, it was adopted only by him and, even within his own judgment, it does not indicate a clear intention to recognise a novel head of liability; he equivocates on the extent of MPI’s novelty, as we have seen. Fifth, it is not wholly clear what exactly the test for liability is under *Campbell*. As Moreham pointed out in 2005, as many as three distinct tests for liability appear to be deployed in the case. Subsequent cases have refined the methodology to the point that, today, there is no major concern about this.<sup>46</sup> But there is certainly no great clarity provided by *Campbell* itself. This seems to be, in large part, due to the lack of consensus on the nature of the cause of action in play.

At this stage, one further point about *Campbell* can be made. This is that the judgments within it indicate a broad concern that the House ought not to appear to be acting in a particularly activist fashion. In part, this can be comprehended by recalling that, in the early 2000s, there was considerable academic debate as to the possible “horizontal effect” of the Human Rights Act 1998.<sup>47</sup> *Campbell* was an opportunity for the House to clarify not only the

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<sup>45</sup> *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406.

<sup>46</sup> The most significant refinements of the doctrine occur in the cases of *Re S (A Child)* [2004] UKHL 47, [2005] 1 AC 593 (in which the “ultimate balancing test” is elucidated by Lord Steyn at [17]); and *Murray v Express Newspapers Ltd* [2008] EWCA Civ 446, [2009] Ch 481 (in which the Court elaborates on the evidential matters that are relevant to a determination of whether a claimant has a reasonable expectation of privacy, at [36]).

<sup>47</sup> For key contributions to this debate, see Murray Hunt, ‘The “horizontal effect” of the Human Rights Act’ [1998] PL 423; Richard Buxton, ‘The Human Rights Act and private law’ (2000) 116 LQR 48; William Wade, ‘Horizons of horizontality’ (2000) 116 LQR 217; Anthony Lester and David Pannick, ‘The Impact of the Human Rights Act on Private Law: The Knight’s Move’ (2000) 116 LQR 380; Nicholas Bamforth, ‘The true “horizontal effect” of the Human Rights Act 1998’ (2001) 117 LQR 34; Deryck Beyleveld and Shaun Pattinson, ‘Horizontal applicability and horizontal effect’ (2002) 118 LQR 623; Jonathan Morgan, ‘Privacy, Confidence and Horizontal Effect: “Hello” Trouble’ [2003] CLJ 444; Max Du Plessis and Jolyon Ford, ‘Developing the common law progressively - horizontality, the Human Rights Act and the South African experience’ [2004] EHRLR 286. Later contributions of note include Nicole Moreham, ‘Privacy and horizontality: relegating the common law’ (2007) 123 LQR 373; Gavin Phillipson, ‘Clarity postponed: horizontal effect after Campbell’ in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP 2007).

extent of the privacy protections available under the English common law, but also to give an indication of the manner in which it would give effect horizontally to the provisions of the HRA. Seen in this light, statements such as Baroness Hale's that the courts "will not invent" new causes of action might be seen as laying down a marker for the extent of judicial creativity that could be expected in response to horizontal human rights claims. The judgments thus paint a picture – whether accurate or not – of a court committed to limiting creativity in the common law to the development of liability rules under *existing* heads of liability. This approach to common law development is a classic hallmark of the narrow incremental mode.<sup>48</sup> So there is both evidence of narrowly incremental thinking taking place in *Campbell*, and a contextually appropriate explanation for it.

Put simply, notwithstanding its status as a seminal case for privacy rights, formally speaking *Campbell* is something of a fudge. The House of Lords appears at pains not to appear activist. It emphasises (indeed, it arguably over-emphasises) the continuity between the methodology in earlier breach of confidence cases (including those after the coming into force of the Human Rights Act 1998) and downplays the notion that its ruling represents a significant, novel development. The result of this fudge is, troublingly, that subsequent courts had little evidence to indicate the nature of the cause of action that has come to be known as "misuse of private information". Nobody had much of a clue whether we were now grappling with an equitable doctrine, a tort, or something else entirely. As we will shortly see, this situation could not endure indefinitely and eventually demanded a resolution.

Before we move on, however, it is appropriate to highlight a possible objection to my argument. Chris Hunt has argued that *Campbell* represents a radical change in the law because it alters fundamentally the elements of the doctrine of confidence in a manner that does "impermissible violence" to that equitable action.<sup>49</sup> He argues that the alteration to the law of confidence wrought by Lord Goff's judgment in *Spycatcher* was itself an illegitimate and unprincipled change that was, technically speaking, merely *obiter*, and which Lord Goff himself may not have intended to be a definitive reworking of its elements. As such, Hunt argues that there was no need for the House in *Campbell* to adopt it as its starting point when it considered the elements of equitable confidence. Having established this to his satisfaction, Hunt goes on to argue that dispensing with the second limb of the *Coco* formulation of equitable confidence is a "radical" change to that doctrine, since it is unsupported by either precedent or principle.<sup>50</sup> An objection to my argument might thus be raised along the lines of Hunt's thesis – that *Campbell* ought properly to be considered a radical development of the

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<sup>48</sup> It also maps perfectly onto Keith Stanton's "pocket-based" model of incrementalism, which would sit squarely towards the narrow end of the incrementalism scale I have outlined. See Stanton, n 15, 42-44 and 47-50.

<sup>49</sup> Chris DL Hunt, 'Rethinking surreptitious takings in the law of confidence' [2011] IPQ 66, 73. Hunt borrows the phrase "impermissible violence" from Tom Bingham, 'Should There Be a Law to Protect Rights of Personal Privacy?' (1996) EHRLR 450, 457.

<sup>50</sup> *Coco*, n 23.

law because of the “harm” (as Alexandra Sims puts it) it has done to the equitable doctrine of confidence.<sup>51</sup>

I would make two points in response to such an objection. First, Hunt’s diagnosis of *Campbell*’s radicalness is based firmly on his view that Lord Goff’s reformulation of equitable confidence in *Spycatcher* is simply not correct in law and ought not to have been followed by any subsequent court. As a matter of strict, formal law, this is a technically plausible position to take. But it does not hold much water as a statement of the position that the law had come to occupy – perhaps incorrectly, in strictly formal terms – by the time *Campbell* was decided. The *Spycatcher* formulation had unarguably come to be regarded judicially as an accurate statement of equitable confidence’s elements. Second, there is a strong undercurrent of formalism evident in Hunt’s argument. He is concerned that equitable confidence ought to retain its traditional shape. Moreover, if it is to develop, it ought not to do so in a manner that conflicts with what he identifies as its informing principles: “the twin policies of relationship preservation and of remedying unconscionable conduct”.<sup>52</sup> In making these concerns the centrepiece of his argument, Hunt prioritises maintaining the traditional shape of an equitable doctrine over maintaining certainty in tort. His ideal solution to the problem he identifies is – perhaps surprisingly – the same as that which I criticise the House in *Campbell* for not pursuing: the recognition of a clearly distinct, novel privacy tort. There is, then, a problematic tension in Hunt’s argument (and in the arguments of those who take a similar line<sup>53</sup>) between his strong desire to maintain certainty in equity and his enthusiasm for the adoption of a wholly novel head of liability in tort, unrelated to equitable confidence. It is clearly difficult to consistently square a strong commitment to formal rule of law concerns such as the maintenance of legal certainty with the realisation that privacy interests are important and ought to be taken seriously by the common law.

## 2.2 Post-*Campbell* cases

I have documented elsewhere the impact that a decision not to recognise either a broad privacy tort or a discrete tort of “intrusion upon seclusion” has subsequently had on one aspect of the law.<sup>54</sup> This is the rather unforeseeable – and formally difficult to explain – development of the “third party interests” doctrine, according to which the interests of individuals who are not party to the proceedings are nevertheless accorded significant weight

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<sup>51</sup> Alexandra Sims, “‘A shift in the centre of gravity’: the dangers of protecting privacy through breach of confidence” [2005] IPQ 27, 28.

<sup>52</sup> Hunt, n 49, 72.

<sup>53</sup> Examples include Sims, n 51; Arye Schreiber, ‘Confidence crisis, privacy phobia: why invasion of privacy should be independently recognised in English law’ [2006] IPQ 160; Rachael Mulheron, ‘A Potential Framework For Privacy? A Reply To Hello!’ (2006) 69(5) MLR 679.

<sup>54</sup> Thomas DC Bennett, ‘Privacy, third parties and judicial method: *Wainwright*’s legacy of uncertainty’ (2015) 7(2) Journal of Media Law 251. In that article, I traced the root of the problem back to the case of *Wainwright* (n 45). *Wainwright* was heard by the House of Lords in the year preceding its hearing of *Campbell*. In that case, the House rejected the claimants’ argument that it ought to recognise a general privacy tort. The argument made in this article could equally be traced back as far as *Wainwright*, and the criticisms I level here at the *Campbell* ruling could just as appropriately be levelled at *Wainwright*. However, since *Campbell* gave the House the opportunity to revisit its broad rejection of the idea of a tort of privacy, it remains just as appropriate to level that criticism at the *Campbell* decision.

by the court when determining an MPI claim (which would normally be a purely bilateral affair between claimant and defendant). In this section, I explore another formal difficulty resulting from the decision in *Campbell*. This is the difficulty in determining the very nature of MPI – whether it is equitable, tortious, or something else entirely.

Some post-*Campbell* privacy cases seem to confirm the existence of *both* traditional equitable confidentiality *and* MPI as separate causes of action with differing focuses,<sup>55</sup> whilst others prefer the notion of a single, modified cause of action.<sup>56</sup> And yet other cases equivocate on whether these comprise one cause of action with interchangeable names or two separate doctrines.<sup>57</sup> A further possibility, barely touched upon in the case law, is that MPI is *neither* tortious *nor* equitable, but is instead something entirely new. Given the strong influence that the European Convention on Human Rights had on its development and content, the notion that it is a sort-of “hybrid”<sup>58</sup> doctrine encompassing equitable, tortious and higher-order public law principles (i.e. Convention rights) is one that might at the very least have been worth exploring. It is hinted at in the Court of Appeal’s judgment in *McKennitt*, wherein Buxton LJ comments that Arts 8 and 10 of the ECHR are now “the very content of the domestic tort that the English court has to enforce” but the courts have not pursued that line of thinking with any vigour since he made those remarks in 2006.<sup>59</sup>

To make matters worse, the confusion continues even *within* individual judgments in post-*Campbell* privacy cases. The 2014 case of *Weller v Associated Newspapers Ltd* highlights this problem.<sup>60</sup> In *Weller*, Dingemans J identifies the claimants’ claim as “an action for breach of confidence”, remarking that this cause of action has been “renamed ... misuse of

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<sup>55</sup> For example, *Tchenguz v Imerman* [2010] EWCA Civ 908, [2011] Fam 116; *Vidal-Hall v Google Inc*, n 19.

<sup>56</sup> In *Murray v Express Newspapers Ltd* [2007] EWHC 1908 (Ch), [2007] EMLR 22, Patten J clearly believes there to be only one cause of action – a modified doctrine of confidence (see [18]-[21]). The Court of Appeal, hearing an interlocutory appeal in *Murray* [2008] EWCA Civ 446, [2009] Ch 481, expressly adopts Lord Nicholls’ view from *Campbell* (at [24]).

<sup>57</sup> For example, see the summary of the position in English law attempted by the Court of Appeal in *McKennitt v Ash* [2006] EWCA Civ 1714, [2007] 3 WLR 194 at [8], which suggests both that the “tort of breach of confidence” (by which, presumably, the court means the equitable doctrine) has been “rechristened” as a tort of MPI, and also that the instant claim invokes “old-fashioned breach of confidence” (which, presumably, endures nonetheless). In *Green Corns Ltd v Claverley Group Ltd* [2005] EWHC 958 (QB), [2005] EMLR 31, Tugendhat J observed that the claim had been brought in both breach of confidence and misuse of private information (as alternatives), but declined to offer an opinion on which cause of action was applicable or, indeed, whether they were the same or distinct from one another. He disposed of the case according to “[t]he law of confidence” which, “so far as material, can be taken from the speeches of the House of Lords in *Campbell*” (at [48]).

In *OBG v Allan*, n 38, the House of Lords equivocates once again on the issue. Lord Hoffmann suggests (at [118]) that there is just one cause of action that has been “adapted”. Yet Lord Nicholls now seems more inclined towards separating the two (at [255]): “As the law has developed breach of confidence, or misuse of confidential information, now covers *two distinct causes of action*, protecting two different interests: privacy, and secret (‘confidential’) information. It is important to keep these two distinct.” (Emphasis added.) It is noteworthy that neither judge precisely repeats their views from *Campbell*, and, indeed, may each be thought to have changed their positions.

<sup>58</sup> Alastair Mullis and Ken Oliphant, *Torts* (4<sup>th</sup> edn, Palgrave MacMillan 2011) 3.

<sup>59</sup> *McKennitt*, n 57, [11].

<sup>60</sup> [2014] EWHC 1163 (QB), [2014] EMLR 24. In *Weller*, Dingemans J gave judgment on a claim for misuse of private information in respect of photographs taken by a paparazzo in California of (well-known musician) Paul Weller’s children.

private information”.<sup>61</sup> Elsewhere in the judgment, however, he paints a subtly different picture, for he tells us that “claims for misuse of private information were *absorbed into* the established claim for breach of confidence” some years ago.<sup>62</sup> And in yet another place he identifies MPI as a “*new cause of action*”.<sup>63</sup> Thus, in the space of just five paragraphs, Dingemans J stakes out three quite different positions on the nature of the claim at hand. It is highly unlikely that this was deliberate – indeed the learned judge may not even have considered the distinctions drawn within his own use of terminology.<sup>64</sup> But this alone highlights the depth of the difficulty which the ambiguity surrounding this cause of action’s doctrinal roots has caused.

The 2004 judgment of the New Zealand Court of Appeal in *Hosking v Runting* is also revealing, since it provides an external perspective.<sup>65</sup> In *Hosking*, the Court was presented with an opportunity to clarify the manner in which New Zealand law dealt with informational privacy violations. Given the option to expand the existing doctrine of confidence, the court preferred to recognise openly a novel head of tortious liability protecting private information. In so doing, the court established a “private facts” tort. The judgment sheds light on the confusion engendered by the ways in which the English law of confidence was put to use, between the House of Lords’ cases of *Spycatcher* in 1988 and *Campbell* (which was handed down shortly after *Hosking*) in 2004, in order to provide a remedy in cases dealing with the public disclosure of private matters.<sup>66</sup> The New Zealand Court of Appeal, endeavouring to make sense of the English authorities, proclaimed that, by 2004 (just *before* the House of Lords’ decision in *Campbell* was handed down) English law recognised “two quite distinct versions of the tort of breach of confidence.”<sup>67</sup>

One is the long-standing cause of action applicable alike to companies and private individuals under which remedies are available in respect of use or disclosure where the information has been communicated in confidence. ... The second gives a right of action in respect of the publication of personal information of which the subject has a reasonable expectation of privacy irrespective of any burden of confidence... The first formulation reflects the historical approach to the law of torts with the focus on wrongful conduct

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<sup>61</sup> *Weller*, n 6060, [24] (emphasis added).

<sup>62</sup> *Ibid*, [20] (emphasis added).

<sup>63</sup> *Ibid*, [22] (emphasis added).

<sup>64</sup> The judge did note that the question of whether MPI was tortious or equitable was, at the time, being considered by the Court of Appeal, and that it was not his intention to settle that question in this case: “It might be noted that the issue of whether the cause of action for misuse of private information is now a separate tort, as opposed to an equitable cause of action, is an issue to be addressed by the Court of Appeal on an appeal from the judgment of Tugendhat J. in *Vidal-Hall v Google Inc* ... I do not need to say anything further on that issue, and I do not do so” (*ibid*, [24]).

<sup>65</sup> [2004] NZCA 34, [2005] 1 NZLR 1.

<sup>66</sup> Cases pleaded and disposed of under the equitable doctrine of breach of confidence in circumstances where it might be said that the nub of the plaintiffs’ complaints was to do with violations of their privacy include: *HRH Princess of Wales v Mirror Group Newspapers Ltd* (1995, unreported), *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804.

<sup>67</sup> *Hosking*, n 65, [42].

whereas the second reflects more the impact of a developing rights-based approach.<sup>68</sup>

This statement is starkly indicative of the problem this doctrinal uncertainty has caused. For it contains mutually incompatible statements on the nature of the English causes of action. Thus the New Zealand Court of Appeal is led to identify (wrongly, at least at a formal level) the long-standing equitable doctrine of confidence as a tort (an error the English Court of Appeal also made in *McKennitt*).<sup>69</sup> Having done so, it further recognises a second tort dealing with *private*, rather than *confidential*, information, which had apparently appeared at some point after *Spycatcher* but clearly *before* the House of Lords' decision in *Campbell* (which had not been handed down when *Hosking* was decided). The fault here lies not with the judges in *Hosking* but rather with the confused state of English law at the time and the lack of a clear, universal understanding of its development.

Ten years after *Campbell*, the English courts were required, for the first time, to decide whether MPI is a tortious or equitable cause of action in the case of *Vidal-Hall v Google Inc.*<sup>70</sup> The claim was brought in respect of information obtained and (according to the claimants) misused by the defendant through the installation of “cookies” on their computers via their web browsers. At the case's first hearing before Tugendhat J, in the High Court, this was decided as a preliminary matter; it was necessary to determine whether the claims – pleaded in *both* MPI and breach of confidence – were amenable to service upon Google Inc outside the jurisdiction of England and Wales. (Under the Civil Procedure Rules as they stood at the time, tort claims could be served extra-jurisdictionally, but non-tort claims could not.<sup>71</sup>) Tugendhat J concluded that MPI exists as a head of tortious liability, distinct from equitable confidentiality. The MPI claim could therefore be served, but a separate claim in breach of confidence – being equitable rather than tortious – could not.<sup>72</sup>

Unfortunately, and most likely due to the necessarily brief nature of legal proceedings regarding preliminary issues, it must be said (with great respect) that the learned judge's reasoning lacks the detail and depth needed to provide wholesome support for his conclusion. From the judgment, it is plain that Tugendhat J is convinced that MPI *is* tortious, but that he finds it difficult to pin down a great deal of supporting evidence.

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<sup>68</sup> Ibid, [42].

<sup>69</sup> See n 57.

<sup>70</sup> *Vidal-Hall*, [2014] EWHC 13 (QB), [2014] 1 WLR 4155.

<sup>71</sup> The law pertaining to out of jurisdiction service was, at the time, governed by rule 6.37 of the Civil Procedure Rules 1998. The practice direction to that rule, 6B, paragraph 3.1(9), provides that service outside the jurisdiction is permitted where: “A claim is made in tort where (a) damage was sustained within the jurisdiction; or (b) the damage sustained resulted from an act committed within the jurisdiction.” This provision has since been revised by the 81<sup>st</sup> update to the Civil Procedure Rules to enable out of jurisdiction service for claims in both breach of confidence and misuse of private information. The revision came into effect on 1 October 2015.

<sup>72</sup> Tugendhat J held that he was bound by the Court of Appeal's decision in *Kitetechnology BV v Unicor GmbH Plastmaschinen* [1995] FSR 765 to hold that the action pleaded in breach of confidence was equitable (n 70 at [71]).

The case of *Douglas v Hello! Ltd (No.3)* was relied on heavily by counsel for Google as they endeavoured to show that MPI was not tortious.<sup>73</sup> In *Douglas (No.3)*, the claimants brought a claim in breach of confidence in order to protect their privacy in respect of surreptitiously-taken photographs of their wedding ceremony in New York. This was the judgment in which the Court of Appeal infamously bemoaned that it could not

... pretend [to] 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>74</sup>

In *Douglas (No.3)* (which Tugendhat J cites) the Court of Appeal held that “the effect of shoe-horning this type of claim into the cause of action [for] breach of confidence means that it does not fall to be treated as a tort under English law”.<sup>75</sup> The court in *Douglas (No.3)* was, at this point, considering whether s.9 of the Private International Law (Miscellaneous Provisions) Act 1995 applied, a question which it answered in the negative. In *Vidal-Hall*, counsel for Google submitted that, in this part of *Douglas (No.3)*, the court was referring to what Lord Nicholls had (in *Campbell*) called the tort of misuse of private information. Tugendhat J rejected this, holding that the Court of Appeal’s remarks in *Douglas (No.3)* referred to the equitable doctrine of confidence only. In support of this, Tugendhat J noted that this was the only possible doctrine to which the judge in *Douglas (No.3)*, Lindsay J, could have been referring, given that the first instance decision pre-dated *Campbell* by nearly a year.<sup>76</sup> He also states that Lord Nicholls’ reference in *OBG*, four years after *Campbell*, to “two distinct causes of action” supports his conclusion that MPI and breach of confidence are separate from one another.<sup>77</sup>

Tugendhat J concludes this portion of his judgment by looking (much more briskly) at cases in which his brethren on the bench have identified MPI in tortious terms. He notes that the phrase “misuse of private information” has become a legal term of art which has frequently, if not consistently, been identified by courts as a tort.<sup>78</sup> These uses, he holds, “cannot be dismissed as all errors in the use of the words [sic] ‘tort’.”<sup>79</sup> The Court of Appeal, when it considered *Vidal-Hall*, also pursued this line of reasoning, remarking that these judicial uses of the term “tort” in relation to MPI “connote an acknowledgement ... of the true nature of the cause of action.”<sup>80</sup>

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<sup>73</sup> [2003] EWHC 55 (Ch), [2003] EMLR 29.

<sup>74</sup> *Ibid*, [53].

<sup>75</sup> *Ibid*, [96].

<sup>76</sup> [2003] EWHC 786 (Ch), [2003] 3 All ER 996. See in particular [181]-[186] on breach of confidence. It is worth noting that, having himself acted as counsel for the claimants in a number of the *Douglas* cases, including nos. 3 and 6, Tugendhat J was well-placed to recall the cause of action relied upon.

<sup>77</sup> See n 57.

<sup>78</sup> Tugendhat J cites (in *Vidal-Hall*, n 70, at [68]): *Secretary of State for the Home Office v British Union for the Abolition of Vivisection* [2008] EWHC 892 (QB), per Eady J at para [28]; *Imerman v Tchenguiz*, n 55, [65] (“there is now a tort of misuse of private information”); and *Walsh v Shanahan* [2013] EWCA Civ 411, [2013] 2 P & CR DG7 per Rimer LJ at para [55].

<sup>79</sup> *Vidal-Hall*, n 70, [68].

<sup>80</sup> *Vidal-Hall v Google Inc* [2015] EWCA Civ 311, [2016] QB 1003, [26] (*Vidal-Hall (CA)*).

However, whilst there may be some underlying, intuitive veracity to the notion that if something is generally treated as a tort then it probably is one, the mere repeated judicial use of the term “tort” is not, in itself, conclusive proof of its accuracy. For neither the common law nor equity has ever had much truck with the notion that labels provide conclusive proof of content. As Hunt puts it, “repetition does not transform a falsity into a truth”.<sup>81</sup> Indeed, since Tugendhat J was the first judge to consider this question of MPI’s classification as a disputed point of law, it is apparent that no previous reference to the doctrine as tortious was founded on detailed judicial analysis or, indeed, detailed submissions from counsel, relating to its nature. This must call into question the reliability and suitability of those references for the purpose for which Tugendhat J uses them.

When *Vidal-Hall* reached the Court of Appeal, the defendant repeated its argument based on the decision in *Douglas (No.3)*. It argued that the identification of the basis of that claim as equitable amounted to a binding declaration that the only cause of action available in these sorts of informational privacy cases was that one, same, equitable doctrine. The Court of Appeal rejects outright this argument of Google’s, remarking that the *Douglas (No.3)* observations were *obiter* rather than *ratio*.<sup>82</sup>

The Court first notes counsel for Google’s “uncontroversial proposition” that, following the coming into force of the HRA, the gap in protection for Art.8 interests in respect of informational privacy was bridged by the courts “developing and adapting” the older equitable doctrine of confidence “to protect [claimants from] the misuse of private information”.<sup>83</sup> The Court points to the decision in *A v B* as an example of that process, wherein the Court of Appeal “absorb[ed] the rights which articles 8 and 10 protect into the long-established action for breach of confidence”.<sup>84</sup> One unfortunate aspect of the Court of Appeal’s judgment becomes apparent at this point. This is that the Court is mobilising a range of under-determinate terminology in order to describe the developmental process by which privacy law developed in the early years of the HRA. The process is described as one of development, adaptation and absorption. There is a significant semantic tension between, on the one hand, these descriptions of the process and, on the other, the Court’s clear belief that “[a]lthough the process may have started as one of ‘absorption’ ... it is clear that ... there are now two separate and distinct causes of action”.<sup>85</sup> For the descriptive terms used imply strong, internal continuity; they give rise to the intuitive understanding that a *single* cause of action has been “developed” and “adapted”, and that protection for a particular type of interest (i.e. privacy) has been “absorbed” into it. Thus, when the Court, just a paragraph later, subsequently asserts that two distinct actions now exist, it is not at all apparent that (and no explanation is offered of how) this can be the case. Given this rather baffling use of language, it is clear that this judgment, too, requires close scrutiny.

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<sup>81</sup> Hunt, n 49, 83.

<sup>82</sup> *Vidal-Hall (CA)*, n 80, [38].

<sup>83</sup> *Ibid*, [19].

<sup>84</sup> *A v B Plc* [2002] EWCA Civ 337, [2003] QB 195, [4].

<sup>85</sup> *Vidal-Hall (CA)*, n 80, [21].

When one unpacks the Court of Appeal’s reasoning in *Vidal-Hall*, it becomes apparent that it rests upon three strands of argument.<sup>86</sup> The three strands may be summarised as follows: (i) as a matter of substance, “confidentiality” and “privacy” are distinct from one another and give expression to “different interests”; (ii) the law is still developing, and the ongoing process of development that began as one of “absorbing” privacy claims within confidentiality has reached a point where “there are now two separate and distinct causes of action”; and (iii) MPI has frequently (if not always consistently) been referred to by the judiciary as a “tort”.<sup>87</sup> Thus strand (i) is substantive, relating to the informing principles underpinning these causes of action, whilst (ii) and (iii) are essentially empirical (and purely descriptive) observations.

At a formal level, these three strands of the Court’s reasoning are problematic. None of them gives any hint of the method by which the *law relating to* “confidentiality” and “privacy” has developed in such a way as to give expression to these “different interests”. They say nothing about the doctrinal roots of MPI. The judgment is also unhelpfully vague about just what these “different interests” in strand (i) are. We are likely to be on fairly safe ground if we assume the Court has in mind the protection of equitable ideals of trust and confidence (the maintenance of the relationship of trust between confidants) when it talks of “confidentiality”. We can similarly make the assumption (although we are arguably on less certain ground if we do<sup>88</sup>) that it is drawing on the sorts of dignity and autonomy-based concerns that the Strasbourg Court regards as central to Art.8 ECHR when it talks of “privacy”.<sup>89</sup>

Moreover, (ii) is not really a strand of argument at all; rather it is the very question that the Court is considering. To simply assert that “there are now two separate and distinct causes of action” does not provide an explanation of *how* they came into being. Likewise strand (iii) says nothing about *how* MPI came into its own as a tort. Its reliance here on frequent judicial descriptions of MPI as a “tort” perhaps provides useful *evidence* that MPI appears, as a matter of semantic empiricism, to be identified frequently as tortious – but it cannot explain its emergence *as a tort*. We are thus left with a judgment that provides a bare answer to the question posed. Its reasoning does not – at any point – give any clue as to the Court’s understanding of just how MPI emerged *as a tort*.

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<sup>86</sup> Ibid. These are summarised by the Court at [21].

<sup>87</sup> The Court of Appeal cites, as examples of MPI being described judicially as a “tort”, *McKennitt*, n 57; *Lord Browne of Madingley v Associated Newspapers Ltd* [2007] EWCA Civ 295, [2008] QB 103; *Murray v Express Newspapers*, n 56; *Tchenguiz v Imerman*, n 55.

<sup>88</sup> Given the history of judicial reluctance to define “privacy” in English law, we probably have less secure grounds to assume this is the Court’s understanding of “privacy” than we had for making our assumptions about its understanding of “confidentiality”.

<sup>89</sup> See, for example, *Reklos v Greece* [2009] EMLR 16, [39] (on “autonomy”); *Pretty v United Kingdom* (2002) 35 EHRR 1: “the notion of personal autonomy is an important principle underlying the interpretation of [the] guarantees [in Article 8]”, (at [61]); “The very essence of the Convention is respect for human dignity...” (at [65]).

When the Court offers a (brief) account of the HRA era case law during which MPI has developed, it fares no better. For instance, the Court quite rightly identifies Lord Nicholls' judgment in *Campbell* as "highly influential".<sup>90</sup> Yet the Court – despite regarding this as "highly influential" – does not explicitly state that *Campbell* was the point at which MPI emerged in tortious form. Instead, it leaps ahead (with an appropriately dramatic "four years later") to the House of Lords' decision in *OBG* (in which Lord Nicholls stated that the law had developed "two distinct causes of action" for confidence and privacy).<sup>91</sup> Thus it leaves us with an analysis-free four-year period during which, presumably, the Court believes MPI gained its status as a distinct tort (without being conclusively labelled as such by our highest court). Bafflingly, it is on the developments in the law *during* this remarkable – and clearly highly significant – period of change that the Court is silent.

The Court of Appeal rather lets the proverbial cat out of the bag when, in concluding on the issue of MPI's classification, it remarks:

if one puts aside the circumstances of its "birth", there is nothing in the nature of the claim itself to suggest that the more natural classification of it as a tort is wrong.<sup>92</sup>

This is surely the clearest possible admission that the Court was unable to identify the "circumstances of [MPI's] birth". In this regard, it has thus fared no better than the High Court in its efforts (indeed, Tugendhat J's analysis is the more detailed of the two). And so irrespective of the correctness (or otherwise) of the conclusion reached, the judgment leaves unanswered a key question: if MPI *is* tortious then *how*, as a matter of formal law, did it come into being?

It has not been my aim to answer that question in this essay. But it is important to note that it has yet to be satisfactorily answered. For it arises directly because of the "shoe-horning" approach to the development of MPI to which English courts have committed themselves in the post-*Campbell* era. The insistence on "shoe-horning" privacy claims into the confidence/post-confidence vehicle is symptomatic of an approach to judging that determinedly restricts the development of the law to taking place on a narrowly incremental basis. This bears all the hallmarks of being based on a restrictive conception of the judicial role, related to a formalistic conception of the rule of law that prioritises the maintenance of legal certainty. Somewhat ironically, it is this deliberate subordination by the House of Lords of its creative powers to the restraining impulse of narrow incrementalism that has led to the considerable uncertainty and confusion that renders the very nature of the cause of action to which *Campbell* is credited with giving rise unclear.

## Conclusions

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<sup>90</sup> *Vidal-Hall (CA)*, n 80, [22].

<sup>91</sup> *OBG*, n 38, [255]; *Vidal-Hall (CA)*, *ibid*, [24].

<sup>92</sup> *Vidal-Hall (CA)*, *ibid*, [43].

Critics might object to my argument by saying that, whatever the judges in *Campbell* might have said at the time, the manner in which the doctrine of MPI has subsequently been interpreted and applied by the lower courts indicates that what happened in *Campbell* was highly significant. For if we now have a new tort utilising a novel methodology that is providing relief in novel circumstances, is that not proof enough of *Campbell's* activism? The argument behind such an objection is that there is no smoke without fire. *Post hoc ergo propter hoc*.

To such an objection, I would respond that, as we have seen, there is no clear, formal evidence – either in *Campbell* itself or in subsequent cases – that *Campbell* heralded the recognition of a novel tort, only that it did ... something. And suddenly we had this thing called “misuse of private information” and lawyers were scrabbling around wondering what to do with it, when to plead it, how it worked and which remedies it might help them secure for their clients. Whilst judges and academics alike have tended to assume that *Campbell* did give rise to a novel tort, there has been no detailed academic examination of the case law with the intention of proving it. The evidence we have examined in this essay casts doubt on whether this could indeed be proved. The existence of smoke does not prove the existence of a fire; many faulty things produce smoke. Moreover, whilst the High Court and Court of Appeal have agreed in the case of *Vidal-Hall* that MPI is tortious, the judicial analysis in those two cases is unconvincing, leaving a number of important questions entirely unanswered.

Thus, even if MPI *is* tortious, its recognition was most certainly not the product of a clear, positive decision to recognise a novel tort. Rather its current status – recognised as a tort by the Court of Appeal – is simply one possible rationalisation of a hodgepodge of other decisions in which its status has not been in issue and was consequently not considered in any detail.

*Campbell* itself was not a particularly activist decision. It moved the law relating to privacy along, but only to a limited extent. In taking this narrowly incremental approach, the House appears to have been keen to pre-empt and avoid criticism for being “activist” – that is, for undermining legal certainty and the rule of law. And yet it is demonstrable that taking this narrowly incremental approach has not given us the legal certainty in respect of our common law privacy protections that we might have expected. Indeed, it has led to considerable uncertainty both in respect of the “third party interests” doctrine upon which I have previously written elsewhere, and in respect of the very nature of the cause of action that *Campbell* is said to have given us.

From this, it is entirely arguable that the House of Lords could more usefully have taken a significantly more activist approach in *Campbell*. Had the House of Lords recognised MPI as a novel and distinct tort there and then, the problem of uncertainty upon which we have dwelt would not have arisen, at least not in terms of the nature of the doctrine. A move to recognise clearly a novel, broadly-framed cause of action – most likely in tort – to guard against invasions of privacy, or to recognise a number of discrete torts to cover the same ground,

would have required the House to operate in a significantly wider mode of incrementalism. But doing so would still have been defensible. For, as Sir Michael Tugendhat rightly contends, courts may legitimately extend – and have on a number of occasions legitimately extended – the law quite significantly. The key to engaging in defensible incrementalism is maintaining a link with past judicial decisions. But this need not mean a rigid adherence to the limits of existing precedent. It can legitimately mean recognising novel heads of liability where doing so is necessary in order, for example, to give effect to an underlying principle of justice.

And whilst it is certainly not the only – and probably not even the primary – reason to think that such a move would have been beneficial, it might well have prevented the very problem of uncertainty by which those who tend to criticise “activist” decisions are particularly troubled.