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# Privacy and incrementalism

Thomas DC Bennett

## 1 Introduction

English and Welsh tort law has no answer to ‘pure’ intrusions into individuals’ privacy. This is because there is no broad tort of ‘invasion of privacy’, nor a discrete tort of ‘intrusion upon seclusion’. English and Welsh law does contain two doctrines that respond to information-based privacy violations: equitable confidentiality and the ‘tort’ of ‘misuse of private information’.<sup>1</sup> But neither responds to intrusions in the absence of some information-based wrongdoing. The gap in protection against intrusions sets English and Welsh law apart from other common law jurisdictions including the USA, Canada and New Zealand. Scholars have long lamented this lacuna, but little has been done to try to uncover the reasons *why* it persists.<sup>2</sup> We do not need yet another normative argument in favour of recognising an intrusion tort. What is now needed is a concerted effort to understand the reasons for the persistence of the intrusion lacuna, so that an effective challenge to it can be made. This chapter seeks to drive the debate in this field forward by identifying one such reason.<sup>3</sup>

The reason that is identified in this chapter concerns the methodology adopted by English and Welsh courts in developing our information-focused privacy law. The methodology is highly restrictive, and we can get to grips with it by theorising the manner in which courts elaborate the common law – a practice known as ‘incrementalism’. The prevailing methodology in English and Welsh privacy cases exhibits the characteristics of incrementalism in its ‘narrow’ form. But it is necessary, if we are to understand narrow incrementalism’s predominance in privacy, to go further. We must uncover the rationale that underpins its predominance. The rationale is, as we shall see, tightly connected to a formalistic conception of the judicial role, itself emanating from a formalistic conception of the rule of law. Narrow incrementalism is merely a manifestation of this formalistic conception. But it has a profound effect: it creates an apparent ‘formal barrier’ to the recognition of an intrusion tort (or indeed to the recognition of a broader, all-encompassing privacy tort). This formal barrier keeps the intrusion lacuna firmly in place.

Overcoming the formal barrier is a necessary (though not in itself sufficient) condition for solving the intrusion lacuna within English tort law. For it has become firmly engrained in the judiciary’s understanding of what can and cannot be done in the field of privacy. But it is only once we identify this formal barrier as bearing significant (though not exclusive) responsibility for the persistence of the intrusion lacuna that we can then begin to sketch out a way to overcome it. We can locate a solution by looking to comparable jurisdictions that have recognised intrusion torts notwithstanding the presence of similar, rule of law-based arguments

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<sup>1</sup> It is unclear whether ‘misuse of private information’ can properly be regarded as tortious. The English and Welsh courts have concluded that it is, but their reasoning is unpersuasive. See *infra* note 14, and accompanying text.

<sup>2</sup> See Nicole A Moreham, ‘Privacy in the Common Law: A Doctrinal and Theoretical Analysis’ (2005) 121 *Law Quarterly Review* 628. See also David Eady, ‘A Statutory Right to Privacy’ (1996) 3 *European Human Rights Law Review* 243; Basil Markesinis et al, ‘Concerns and Ideas about the Developing English Law of Privacy (and How Knowledge of Foreign Law Might Be of Help)’ (2004) 52 *American Journal of Comparative Law* 133; Raymond Wacks, *Privacy and Media Freedom* (OUP 2013).

<sup>3</sup> There is at least one other reason for the persistence of the intrusion lacuna in English and Welsh law, which I do not explore here (for lack of space). That other reason concerns the difficulties in conceptualising ‘privacy’ in a manner that makes it amenable to legal protection. I address that matter separately elsewhere. See Thomas DC Bennett, ‘Triangulating Intrusion in Privacy Law’ (2019) *Oxford Journal of Legal Studies* (forthcoming).

against doing so, and in particular by identifying the methodology courts developing those torts adopt. This essay uses Canada as its main comparator. The province of Ontario recognised an intrusion tort in 2012 in the case of *Jones v Tsige*.<sup>4</sup> When we unpack that decision, we can see that it embraced a different, wider mode of incrementalism. This wider mode, being less constrained by precedent and more concerned with achieving alignment with underlying legal and policy principles, legitimised the recognition of a novel head of liability. The same thing (methodologically speaking) occurred in New Zealand mere months after the *Jones* decision.<sup>5</sup> And it happened again in Ontario in 2016, when a second novel privacy tort – public disclosure of private facts – was recognised there.<sup>6</sup>

Before we engage in our comparative exercise, however, we must begin by examining the intrusion lacuna as it persists in English and Welsh law.

## 2 The intrusion lacuna

When I talk of privacy ‘intrusions’ in this chapter, I mean acts that intrude (whether physically or, in this technologically advanced age, virtually) into a person’s private space, property or affairs.<sup>7</sup> Some intrusions lead to an intruder obtaining private information which is then disseminated. Such instances appear to straddle the distinction between intrusion-type and informational privacy violations; since both occur, courts might legitimately resolve the entire case through a legal mechanism that focuses on one type of privacy violation rather than the other.<sup>8</sup> Whilst these sorts of cases might give rise to conceptual difficulties, they are not examples of the problem with which I am concerned. For in this chapter I am addressing the lacuna that exists in respect of ‘pure’ intrusions. A ‘pure’ intrusion is one in which an intrusive act takes place but either (a) no private information is obtained by the intruder, or (b) if information is obtained, no dissemination of it takes place. I make mention of some examples a little later in this section.

Protection for privacy interests in English and Welsh law has long focused on the protection of *information* from unauthorised *dissemination*, rather than on protecting *people* from intrusive *acts*. A cause of action has lain in equity providing relief for ‘breach of confidence’ for nearly two hundred years.<sup>9</sup> Whilst the jurisdiction of the courts of equity was primarily used in early cases to guard against commercial breaches of confidence (often in an employment setting), it is clear that creative counsel were able to mobilise this doctrine as early as the nineteenth century to protect privacy interests.<sup>10</sup> By some wholly obscure process that

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<sup>4</sup> *Jones v Tsige* 2012 ONCA 32, 108 OR (3d) 241.

<sup>5</sup> *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672.

<sup>6</sup> *Jane Doe 464553 v ND* 2016 ONSC 541, 128 OR (3d) 252.

<sup>7</sup> In so doing, I draw a clear distinction between information-based privacy violations and intrusion-type privacy violations. This distinction has its roots in William Prosser’s taxonomy (*infra* note 90,). Whilst popular amongst privacy scholars, it should be noted that this distinction does not enjoy universal support. Paul Wragg, for instance, has recently challenged the distinction in ‘Recognising a Privacy-Invasion Tort: The Conceptual Unity of Informational and Intrusion Claims’ (2019) 78 *Cambridge Law Journal* 409.

<sup>8</sup> The phone hacking case of *Gulati v Mirror Group Newspapers Ltd* [2015] EWHC 1482 (Ch), [2015] WLR(D) 232 is a good example of this. The hacking of the claimants’ voicemails constituted intrusive acts, whilst the publication in national newspapers of private information gleaned from the hacked accounts constituted informational violations. The English and Welsh courts dealt with the case as a ‘misuse of private information’ (that is, using information-based privacy doctrine). But this was possible only because of the presence of private information that had been (a) obtained, and (b) published, without consent (or other lawful excuse). See further *infra* note 28 and accompanying text.

<sup>9</sup> The history of the doctrine of confidentiality is masterfully explored in Megan Richardson et alia, *Breach of Confidence: Social Origins and Modern Developments* (Edward Elgar 2012).

<sup>10</sup> *Prince Albert v Strange* (1849) 1 H & Tw 1, 47 ER 1302. The court even went so far as to state expressly that ‘privacy is the right invaded’ (1312).

has been variously described as one of ‘development’,<sup>11</sup> ‘adaptation’,<sup>12</sup> and ‘absorption’,<sup>13</sup> but which has yet to be adequately explained,<sup>14</sup> the equitable doctrine of confidence ‘morphed’<sup>15</sup> into (but mysteriously somehow also continued to exist separately from) a cause of action for ‘misuse of private information’ (MPI) in the 2004 case of *Campbell v Mirror Group Newspapers*.<sup>16</sup>

This development was spurred by the statutory requirement, which arose when the Human Rights Act 1998 (HRA) came into force in 2000, for the English common law to achieve compatibility with the European Convention on Human Rights.<sup>17</sup> It will be helpful at this point to pause and explain briefly the relationship between the HRA and the incremental method that is the focus of this chapter. The HRA has an impact on the common law, in that it obliges the courts both to elaborate the common law sufficiently to make it Convention-compatible, and to act compatibly with Convention rights when they do so. But it does not prescribe a particular developmental methodology for the courts to use when doing this. As such, the manner in which the HRA affects the common law, by a method known as ‘indirect horizontal effect’,<sup>18</sup> does not fundamentally alter the incremental method by which the common law develops.<sup>19</sup> Indeed, the very essence of indirect horizontality is that the common law remains the vehicle through which Convention-compatibility is achieved. This stands in opposition to a notion of *direct* horizontality (not adopted by domestic courts in the UK), according to which the common law would be supplanted by direct statutory recourse to the courts under the HRA in cases involving human rights violations committed by private (that is, non-state) actors.<sup>20</sup> This preference for *indirect* (rather than *direct*) horizontal effect retains ‘incrementalism’ as the touchstone of legitimate common law development. So, whilst we should acknowledge the fact that the HRA spurred the courts into action in elaborating the doctrine of misuse of private information, we should not assume that this entailed the adoption of a radically different developmental methodology; it did not.

With English and Welsh law having focused on protecting against *informational* violations of privacy since the nineteenth century, a glaring gap in protection for privacy interests jeopardised by *physical intrusions* into personal space went unaddressed. It became clear in the late twentieth century that the equitable doctrine of confidence would not assist the victims of intrusion-style privacy violations. In 1990, the case of *Kaye v Robertson* came before the Court of Appeal.<sup>21</sup> The problem faced by Kaye’s lawyers was the lack of a cause of action

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<sup>11</sup> *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1, [255]. See also *Vidal-Hall v Google, Inc.* [2015] EWCA Civ 311, [2016] QB 1003, [38].

<sup>12</sup> *Douglas v Hello! Ltd (No 8)* [2005] EWCA Civ 595, [2005] 3 WLR 881, [51]. See also *Vidal-Hall*, *ibid.*

<sup>13</sup> *A v B Plc* [2002] EWCA Civ 337, [2003] QB 195, [4]. See also *Vidal-Hall (CA)*, *ibid.*, [21].

<sup>14</sup> On the inability of the courts to explain clearly or coherently the emergence of the MPI doctrine from equitable confidence, see Thomas DC Bennett, ‘Judicial Activism and the Nature of “Misuse of Private Information”’ (2018) 23(2) *Communications Law* 74.

<sup>15</sup> Wacks, *supra* note 2, 69 and 103ff.

<sup>16</sup> *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457.

<sup>17</sup> See further *infra* note 115, and accompanying text.

<sup>18</sup> The language of horizontal effect has its roots in the European Court of Justice ruling in *Van Gend en Loos v Neder-Landse Tariefcommissie* (Case 26/62), [1963] ECR 1. There has since been something of a (linguistic) ‘spill-over’ effect into municipal law, making use of ‘horizontal effect’ and ‘vertical effect’ as terms of art to describe the relationship between higher-order public law and both private individuals and the state respectively.

<sup>19</sup> On the centrality of incrementalism to common law developmental method under the HRA, see Gavin Phillipson and Alexander Williams, ‘Horizontal Effect and the Constitutional Constraint’ (2011) 74(6) *Modern Law Review* 878.

<sup>20</sup> On direct horizontal effect, see William Wade, ‘Horizons of Horizontality’ (2000) 116 *Law Quarterly Review* 217.

<sup>21</sup> [1991] FSR 62. An actor, Gordon Kaye, had been seriously injured in a traffic accident. As he recovered in intensive care in hospital, two journalists from the *Sunday Sport* managed to gain access to his private room (in breach of clear instructions not to enter) and conducted what they described as an ‘interview’ with the barely

in which they could base a claim. Kaye's lawyers ruled out pleading the case in breach of confidence (perhaps too hastily). As such, the Court had no opportunity to consider whether that doctrine could provide relief. Nevertheless, there is no indication in the judgment that the judges thought breach of confidence would have availed the plaintiff. Indeed, the Court of Appeal lamented the lack of a privacy tort apt to assist Gordon Kaye in the circumstances.<sup>22</sup> In the end, the Court mobilised the lesser-known doctrine of malicious falsehood to grant some relief (on rather tenuous grounds, since it was far from clear that Kaye had suffered the special damage required by the doctrine). But a glaring gap in privacy protection had been exposed.<sup>23</sup>

In the late 1990s, the case of *Wainwright v Home Office* highlighted the intrusion lacuna even more vividly.<sup>24</sup> *Wainwright* did not involve the publication of any private information whatsoever; it was, in essence, a case of pure intrusion. A mother and son were strip-searched on a visit to a Leeds prison in a manner that breached prison rules.<sup>25</sup> Both claimants suffered emotional distress; the son, who had physical and learning disabilities, also developed Post-Traumatic Stress Disorder. They brought a claim for, *inter alia*, invasion of privacy. After hearings in the County Court and Court of Appeal, the case was heard in – and the claim rejected by – the House of Lords. A key ground for the rejection of the claim was the lack of any privacy-based cause of action in English and Welsh law apt to respond to intrusion-type privacy violations such as these.<sup>26</sup>

Some scholars have suggested, based on recent cases, that English and Welsh law is becoming more willing to recognise and remedy privacy violations that resemble pure intrusions.<sup>27</sup> However, even brief scrutiny reveals such suggestions to be premature. In *Gulati v Mirror Group Newspapers Ltd*, claimants whose voicemail accounts had been compromised by the defendant recovered damages, despite much of the information thereby gleaned never being published.<sup>28</sup> However, the decision, rendered in MPI, does not recognise a novel head of liability. Although the level of damages awarded was confirmed on appeal, the issue of liability was uncontested even at first instance; the defendant admitted – perhaps unnecessarily – that its conduct amounted to a misuse of private information.<sup>29</sup> Moreover, even if there had been some expansion of the doctrine's limits, *Gulati* would still be firmly focused on the obtaining of *information*; there is nothing in the case to suggest that an intrusion through which no *information* was obtained has become actionable.<sup>30</sup>

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conscious Kaye. They also took photographs of him in that state to accompany their planned scoop. Lawyers for Kaye sought injunctive relief to restrain publication of the 'interview' and the pictures.

<sup>22</sup> *Id.* 70.

<sup>23</sup> Helen Fenwick and Gavin Phillipson argued that Kaye might have succeeded in a claim for breach of confidence, had his lawyers pleaded it ('Confidence and Privacy: a Re-Examination' (1996) 55(3) *Cambridge Law Journal* 447, 454).

<sup>24</sup> *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406.

<sup>25</sup> Both claimants were required to undress fully (the rules stating that a person being searched should not be required to expose both their top and bottom halves simultaneously). The mother was searched in a room that did not have adequate window coverings and was searched, improperly, by male officers. The son also suffered a battery when officers manipulated his penis in order to retract his foreskin.

<sup>26</sup> *Wainwright supra* note 24, [18].

<sup>27</sup> The term 'misuse of private information' first appears in *Campbell supra* note 16, [14] (Lord Nicholls).

<sup>28</sup> *Gulati, supra* note 8. Suggestions that *Gulati* exemplifies a novel, intrusion facet of the MPI doctrine can be found in Nicole A Moreham, 'Liability for Listening: Why Phone Hacking is an Actionable Breach of Privacy' (2015) 7(2) *Journal of Media Law* 155, and John Hartshorne, 'The Need for an Intrusion upon Seclusion Privacy Tort within English Law' (2017) 46(4) *Common Law World Review* 287. cf Jacob Rowbottom, 'A Landmark at a Turning Point: *Campbell* and the Use of Privacy Law to Constrain Media Power' (2015) 7(2) *Journal of Media Law* 170.

<sup>29</sup> See further Rowbottom, *id.*

<sup>30</sup> The second case giving rise to suggestions that intrusion is now covered by English law is *PJS v Associated Newspapers Ltd* [2016] UKSC 26, [2016] 1 AC 1081. However, as in *Gulati*, there is no suggestion in the case that an MPI claim could succeed in a 'pure' intrusion situation where there was neither non-consensual acquisition

Making a case for the recognition of an intrusion tort, Nicole Moreham finds that MPI doctrine provides inadequate protection for an individual's right to protection from undesired access to his person.<sup>31</sup> By this, she primarily has in mind acts of 'unwanted watching, listening and recording'.<sup>32</sup> The common law is inadequate because '[n]either breach of confidence nor misuse of private information . . . protects against the non-disclosure aspects of physical privacy.'<sup>33</sup> There is thus 'no clear common law right protecting against unwanted observation and recording where subsequent dissemination of material has not occurred.'<sup>34</sup> Moreham has also conducted an extensive survey of alternative legal remedies for intrusion-type privacy violations and has concluded that none of these provides a satisfactory substitute for an intrusion tort.<sup>35</sup>

Patrick O'Callaghan concurs with this bleak assessment, noting the 'significant' gap in English and Welsh law in respect of intrusions.<sup>36</sup> He sees 'absolutely nothing in recent case law to suggest that the new tort [of MPI] could potentially encompass other forms of invasion of privacy'.<sup>37</sup> This leads him to the 'unhappy conclusion' that, if *Kaye* were to be litigated once again in the light of the MPI tort, the courts would reach the same conclusion as before on the non-availability of protection against physical privacy intrusions.<sup>38</sup> This must surely, as a matter of formal law, be correct. A remedy would only be available in a *Kaye*-type scenario if the information obtained (the photographs and the 'interview') was published.<sup>39</sup> If the journalists who entered his room obtained information that they subsequently decided was not sufficiently newsworthy to publish, there would be no remedy available in tort (or equity) for the pure intrusion.

English and Welsh law's intrusion lacuna thus persists, despite attracting derision from pro-privacy commentators. Raymond Wacks tells us that, currently, the *Wainwright* ruling means that '[a] claimant who is subjected to an intrusion must . . . look elsewhere for a remedy.'<sup>40</sup> By this he means that such a claimant must look outside of tort law as it presently stands. He has proposed a statutory intrusion tort as a solution, but there has been no sign of any desire to enact such legislation in the UK Parliament in recent years.<sup>41</sup>

### 3 English and Welsh law's narrowly-focused privacy jurisprudence

The line of authority that began with the recognition of breach of confidence as an equitable wrong and which has, in recent times, led to the intrusion lacuna in English and Welsh law discloses the predominance of a particular, restrictive kind of judicial thinking. It manifests, in large part, as a commitment to placing tight constraints on judicial law-making. This is

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nor dissemination of private information. As such, *PJS* cannot be said to have opened up the MPI doctrine into anything even close to a full-blown intrusion tort.

<sup>31</sup> Moreham, *supra* note 2.

<sup>32</sup> Nicole A Moreham, 'Beyond Information: Physical Privacy in English Law' (2014) 73(2) *Cambridge Law Journal* 350, 362.

<sup>33</sup> *Id.* 362.

<sup>34</sup> *Id.* 364.

<sup>35</sup> *Id.*

<sup>36</sup> Patrick O'Callaghan, *Refining Privacy in Tort Law* (Springer 2013) 133, 146.

<sup>37</sup> *Id.* 155.

<sup>38</sup> *Id.*

<sup>39</sup> Moreham has argued that the phone-hacking case of *Gulati* demonstrates an increasing willingness on the part of the judiciary to provide relief for violations of 'physical privacy' in Moreham, *supra* note 28, 164. For reasons that I and others have given elsewhere, it remains premature to suggest that *Gulati* reflects an emergent intrusion tort. See Bennett, *supra* note 3 and Rowbottom, *supra* note 28, 186.

<sup>40</sup> Wacks, *supra* note 2, 187.

<sup>41</sup> *Id.* 263–70.

attributed, in key cases, to a particular conception of the judicial role that displays classically formalist characteristics.

The most obvious way in which this restrictive conception appears in the cases is as a perceived prohibition on ‘radical’ extensions of the law, whatever that might mean. Four cases will suffice to exemplify this point. In *Malone*, Megarry V-C concludes that ‘it is no function of the courts to legislate in a new field. The extension of the existing laws and principles is one thing, the creation of an altogether new right is another’.<sup>42</sup> Ultimately this concern leads him to reject the opportunity to recognise a novel privacy tort. The formalistic conception of the judicial role also bulks large in *Kaye*, with Bingham LJ stating openly that the court ‘cannot’ give the plaintiff a privacy-based remedy.<sup>43</sup> The Court, moreover, speaks expressly of the desirability of Parliament legislating in this field, suggesting that the judges thought that extending the law to cover the situation at hand would be too radical a step. In *Wainwright*, Lord Hoffmann contrasts the legitimacy of extending ‘an existing principle’ with attempting ‘radical change’.<sup>44</sup> His Lordship did not give a clear indication of exactly where he would draw the line, but gives *Khorasandjian v Bush*<sup>45</sup> (in which the claimant sought the extension of the tort of private nuisance to encompass telephone harassment) as an example of an attempt at a ‘radical change’ that went ‘a step too far’.<sup>46</sup> In *Campbell*, Baroness Hale echoes Lord Hoffmann’s *Wainwright* judgment when she states 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>47</sup>

One particularly prominent proponent of such a formalistic conception of the judicial role, emanating from his formalistic conception of the rule of law, is Joseph Raz.<sup>48</sup> The key theme of Raz’s account of the judicial obligation is that the central function of law is the provision of authoritative guidance by which the law’s addressees may regulate their conduct. This central tenet of Raz’s formalism features heavily in his conception of the rule of law, which requires that legal rules be prospective, clear and (relatively) stable, with clear secondary rules for determining which pronouncements from the authority are to be regarded as laws (rules of recognition).

In advancing his concept of practical reason, Raz identifies first- and second-order reasons for decision-making. It is necessary to unpack these at this stage, for they have relevance to the elucidation of different forms of ‘incrementalism’ in the next section. First-order reasons may comprise any reasons to make a decision one way or another. These might involve matters of policy, convenience, efficiency, financial concerns, moral inclinations and so forth (the list is not exhaustive). A decision made on a balance of these first-order reasons amounts to the exercise of discretion; the decision-maker has discretion to weigh these reasons (of presumptively equal weight) against one another and conclude as he sees fit.

Exclusionary reasons are second-order reasons not to act on the conclusion reached by balancing first-order reasons. They are secondary rules that override the first-order balancing exercise. Raz gives an example of such an exclusionary reason being a rule against making major investment decisions when tired or intoxicated.<sup>49</sup> Exclusionary reasons *always* override first-order reasons for action, such that a first-order balancing act is not even required. If an exclusionary reason commands a particular result in a certain instance, that is the only result

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<sup>42</sup> *Malone v Metropolitan Police Commissioner* [1979] Ch 344, 372.

<sup>43</sup> *Kaye*, *supra* note 21, 70.

<sup>44</sup> *Wainwright*, *supra* note 24, [18].

<sup>45</sup> *Khorasandjian v Bush* [1993] QB 727. This change was rejected in *Hunter v Canary Wharf Ltd* [1997] AC 655.

<sup>46</sup> *Wainwright*, *supra* note 24, [18].

<sup>47</sup> *Campbell*, *supra* note 16, [133]. See further Bennett, ‘Judicial Activism’ *supra* note 14.

<sup>48</sup> Joseph Raz, *The Authority of Law* (OUP 1979); Joseph Raz, *Practical Reason and Norms* (Princeton University Press 1990).

<sup>49</sup> Raz (1990), *id.* 37–38.

that may legitimately be reached. This is justifiable on rule-consequentialist grounds; that is, that one may 'be better off in the long run by always following a predetermined course of action' if one is required to make a decision 'under conditions of impaired rationality or incomplete information.'<sup>50</sup> For Raz, legal rules issued by a jurisdiction's authoritative source, such as statute, operate on the law's addressees as exclusionary reasons, mandating compliance irrespective of what might be thought desirable on a balance of first-order reasons. This applies not just to statutory declarations of rules, but – crucially, for our purposes – also to precedential authority.

The desire to ensure legal certainty as a rule of law concern, and to delineate clearly the limits of legitimate judicial law-making, has led to the widespread adoption of a particular distinction between 'legislative' and 'judicial' styles of law-making. Put simply, according to proponents of this distinction, judges may not legitimately engage in law-making of a 'legislative' type, but must make law only in a 'judicial' manner. We saw this distinction explicitly bulking large in Megarry V-C's judgment in *Malone*, and the rule of law concern that underpins it is clearly evident also in the courts' refusal to countenance 'radical' developments in *Kaye*, *Wainwright* and *Campbell*.

However, despite its widespread rehearsal, the legislative/judicial distinction is deeply problematic. It suffers from two major flaws: a lack of clear definitions for either term and a lack of consistency not only in their use but in making the argument that they are, in fact, distinct. For example, Aileen Kavanagh, a proponent of the distinction, distinguishes 'radical and broad-ranging reform' (legislative) from 'partial and piecemeal reform' (judicial) in a manner that has much in common with Megarry V-C in *Malone*.<sup>51</sup> But just what Megarry V-C meant by 'radical and broad-ranging reform' was unknowable in *Malone* and seems no clearer in the abstract world of scholarly literature. Kavanagh tells us that it may involve 'radical policy change' that has 'economic and social implications', which 'may require the reconciliation and balancing of a broad range of conflicting interests and viewpoints'.<sup>52</sup> These are the features, in her view, that place this sort of law-making beyond the legitimate role of judges. They are, however, descriptively under-determinate. We are not, for example, told where the line is to be drawn between 'radical' policy change and policy change that is not 'radical'. Neither are we told how 'broad' the range of conflicting interests must be, nor how serious the 'economic and social implications' need to be, before they trigger this apparent rule against radicalism.

Kavanagh also tells us that while legislators are entitled to make law in an entirely 'forward-looking' fashion (without regard for past legal rules of any sort), judges are 'obliged to . . . look backward at . . . the existence and import of existing precedents'.<sup>53</sup> Her notion of the common law adjudicative process is thus tightly circumscribed. Judges are constrained to develop the law only using the 'techniques' of distinguishing, extending and overruling existing precedents.<sup>54</sup> Kavanagh does not suggest that the judicial role ever includes recognising a *novel* legal rule. Rather she views the judicial common law role as being centred upon existing doctrine and allowing for some, tightly limited modification of it.

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<sup>50</sup> Stephen R Perry, 'Judicial Obligation, Precedent and the Common Law' (1987) 7(2) *Oxford Journal of Legal Studies* 215, 220.

<sup>51</sup> Aileen Kavanagh, 'The Idea of a Living Constitution' (2003) 16 *Canadian Journal of Law & Jurisprudence* 55, 69; Aileen Kavanagh, 'The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998' (2004) 24(2) *Oxford Journal of Legal Studies* 259, 261. See also Phillipson and Williams, *supra* note 19, 903.

<sup>52</sup> Kavanagh (2004), *id.* 273.

<sup>53</sup> *Id.* 271.

<sup>54</sup> See section 4.1 on 'Narrow incrementalism', below.



Kavanagh is right to acknowledge that judicial law-making is *conditioned* by pre-existing law.<sup>55</sup> But this observation in itself does not clarify the methodological limitations on judges as they take account of this pre-existing law. For the terms used in making this point ('extending', 'adjusting', 'introducing small alterations'<sup>56</sup>) are also highly under-determinate. We are at no point told where precisely the line is to be drawn between an adjustment and a radical departure, nor between a small alteration and a larger one.

The legislative/judicial distinction seems to rely on an intuitive sense of the limits of judicial law-making power. Lord Walker, writing extra-judicially, locates the same difficulty in judicial pronouncements that rely upon this legislative/judicial distinction: 'it is not easy to discern, from the pronouncements of the House of Lords and the Supreme Court . . . what is, and what is not, off-limits for the development of the common law by a court of last resort. A lot seems to depend on judicial intuition'.<sup>57</sup> We see precisely the difficulty that arises from this sort of under-determinacy in *Malone*. Addressing the question of whether or not he ought to recognise a distinct right to privacy at common law, Megarry V-C states: 'At times judges must, and do, legislate; but . . . they do so only interstitially, and with molecular rather than molar motions . . . Anything beyond that must be left for legislation.'<sup>58</sup> According to this, judges *may* legislate, but there is a limit on their legislative activity – the limit being to legislate only 'interstitially'.<sup>59</sup> And so yet another under-determinate term inherits responsibility for clearing the matter up.

Unfortunately, it clears up nothing. The notion of judges legislating interstitially features prominently in John Bell's work on judicial decision-making.<sup>60</sup> Bell tells us that where 'the rule itself does not dictate the answer', judges are left 'to make value-judgments about how the rule is best understood'.<sup>61</sup> The making of a value-judgment in any given case then involves a form of creative decision-making that is, in Bell's view, analogous to the legislative behaviour of Parliament. However, judges enjoy less freedom than Parliament – there are 'limitations within which the judge exercises his choice'.<sup>62</sup> Thus, 'because of its limitation to partial and essentially remedial legal development within the confines of reasonable coherence and consistency with the rest of the law, judicial activity is narrower in scope than parliamentary law-making or administrative discretion.'<sup>63</sup>

So, both Bell and Kavanagh's conceptions of the judicial role, which delimit the judiciary from making 'radical' changes to existing doctrine, are rooted in a particular philosophy of adjudication that is in turn founded in a formalistic, procedural notion of the rule of law, of the sort we can associate with Raz. Yet both resort to highly under-determinate

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<sup>55</sup> Lesley Dolding and Richard Mullender, 'Tort Law, Incrementalism, and the House of Lords' (1996) 47(1) *Northern Ireland Legal Quarterly* 12, 13.

<sup>56</sup> Kavanagh (2004), *supra* note 51, 272.

<sup>57</sup> Robert Walker, 'Developing the Common Law: How far is too far?' (2013) 37(1) *Melbourne University Law Review* 232, 250.

<sup>58</sup> *Malone*, *supra* note 42, 372.

<sup>59</sup> The notion of interstitial legislation in Megarry V-C's statement has origins in the dissenting judgment of Holmes J in *Southern Pacific Co. v Jensen* 244 US 205, 221 (1917).

<sup>60</sup> John Bell, *Policy Arguments in Judicial Decisions* (OUP 1982), 226 ff. Interstitial activity of any sort involves performance within narrow confines. The *Oxford English Dictionary* defines the noun 'interstice', from which the adjective 'interstitial' derives, as: 'An intervening space . . . a relatively small or narrow space, between things or the parts of a body . . . a narrow opening, chink, or crevice.' <https://www.oed.com/view/Entry/983>, accessed 20 May 2019. Interstitial legislation is a notion that Phillipson and Williams adopt. They do not, however, adopt Bell's 'interstitial legislator' model unequivocally, finding scope in their conception of the post-HRA judicial role to include aspects of Bell's 'rights model', based on the work of Ronald Dworkin. See Phillipson and Williams, *supra* note 19, 905.

<sup>61</sup> Bell, *supra* note 60, 227.

<sup>62</sup> *Id.* 228.

<sup>63</sup> *Id.* 230.

language in order to prescribe the particular limitations on judicial law-making that they believe are necessary. Insofar as Kavanagh's and Bell's notions derive from and rely upon a Razian concept of law as an authoritative body of rules (centralising the function of providing adequate guidance by which the law's addressees can prospectively regulate their conduct), this lack of clarity ought to trouble them. For *if* – as they insist – there really are clear limits on the judicial role, it ought surely to be possible to speak of them in plainer terms.

Of course, it is not actually possible to delineate the law-making boundaries of the judicial role with the level of precision strict formalism demands. That is why neither Kavanagh nor Bell nor any other equally learned and thoughtful scholar has managed to do it. It is not possible because law is a human practice, inevitably tending towards intuitive judgments that inhere in the human thought process.<sup>64</sup> Judges are not robots.<sup>65</sup> Because of this, the very pursuit of a formalist utopia is doomed to failure. This is a point made time and time again in realist jurisprudential literature.<sup>66</sup> But what can easily go unchallenged are the methodological aspects of the judicial practice that attempt to instantiate the formalists' premise. They can go unnoticed because they are matters of detail rather than of broad-brush legal philosophy. We must therefore now turn our attention to the method by which judges elaborate the common law – a particular practice known as 'incrementalism'.

## 4 Incrementalism

'Incrementalism' is a term used by common lawyers to describe the process by which the common law develops at the hands of judges.<sup>67</sup> In relatively recent times, scholars who have championed the legislative/judicial distinction (who, broadly speaking, have tended to be drawn from the public law side of the legal spectrum) have seized upon incrementalism as a notion capable of providing some practical guidance to the courts as to how to go about their role (in accordance with a restrictive conception of that role derived from a formal conception of the rule of law).<sup>68</sup> In particular, Gavin Phillipson and Alexander Williams have made a forceful case for incrementalism providing a model for the process of interstitial legislation.<sup>69</sup> In so doing they imply that the incremental method – if we can work out what it is – can clarify the operation of the legislative/judicial distinction, and perhaps cure some of the defects we identified above.

'Incrementalism' entered into the popular legal lexicon in Brennan J's judgment in the Australian High Court case of *Sutherland Shire Council v Heyman*.<sup>70</sup> Brennan J's incrementalism expressly informed the House of Lords' judgment in the seminal negligence case of *Caparo v Dickman Plc*<sup>71</sup> and recently received further affirmation from the UK Supreme Court in *Robinson v Chief Constable of West Yorkshire*.<sup>72</sup> Lesley Dolding and Richard Mullender define incrementalism generally as 'a form of adjudication involving the articulation

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<sup>64</sup> Richard Mullender, 'English Negligence Law as a Human Practice' (2009) 21(3) *Law & Literature* 321.

<sup>65</sup> At least, not yet.

<sup>66</sup> Oliver Wendell Holmes, 'The Path of the Law' (1896-97) 10 *Harvard Law Review* 457; Benjamin N Cardozo, *The Nature of the Judicial Process* (reprinted, Feather Trail Press 2009).

<sup>67</sup> It is not used uniformly and in fact bears a range of meanings. The meanings borne by 'incrementalism' range from highly restrictive ('narrow') ones to far more permissive ('wide') ones. I explore both these extremes below.

<sup>68</sup> For example, Kavanagh (2004), *supra* note 51, 272; Jeff A King, 'Institutional Approaches to Judicial Restraint' (2008) 28(3) *Oxford Journal of Legal Studies* 409, 429ff; Phillipson and Williams, *supra* note 1951, 888–9.

<sup>69</sup> Phillipson and Williams, *supra* note 19, 904–905.

<sup>70</sup> *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

<sup>71</sup> *Caparo v Dickman Plc* [1990] 2 AC 60.

<sup>72</sup> *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] 2 WLR 595.

of liability rules which are, at once, new (and, hence, can properly be regarded as the fruit of judicial law-making) and yet are conditioned by pre-existing law.<sup>73</sup>

However, as Dolding and Mullender realise, the concept of incrementalism must be refined if it is to provide a clear method for legal development. This is because, like the other under-determinate terms we have already encountered, ‘what is incremental is to an extent in the eye of the beholder.’<sup>74</sup> As Alison Young puts it when discussing the *Wainwright* case, ‘creating a tort of privacy *could be* regarded as more than a merely incremental development of the common law.’<sup>75</sup> Equally, creation of a privacy tort could be regarded as impeccably incremental.<sup>76</sup> Thus, as Keith Stanton points out, the term ‘incrementalism’ has a ‘range of conceivable meanings’.<sup>77</sup>

#### 4.1 Narrow incrementalism

The range of incrementalism’s meanings comprise a scale upon which we can plot more and less restrictive limits on judicial law-making. At the more restrictive end of the scale, Dolding and Mullender place what they call ‘narrow incrementalism’. This bears much similarity to what Stanton calls ‘gradualism’ and Cass Sunstein calls ‘minimalism’.<sup>78</sup> It also aligns closely with an approach to public decision making that the political scientist Charles Lindblom calls ‘successive limited comparisons’ and which he describes, perhaps more accessibly, as a process of ‘muddling through’.<sup>79</sup> It is adopted by courts concerned to delimit the scope for judicial law-making in a manner that suggests, when they do so, that a formalistic conception of the rule of law bulks large in their thinking.

Narrow incrementalism treats precedent as having exclusionary force, and thus contains this feature of the Razian conception of the judicial function. Insofar as precedent operates as an exclusionary reason, first-order concerns that might lead the court towards an opposite conclusion in the absence of precedent are not even considered. The presence (or absence) of precedent is determinative of the outcome. If there is a lack of existing case law indicating a rule capable of extension to cover the novel scenario, narrow incrementalism denies any opportunity for extending the law. It results in the courts ‘refus[ing] . . . to contemplate’ elaborating the law in novel situations.<sup>80</sup> So, in a novel case, liability will be imposed only if a sufficiently ‘tight’ analogy can be drawn with an existing liability rule. Conversely, if such an analogy cannot be found, there will be no liability and, crucially, *no expansion of the law*.

Narrow incrementalism thus ‘reduces receptivity to strongly novel claims’.<sup>81</sup> The courts have no need of regard to overarching or underlying principles. As such, ‘the law progresses fitfully, with only furtive reference to . . . community values’.<sup>82</sup> Dolding and Mullender noted, in negligence cases, a ‘passivist’<sup>83</sup> tendency to justify the use of the narrow incremental

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<sup>73</sup> Dolding and Mullender, *supra* note 55, 13.

<sup>74</sup> *Bryan v Maloney* (1995) 182 CLR 609, 661 per Toohey J.

<sup>75</sup> Alison L Young, ‘Horizontality and the Human Rights Act 1998’, ch 4 in David Hoffman (ed.), *The Impact of the UK Human Rights Act on Private Law* (CUP 2011), 40 (emphasis added).

<sup>76</sup> Phillipson and Williams lend some support to this notion, *supra* note 19, 884.

<sup>77</sup> Keith M Stanton, ‘Incremental Approaches to the Duty of Care’ in Nicholas Mullany (ed.), *Torts in the Nineties* (North Ryde 1997) 34.

<sup>78</sup> *Id.* 41; Cass R Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press 2001).

<sup>79</sup> Charles E Lindblom, ‘The Science of “Muddling Through”’ (1959) 19(2) *Public Administration Review* 79.

<sup>80</sup> *Id.* 46.

<sup>81</sup> Mullender, *supra* note 64, 326.

<sup>82</sup> Edmund W Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (CUP 2005) 140.

<sup>83</sup> Dolding and Mullender, *supra* note 55, 18.

approach by reference to issues of non-justiciability.<sup>84</sup> By this they mean the notion that ‘certain disputes are unsuitable for judicial resolution’, either due to a lack of competency<sup>85</sup> or legitimacy,<sup>86</sup> or a ‘complex combination’ of the two.<sup>87</sup>

In the context of negligence law, in cases where courts have adopted narrow incrementalism, it has confined the development of the law, in respect of the recognition of novel duties of care, to existing categories of such duties.<sup>88</sup> The operation of narrow incrementalism in post-*Campbell* privacy cases has achieved a similar state of affairs, confining privacy rights to the obvious existing category of case – informational rights.<sup>89</sup> Narrow incrementalism in the privacy context, then, precludes as a matter of method the adoption of a *novel category* of privacy tort dealing with intrusion into an individual’s seclusion.<sup>90</sup> Only cases within *existing* categories may provide a foundation for a tight analogy with a novel case. So long as courts operate in the narrow incremental mode, inspired by this formalist conception of the judicial role, they consider themselves ‘unable’<sup>91</sup> (rather than merely ‘unwilling’<sup>92</sup>) to recognise a new tort to guard against novel types of privacy violation.

## 4.2 Wide incrementalism

The wide incremental (or principled)<sup>93</sup> approach legitimises the court having regard to overarching principles in order to found novel causes of action, either in the complete absence of precedent, or where there are only hostile or unhelpful authorities. Dolding and Mullender contrast it with narrow incrementalism thus: ‘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>94</sup>

Wide incrementalism therefore shuns ‘the requirement that the facts of a novel claim have to be comprehended by an existing category of case in order to ground a cause of action’

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<sup>84</sup> *Id.* 21. This was most evident in the cases upon which their analysis dwells: *Murphy v Brentwood* [1991] 1 AC 398 and *Cambridge Water v Eastern Counties Leather* [1994] 1 All ER 53.

<sup>85</sup> That is, ‘the *fact* that the courts are (a) unable to provide a forum in which particular kinds of dispute can be adequately resolved or are (b) unable to provide as effective a setting for dispute resolution as that provided by, for example, the legislature.’ Dolding and Mullender, *supra* note 55, 21.

<sup>86</sup> That is, ‘*the principle* of the separation of powers (according to which courts, even if able to do so, ought not to adjudicate on certain matters as a matter of constitutional propriety)’ (*id.*).

<sup>87</sup> *Id.*

<sup>88</sup> See, for example, *Punjab National Bank v de Boinville* [1992] 1 WLR 1138; *White v Jones* [1995] 2 AC 207; *Goodwill v British Pregnancy Advisory Service* [1996] 2 All ER 161; *McFarlane v Tayside Health Board* [2000] 2 AC 59.

<sup>89</sup> There have been several MPI cases in which it might have been said that a tort of intrusion would have better fitted the reality of what occurred, either instead of or in addition to the MPI claim. See, for example, *Mosley v News Group Newspaper Ltd* [2008] EWHC 1777 (QB), [2008] EMLR 20, in which photographs and video footage of the claimant engaging in sado-masochistic sex acts was obtained surreptitiously intrusion and published. The publication clearly engages MPI, but the initial intrusion to obtain the footage, whilst perhaps an aggravating factor, receives no direct response from the court. See also *Ali v Channel 5 Broadcasting Ltd* [2019] EWCA Civ 677.

<sup>90</sup> William Prosser, ‘Privacy’ (1960) 48(3) *California Law Review* 383; *Restatement of the Law (Second): Torts*. (American Law Institute 1977) Vol 3, 376.

<sup>91</sup> *Wainwright*, *supra* note 24, [18].

<sup>92</sup> *Id.*

<sup>93</sup> John DR Craig, ‘Invasion of Privacy and Charter Values: The Common Law Tort Awakens’ (1997) 42 *McGill Law Journal* 355. Craig’s ‘principled approach’ to Canadian charter adjudication shares core features with the wide incremental mode identified by Dolding and Mullender.

<sup>94</sup> Dolding and Mullender, *supra* note 55, 16.

that is indicative of narrow incrementalism.<sup>95</sup> It eschews the formalist quest for a single right answer. Thus, a court operating in the wide incremental mode might legitimately reach any one of a number of defensible conclusions on a given point of law. This potential for the accommodation of ‘reasonable pluralism’,<sup>96</sup> or ‘reasonable disagreement’,<sup>97</sup> gives rise to several further metaphors about the normative space within which judging takes place. Richard Posner talks of a ‘zone of reasonableness’,<sup>98</sup> whilst Mullender, echoing Benjamin Cardozo, dwells on a ‘field of interpretative possibility’<sup>99</sup> within which judges operate when deciding ‘open cases’<sup>100</sup> (that is, cases in which precedent is not determinative of the outcome). This field is ‘shaped by norms that (so far as the imperfections of language will allow) mark out its boundaries and place constraints on judges’.<sup>101</sup> These constraints include (i) ‘the area-specific source (eg a rule or doctrine or concept) invoked by a judge in support of his or her decision’,<sup>102</sup> and (ii) ‘the system of law within which particular rules, doctrines and concepts have force.’<sup>103</sup> Within this systemic ‘field’, judges ‘may specify a range of politically controversial norms’,<sup>104</sup> each of which provides a ‘defensible’ answer to the legal problem in issue.<sup>105</sup> There is no suggestion that these boundaries are either clear-cut or immutable. Indeed, novel decisions can alter the shape of this field simply by virtue of taking place within it.<sup>106</sup>

The model of wide incrementalism offered by Dolding and Mullender (and the spectrum of incrementalism to which it gives rise) is not uncontroversial. Stanton has doubted whether it can properly be described as ‘incremental’ at all.<sup>107</sup> Dolding and Mullender, for instance, identify *Donoghue*<sup>108</sup> and *Anns*<sup>109</sup> as decisions made in the wide incremental mode. For Stanton, describing these decisions as incremental at all ‘seems inappropriate’, since those cases show it to ‘possess[] the capacity for developing the law . . . radically’.<sup>110</sup> Dolding and Mullender maintain, however, that wide incrementalism enables courts to secure ‘fidelity to law’.<sup>111</sup> This, on their account, ‘enjoins judges both to give effect (where applicable) to the law’s presently existing requirements (narrow fidelity) and to pursue the purposes which inform a particular body of law (wide fidelity)’.<sup>112</sup> The purposes informing law (on their notion of wide fidelity) include ‘principles, policies, [and] models of human association’.<sup>113</sup> In a

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<sup>95</sup> *Id.* 32.

<sup>96</sup> John Rawls, *Political Liberalism* (Columbia University Press 1996).

<sup>97</sup> Jeremy Waldron, *Law and Disagreement* (Clarendon Press 1999); Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 *Yale Law Journal* 1347–406.

<sup>98</sup> Richard A Posner, *How Judges Think* (Harvard University Press 2010) 87.

<sup>99</sup> Richard Mullender, ‘Judging and Jurisprudence in the USA’ (2012) 75(5) *Modern Law Review* 914, 921. Cardozo talks metaphorically of judging taking place in a ‘field’ in *The Nature of the Judicial Process* (*supra* note 66) 43.

<sup>100</sup> Mullender, *id.* 921.

<sup>101</sup> *Id.* 922.

<sup>102</sup> *Id.* 921.

<sup>103</sup> *Id.* 922.

<sup>104</sup> *Id.* 915.

<sup>105</sup> *Id.* 921.

<sup>106</sup> *Id.* 923; Laurence H Tribe, ‘The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics’ (1989) 103 *Harvard Law Review* 1, 7–8.

<sup>107</sup> Stanton, *supra* note 77, 40.

<sup>108</sup> *Donoghue v Stevenson* [1932] AC 562, 1932 SC (HL).

<sup>109</sup> *Anns v Merton London Borough Council* [1977] UKHL 4, [1978] AC 728

<sup>110</sup> Stanton, *supra* note 77, 40.

<sup>111</sup> Dolding and Mullender, *supra* note 55, 31–32.

<sup>112</sup> *Id.* 32.

<sup>113</sup> *Id.* 31.

manner that will be familiar to American audiences, their defence of the wide incremental method thus shares central features with Karl Llewellyn's 'grand style' of adjudication.<sup>114</sup>

### 4.3 Narrow incrementalism in English and Welsh privacy cases

We have already seen evidence that the narrow incremental mode predominates in English and Welsh privacy cases. In *Malone, Kaye and Wainwright*, the courts ruled out the recognition of novel privacy torts based on a lack of precedent and on the formalistic legislative/judicial distinction in respect of the limits of the judicial law-making role. This brings us to the emergence of the doctrine of 'misuse of private information' (MPI) in *Campbell*.

The court's obligation as a public authority, under Section 6 Human Rights Act 1998 (HRA), to develop (incrementally) the common law compatibly with European Convention rights,<sup>115</sup> led to an influential article by Helen Fenwick and Gavin Phillipson. In it, they argued that the equitable doctrine of confidence was 'ripe' for transformation into a privacy law.<sup>116</sup> In *Campbell*, the House of Lords did precisely as Fenwick and Phillipson had suggested.

The seminal decision in *Campbell*, in which the nomenclature 'misuse of private information' was introduced to English and Welsh law for the first time and in which the most basic contours of MPI doctrine were sketched out, is itself the fruit of narrow incrementalism. I have made this argument in more detail elsewhere and I will not repeat the detail of that analysis here.<sup>117</sup> But the core evidence for its being the fruit of a narrowly incremental mode of adjudication is as follows. First, there is no unequivocal statement in any of the judgments in *Campbell* of an intention to recognise a novel (as opposed to simply re-labelled) head of liability. Second, there is no unequivocal statement that the cause of action relied upon has changed its basis from being equitable (as in the older doctrine of confidence) 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, insisting instead that the courts will respond only to 'types of activities' already covered by an existing head of liability.<sup>118</sup>

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<sup>114</sup> See Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown & Co. 1960) 36–37. Wide incrementalism is expressly linked to the grand style in Dolding and Mullender, *supra* note 55, 32. The notion of fidelity to legal principle is also evocative of Dworkin's interpretive approach to adjudication, but he would not count fidelity to 'policy' as properly being the concern of judges. Ronald Dworkin, *Law's Empire* (Hart 1998) 221–4.

<sup>115</sup> The section 6 obligation gave rise to a substantial debate, in the early 2000s, around the nature of the 'horizontal effect' that the HRA would have. After much argument, consensus eventually settled on the HRA having 'indirect' horizontal effect – that is, the courts would endeavour to achieve Convention-compatibility through the vehicle of the common law. For key contributions to this debate, see Murray Hunt, 'The "Horizontal Effect" of the Human Rights Act' [1998] *Public Law* 423; Richard Buxton, 'The Human Rights Act and Private Law' (2000) 116 *Law Quarterly Review* 48; William Wade, 'Horizons of Horizontality' (2000) 116 *Law Quarterly Review* 217; Anthony Lester and David Pannick, 'The Impact of the Human Rights Act on Private Law: The Knight's Move' (2000) 116 *Law Quarterly Review* 380; Nicholas Bamforth, 'The true "horizontal effect" of the Human Rights Act 1998' (2001) 117 *Law Quarterly Review* 34; Deryck Beyleveld and Shaun Pattinson, 'Horizontal Applicability and Horizontal Effect' (2002) 118 *Law Quarterly Review* 623; Jonathan Morgan, 'Privacy, Confidence and Horizontal Effect: "Hello" Trouble' [2003] *Cambridge Law Journal* 444; Max Du Plessis and Jolyon Ford, 'Developing the Common Law Progressively – Horizontality, the Human Rights Act and the South African Experience' [2004] *European Human Rights Law Review* 286. Later contributions of note include Nicole A Moreham, 'Privacy and Horizontality: Relegating the Common Law' (2007) 123 *Law Quarterly Review* 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).

<sup>116</sup> Gavin Phillipson and Helen Fenwick, 'Breach of Confidence as a Privacy Remedy in the Human Rights Act Era' (2000) 63(5) *Modern Law Review* 660, 693.

<sup>117</sup> Bennett, 'Judicial Activism' *supra* note 14.

<sup>118</sup> *Campbell supra* n 16, [133].

The judgments within *Campbell* indicate a broad concern that the House ought not to appear to be acting in a particularly activist fashion. The judgments thus paint a picture 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. Moreover, Gavin Phillipson, whose essay on the subject was cited with approval by the House in *Campbell*,<sup>119</sup> argued for and clearly expected only narrowly incremental development of the law. It is clear that on Phillipson's understanding of indirect horizontality, 'whereby courts have a duty to apply the Convention rights in private law cases, but only to existing causes of action', the establishment of a novel tort seems beyond the effect that the HRA is capable of mandating.<sup>120</sup> Implicit in this also seems to be an acceptance that, without the HRA mandating such an establishment, the courts would not be willing to go so far in the discharge of their role as incremental developers of the common law. Such acceptance accords, in his work, the narrow mode of incrementalism the status of being the only legitimate such mode.

The fact that the courts, in more recent cases such as *Gulati* and *PJS*,<sup>121</sup> have not taken the opportunity to recognise 'intrusion' as a separate tortious act – even *obiter* – indicates that narrow incrementalism continues to predominate in the English and Welsh privacy landscape post-*Campbell*. Having established the predominance of narrow incrementalism on these shores, we must next turn our attention to our comparator jurisdiction: Canada.

## 5 The Canadian approach: *Jones v Tsige*

In the 2012 case of *Jones v Tsige*, the Ontario Court of Appeal recognised a novel intrusion tort. The defendant had accessed, without authorisation, the banking records of the plaintiff at least 174 times over a four-year period. For our purposes, what is most noteworthy about the Court of Appeal's decision is that it is not hampered by the sort of formalist conception of the judicial role that predominates in England and Wales.

At first instance, the plaintiff's claim was dismissed summarily. The motions judge accepted the defendant's argument that Ontario recognised no tort of intrusion, based on the ruling in the earlier *Euteneier* case.<sup>122</sup> In the Court of Appeal, however, Sharpe JA (giving judgment for the court) does not find the *Euteneier* judgment dispositive of the plaintiff's claim. It was stated in *Euteneier* that 'there is no "free standing" right to dignity or privacy under the [Canadian] Charter [of Rights and Freedoms] or at common law'. Sharpe JA, however, distinguishes the facts of *Euteneier* with relative ease, remarking that this *obiter* statement 'could not have been intended to express any dispositive or definitive opinion as to the existence of a tort claim for [the] breach of a privacy interest'.<sup>123</sup> By using the technique of distinguishing a hostile precedent, Sharpe JA is acting well within the limits of the 'judicial' mode of law-making as outlined by Kavanagh. However, he then goes further.

Sharpe JA eschews authorities that are inconclusive or even (in one case) hostile to the notion that an intrusion-type tort of privacy could be recognised. Acknowledging that, '[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',

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<sup>119</sup> *Id.* [18].

<sup>120</sup> Gavin Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act' (2003) 66 *Modern Law Review* 726, 729.

<sup>121</sup> *PJS supra* note 30.

<sup>122</sup> *Euteneier v Lee* (2005) 77 OR (3d) 621 (CA), [2005] SCCA No 516.

<sup>123</sup> 2012 ONCA 32, 108 OR (3d) 241, [38].

Sharpe JA points out that, in several cases, courts have refused to strike out such claims.<sup>124</sup> Indeed, ‘dicta in at least two cases [from other provinces] support the idea’ that a common law right of action for intrusion-type privacy violations can lie.<sup>125</sup>

Besides the lack of precedent for an intrusion tort, the respondent (defendant), Winnie Tsige, also argued that the presence of legislation in the field of privacy precluded judicial intervention. For its presence ‘reflects carefully considered economic and policy choices’ that are beyond the capacity of the courts: ‘expanding the reach of the common law in this area would interfere with these carefully crafted regimes . . . [A]ny expansion of the law relating to the protection of privacy should be left to Parliament and the legislature.’<sup>126</sup>

This argument finds no favour. Four common law provinces (British Columbia, Manitoba, Saskatchewan and Newfoundland) have enacted statutory torts of invasion of privacy, whilst the civil law province of Québec explicitly protects a right to privacy in its civil code.<sup>127</sup> However, none of these offer a conclusive definition of what constitutes an invasion of privacy. As Sharpe JA points out, ‘existing provincial legislation indicates that when the legislatures have acted, they have simply proclaimed a sweeping right to privacy and left it to the courts to define the contours of that right’.<sup>128</sup> He concludes, therefore, that ‘it would take a strained interpretation to infer from these statutes a legislative intent to supplant or halt the development of the common law in this area’.<sup>129</sup>

The judge’s treatment of this line of argument provides a clear contrast with the English and Welsh cases we have considered. Tsige’s submissions are formalistic; her argument is that the mere presence of the hostile precedent (*Euteneier*) and statutes in this field operates as a Razian exclusionary rule which prohibits the recognition of a novel tort. Sharpe JA has a significantly broader field of vision and is far more attentive to context. For he delves into the *content* of *Euteneier*, and of statutes and further provisions (from other provinces) not mentioned by Tsige. With the benefit of having that content at his fingertips, he relates it far more closely than Tsige does to the issue at hand. It is this that enables him to determine that *Euteneier* should be distinguished. It also leads him to conclude that the best interpretation of the legislative intent behind the Ontarian statutes is the polar opposite of that for which Tsige argues; that the under-determinate language pervading these various statutory provisions implicitly discloses a commitment to leaving the courts to determine the scope of privacy protections.

Sharpe JA’s survey of relevant doctrinal matters does not, however, end there. Having considered law directly on the point of intrusion, he then points to ‘the principle that the common law should be developed in a manner consistent with *Charter* values’.<sup>130</sup> Unlike the UK’s Human Rights Act, the Canadian *Charter of Rights and Freedoms* does not explicitly

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<sup>124</sup> *Id.* [25]. Sharpe JA goes on to cite *Somwar v McDonald’s Restaurants of Canada Ltd* (2006) 79 OR (3d) 172 (SC); *Nitsopoulos v Wong* (2008) 298 DLR (4th) 265 (Ont SC); *Capan v Capan* (1980) 14 CCLT 191 (Ont HC); *Lipiec v Borsa* (1996) 31 CCLT (2d) 294 (Ont Gen Div); *Shred-Tech Corp v Viveen* 2006 CarswellOnt 7762 (Ont SC).

<sup>125</sup> *Jones supra* note 123, [33]. See *Motherwell v Motherwell* (1976) 73 DLR (3d) 62 (Alta SC App Div); *Dyne Holdings Ltd v Royal Insurance Co of Canada* (1996) 135 DLR (4th) 142, leave to appeal to SCC refused, [1996] SCCA No 344.

<sup>126</sup> *Id.* [48].

<sup>127</sup> *Id.* [52]–[53].

<sup>128</sup> *Id.* [54].

<sup>129</sup> *Id.* [49].

<sup>130</sup> *Id.* [46]. See *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act 1982, Schedule B to the Canada Act 1982 (UK), ch 11 (the *Charter*). Also see *RWDSU v Dolphin Delivery Ltd* [1986] 2 SCR 573; *R v Salituro* [1991] 3 SCR 654; *Hill v Scientology* [1995] 2 SCR 1130; *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd* 2002 SCC 8, [2002] 1 SCR 156; and *Grant v Torstar* 2009 SCC 61, [2009] 3 SCR 640 as examples of instances where the Supreme Court has developed the common law ‘in a manner consistent with *Charter* values’.



protect privacy.<sup>131</sup> But privacy is a value that underpins other expressly protected rights. In *Hunter v Southam Inc.*,<sup>132</sup> Dickson J ‘observed that the interests engaged by [Section] 8 are not simply an extension of the concept of trespass, but rather are grounded in an independent right to privacy held by all citizens’.<sup>133</sup>

The ‘*Charter* values’ argument does not in itself provide full justification for the step that Sharpe JA takes in recognising a novel intrusion tort. To supplement the ‘*Charter* values’ argument, Sharpe JA makes an implicit appeal to underlying principle: the tortious ideal of ‘corrective justice’. The ideal of corrective justice imposes upon wrongdoers the duty to correct the harm or losses that their wrongdoing occasions.<sup>134</sup> The pursuit of corrective justice within tort law necessitates a strong focus on the harm suffered by the plaintiff and the cause of that harm.<sup>135</sup> There are significant indications that a commitment to the pursuit of corrective justice underpins the judgment of the Ontario Court of Appeal in *Jones*. There is a strong focus on the harm that the plaintiff suffered and the cause of that harm (the defendant’s wrongful conduct), with a particular concern evident for the potential threats to privacy posed by ‘technological change’ (or ‘the internet and digital technology’).<sup>136</sup> Sharpe JA highlights the ‘deliberate, prolonged and shocking’ nature of Tsige’s actions, concluding that ‘[a]ny person in Jones’ position would be *profoundly disturbed* by the *significant intrusion* into her *highly personal* information.’<sup>137</sup> Moreover, ‘we are presented in this case with facts that cry out for a remedy . . . In my view, the law of this province would be sadly deficient if we were required to send Jones away without a legal remedy.’<sup>138</sup>

This strongly suggests that Sharpe JA is concerned to impose liability for broad reasons of principle: ‘a general public sentiment of moral wrongdoing for which the offender must pay’.<sup>139</sup> His broad attentiveness to *Charter* and common law Canadian jurisprudence, to the

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<sup>131</sup> Privacy has, however, been held by the Canadian Supreme Court to be encompassed within s 8 of the *Charter*’s protection against unreasonable searches. Section 8 simply provides: ‘Everyone has the right to be secure against unreasonable search or seizure.’ See *Hunter v Southam, Inc* [1984] 2 SCR 145 (SCC) and *R v Dyment* [1988] 2 SCR 417 (SCC).

<sup>132</sup> *Hunter supra* note 131, 158–9.

<sup>133</sup> *Jones supra* note 123, [39].

<sup>134</sup> See, for example, Jules Coleman, ‘A Mixed Conception of Corrective Justice’ (1991–92) 77 *Iowa Law Review* 47, 441; Stephen Perry, ‘The Moral Foundations of Tort Law’ (1991–92) 77 *Iowa Law Review* 441; Ernest J Weinrib, ‘Legal Formalism: On the Immanent Rationality of Law’ (1988) 97 *Yale Law Journal* 949; Ernest J Weinrib, ‘Right and Advantage in Private Law’ (1989) 10 *Cardozo Law Review* 1283; Ernest J Weinrib, ‘The Special Morality of Tort Law’ (1989) 34 *McGill Law Journal* 403; Richard W Wright, ‘Substantive Corrective Justice’ (1991–92) 77 *Iowa Law Review* 625; Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harvard University Press 1989). See also Richard A Epstein, ‘A Theory of Strict Liability’ (1973) 2 *Journal of Legal Studies* 151; and ‘Causation and Corrective Justice: A Reply to Two Critics’ (1979) 8 *Journal of Legal Studies* 477. A helpful analysis of the core similarities and differences between the arguments of Coleman and Weinrib (who are arguably the leading lights in the corrective justice debate) is offered by William Lucy in *The Philosophy of Private Law* (OUP 2006) ch 8: ‘Corrective Justice’. I do not myself express a view on whether corrective justice (or, indeed, distributive justice) really is, as some argue, the core principle underpinning tort law. For my present purposes it suffices to note that it is one possible principle that may underpin tort law that has been the focus of attention from others.

<sup>135</sup> John Gardner, ‘What is Tort Law for? Part 1: The Place of Corrective Justice’ (2011) 30(1) *Law and Philosophy* 1, 1.

<sup>136</sup> *Jones supra* note 123, [67].

<sup>137</sup> *Id.* [69] (emphasis added). On the corrective justice impulses in *Jones*, see further 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, 71.

<sup>138</sup> *Jones supra* note 123, [67].

<sup>139</sup> *Donoghue supra* note 108, 580. I acknowledge here that I am assuming that Sharpe JA equates (at least roughly) a ‘general public sentiment of moral wrongdoing’ to Lord Atkin’s notion of a ‘social wrong’. This seems to accord with the general tone of his (Sharpe JA’s) judgment, but it does not matter for my purposes if these two, similar expressions do not mean exactly the same thing. My point is that both invoke the ideal of corrective justice.

case law of foreign jurisdictions and to a range of academic comment on the subject of privacy, all point towards a strong concern to fashion a cause of action aimed at providing redress for an ‘obvious social wrong’.<sup>140</sup>

What we therefore see in *Jones* is evidence of the wide incremental mode of common law development.<sup>141</sup> First, the recognition of a new intrusion tort, rejecting Tsige’s argument that it is not open to the court to do so, indicates that some significant *development* of the law is taking place. Second, Sharpe JA’s refusal to be troubled by *Euteneier*, the lack of precedent for an intrusion tort, and the presence of privacy legislation, indicates that he is not operating in the ‘doctrine-bound’ mode associated with narrow incrementalism.<sup>142</sup> Third, the central place that principle – that tort law exists to achieve corrective justice – occupies in the judgment is a hallmark of wide incrementalism. Likewise, the appeal to the ‘Charter value’ of privacy as a justification for the recognition of a new tort, rather than dwelling on the limited existing doctrine, indicates that he perceives incrementalism as embracing, and allowing for, a wide approach.

## 6 Further developments

Whilst we have closely examined only one comparator example, adjudicating privacy cases in the wide incremental mode is not confined to a single, Canadian decision. Within months of the *Jones* decision, the New Zealand High Court followed suit, recognising a similar intrusion tort in *Holland*.<sup>143</sup> Every feature of wide incremental decision-making that we have located in *Jones* is also present in *Holland*.

In *Holland*, Whata J is attentive to relevant precedent in the form of the leading New Zealand privacy case, *Hosking v Runting*.<sup>144</sup> He is also attentive to the incrementalism spectrum. For a range of forms of incrementalism are identified in *Hosking* and each form receives support from at least one judge in that case (though no single mode attracts majority support). Having identified the spectrum, Whata J then formulates his own position as to the mode of incrementalism appropriate in this case and ultimately stakes out a position similar to that which Tipping J adopts in *Hosking*. Had Whata J not paid such detailed attention to *Hosking*, he might only have felt able to adopt the narrower incremental mode favoured by the leading judgment in that case (that of Gault P and Blanchard J). This is despite the fact that there is actually no majority support for the narrower incremental mode in *Hosking*: Gault P and Blanchard J support it, but Keith and Anderson JJ reject it as permitting too much legal development (that is, they see it as too activist), whilst Tipping J prefers a wider mode enabling greater development.

*Jones* is also not the end of the story in Canada. In 2016, the Ontario Superior Court recognised another new privacy tort – public disclosure of private facts – in the case of *Jane Doe*.<sup>145</sup> The case concerned something we would today identify as ‘revenge pornography’. The defendant uploaded a private, sexual video of the plaintiff to a pornographic website and shared the video around various of his and the plaintiff’s acquaintances. The plaintiff’s claims in

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<sup>140</sup> *Id.* 583.

<sup>141</sup> John Craig’s ‘principled approach’ to common law development – which shares core features with Dolding and Mullender’s wide incrementalism – is actually cited approvingly in the judgment. See Craig, *supra* note 93, cited in *Jones supra* note 123, [46].

<sup>142</sup> Dolding and Mullender, *supra* note 55, 16.

<sup>143</sup> *C v Holland supra* note 5. *Holland* involved the voyeuristic video-recording of the plaintiff in the bathroom of a flat she shared with the defendant.

<sup>144</sup> *Hosking v Runting* [2004] NZCA 34, [2005] 1 NZLR 1. In *Hosking*, the New Zealand Court of Appeal recognised a ‘private facts’ tort distinct from the equitable doctrine of confidence. It left open the question of whether further novel privacy torts would be recognised in future.

<sup>145</sup> *Doe supra* note 6.

breach of confidence and intentional infliction of emotional distress succeeded. For our purposes, however, the most significant part of the case is the court's determination of the claim for invasion of privacy. Stinson J considers the *Jones* intrusion tort in detail, but is disinclined to shoe-horn the facts of *Doe* into it, instead recognising another novel tort: 'While the facts of this case bear some of the hallmarks of the tort of "intrusion upon seclusion", they more closely fall within Prosser's second category: "Public disclosure of embarrassing private facts about the plaintiff"'.<sup>146</sup>

The Ontario Court of Appeal's decision to adopt the wide incremental mode in *Jones* thus firmly establishes the legitimacy of that developmental mode. It sets the tone for subsequent developments in Ontarian (and, in all likelihood, broader Canadian) privacy law. Before we draw our conclusions, however, we must briefly say something about the coherence of the courts' preferred modes of incrementalism with tort law more broadly in the jurisdictions upon which we have dwelt.

## 7 Incremental (in)coherence

When we contrast the prevailing mode of incrementalism in privacy cases in England and Wales with that which underpins the *Jones* judgment, it is plain to see that the former is significantly more restrictive than the latter. Given this, it is worth considering whether this reflects a broader jurisdictional divergence in our understandings of what incrementalism ought to involve.

The *Jones* and *Doe* cases fit well within broader Canadian tort law in adopting wide incrementalism. Negligence law in Canada has long been more open to novel categories of claim than English and Welsh negligence law; the *Anns* test, derided by many<sup>147</sup> and eventually abandoned by the English and Welsh courts for being too open to novel claims,<sup>148</sup> still forms the basis of Canadian negligence law today (albeit in a modified form with reduced scope for activism).<sup>149</sup>

But the narrow incrementalism on display in English and Welsh privacy cases does not sit anything like so well within broader English and Welsh tort law. Negligence law, in this jurisdiction, has long embraced wide incrementalism. The Supreme Court recently confirmed this expressly in *Robinson v Chief Constable of West Yorkshire*.<sup>150</sup> In *Robinson*, the court discussed the incremental method in detail in the context of novel duty of care cases.<sup>151</sup> The court makes plain that, in the absence of tightly analogous precedent, courts should consider whether broader, underlying legal principles indicate a way forward. This is one hallmark of wide incrementalism. Moreover, if no clear principle settles matters, the courts are further directed to have regard to (even broader) policy considerations – matters that once found expression in the trite 'fair, just and reasonable' limb of *Caparo*.<sup>152</sup> Thus the Supreme Court plainly envisages situations arising in which the absence of tightly (or even somewhat less tightly) analogous precedent *does not* constitute a Razian exclusionary reason militating against the recognition of a novel category of liability. Such situations have arisen in negligence. For

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<sup>146</sup> *Id.* [41]. See further Prosser, *supra* note 90.

<sup>147</sup> See Joseph C Smith and Peter Bums, 'Donoghue v Stevenson – The Not so Golden Anniversary' (1983) 46 *Modern Law Review* 147; Richard Kidner, 'Resiling from the *Anns* Principle: The Variable Nature of Proximity in Negligence' (1987) 7 *Legal Studies* 319, 322–4.

<sup>148</sup> *Murphy v Brentwood* [1991] 1 AC 398.

<sup>149</sup> *Cooper v Hobart* [2001] 3 SCR 537, 2001 SCC 79. See Jason Neyers, 'Distilling Duty: the Supreme Court of Canada Amends *Anns*' (2002) 118 *Law Quarterly Review* 221.

<sup>150</sup> *Robinson supra* note 72.

<sup>151</sup> See Donal Nolan, 'The Duty of Care after *Robinson v Chief Constable of West Yorkshire Police*' (2018) 9 UK Supreme Court Yearbook 1.

<sup>152</sup> *Caparo supra* note 71.

example, in *Watson v BBC*, the court recognised a novel duty of care to provide ringside medical equipment at a boxing match, opening up a novel duty category.<sup>153</sup>

A further point of comparison is provided by defamation law. In Canada, a public interest defence to defamation – responsible communication on matters of public interest – was recognised in *Grant v Torstar*.<sup>154</sup> *Grant* was itself a combined appeal bringing together two cases: *Grant* itself and *Cusson v Quan* (both emanating from Ontario). In *Cusson*, the Ontario Court of Appeal – once again with Sharpe JA giving the leading judgment – had recognised a *sui generis* public interest defence in much the same terms that eventually formed the Supreme Court’s judgment in *Grant*.<sup>155</sup> What is key about this for our purposes is the acknowledgement that the defence was *sui generis* (that is, that it was not a mere extension of an existing defence).<sup>156</sup> The Supreme Court in *Grant* makes this explicit when McLachlin CJ states, in a one-sentence paragraph dedicated solely to making the point, that responsible communication ‘should be viewed as a new defence, leaving the traditional defence of qualified privilege intact.’<sup>157</sup>

In England and Wales, the broadly equivalent case in defamation was the House of Lords’ *Reynolds* decision, which established the eponymous defence.<sup>158</sup> In *Reynolds* itself, the House of Lords constructed its judgment in a manner reminiscent of its approach (a few years later) in *Campbell*. The House characterised the nascent defence as a mere extension of the older doctrine of common law qualified privilege, and declined to expand it into a broad defence protecting any political speech on the basis that to do so would be too radical an extension of the existing doctrine.<sup>159</sup>

But, ultimately, *Reynolds* came to be regarded as a *sui generis* defence. Judicial suggestions that the *Reynolds* defence was *sui generis* emerged in the Court of Appeal in *Loutchansky*.<sup>160</sup> Subsequently, in *Jameel*, Lord Hoffmann agreed with the *Loutchansky* view of *Reynolds* privilege as a *sui generis* defence and remarked that ‘[i]t might more appropriately be called the Reynolds public interest defence rather than privilege’.<sup>161</sup> Baroness Hale agreed with Lord Hoffmann, saying ‘[i]t should by now be entirely clear that the Reynolds defence is a “different jurisprudential creature” from the law of privilege.’<sup>162</sup> Meanwhile, leading textbooks were also suggesting that *Reynolds* was *sui generis*. *Gatley on Libel and Slander* (eleventh edition) noted that *Reynolds* privilege is ‘of a very different nature from the “classical” privilege founded on a relationship [between the parties]’.<sup>163</sup> *Carter-Ruck on Libel and Privacy* stated that ‘the better view is that *Reynolds* privilege is a different type of privilege from traditional qualified privilege’.<sup>164</sup> Lord Phillips (who had himself coined the ‘different jurisprudential creature’ description in *Loutchansky*) later characterised *Reynolds* as *sui generis*

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<sup>153</sup> *Watson v British Board of Boxing Control* [2000] EWCA Civ 2116, [2001] QB 1134.

<sup>154</sup> *Grant v Torstar* 2009 SCC 61 [2009] 3 SCR 640.

<sup>155</sup> Sharpe JA gave this defence the name ‘responsible journalism’, taking the nomenclature from the *Reynolds* defence. See *Cusson v Quan* 2007 ONCA 771; 87 OR (3d) 241, [139].

<sup>156</sup> *Id.* [32].

<sup>157</sup> *Grant supra* note 154, [95].

<sup>158</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

<sup>159</sup> *Id.* 200–203 (Lord Nicholls), 212 (Lord Steyn), 219–20 (Lord Cooke).

<sup>160</sup> *Loutchansky v Times Newspapers Ltd* [2001] EWCA Civ 1805, [2002] QB 783, [32]–[33], [35].

<sup>161</sup> *Jameel v Wall Street Journal Europe* [2006] UKHL 44, [2007] 1 AC 359, [46]. Somewhat oddly, given his judgments in *Wainwright* and *Campbell*, Lord Hoffmann gave no hint that he saw anything illegitimate in the courts having recognised a *sui generis* public interest defence significantly at variance with traditional qualified privilege.

<sup>162</sup> *Id.* [146], quoting from *Loutchansky supra* note 154, [35].

<sup>163</sup> *Gatley on Libel and Slander* (eleventh edn, Thompson Reuters 2008) 439.

<sup>164</sup> *Carter-Ruck on Libel and Privacy* (6th edn, London, LexisNexis 2010) 291.

in the Supreme Court case of *Flood v Times Newspapers Ltd* – over a decade after the *Reynolds* case.<sup>165</sup>

What we have uncovered is that, in Canada, the recognition of the *Jones* intrusion tort, and the subsequent *Doe* private facts tort, fits coherently with the developmental methodology employed by the courts in other areas of tort law. But in England and Wales, the development of the *Campbell* MPI doctrine stands apart from the methodology utilised in other branches of tort, including negligence and defamation. Intrusion torts have been recognised in jurisdictions that embrace wide incrementalism (including Canada and New Zealand). But in England and Wales, the rigid adherence to narrow incrementalism, attributable to the predominance of a formalistic conception of the judicial role, inhibits the development of such a tort.

It may be that, one day, *Campbell* comes to be seen as a *sui generis* tort, which – by a process of reasoning backwards – might lead to a re-characterisation of the decision as an instance of wide incrementalism. But the evidence suggests that is not yet happening, and it would be a difficult case to make.<sup>166</sup> In the only litigation to have considered directly whether the *Campbell* MPI doctrine is distinct from the equitable doctrine of confidence, *Vidal-Hall v Google, Inc*, both the High Court<sup>167</sup> and Court of Appeal<sup>168</sup> held that it was indeed distinct. But neither court was able to explain *how*, as a matter of formal law, MPI emerged as a separate ‘tort’. This suggests that neither court was willing to countenance the idea that the House of Lords had ‘created’ a novel tort by operating in the wide incremental mode (in a manner that could be described as amounting to a ‘radical’ development). Moreover, even in recent privacy cases, the *Wainwright* mantra – that the courts will not recognise a novel tort of privacy but will only develop existing causes of action – continues to be rehearsed.<sup>169</sup> This indicates that the perceived ‘formal barrier’ to the recognition of an intrusion tort, which leads to the courts operating in the narrow rather than wide incremental mode, continues to exert considerable force over English and Welsh privacy law.

## 8 Conclusion

English and Welsh law does not have a tort of intrusion. Canadian law does. But the important question is not whether Canadian law is therefore better than English and Welsh law. The important question is *why* English and Welsh law lacks such a tort. In order to answer that question, it helps to understand *how* Canadian law has come to have such a tort. We have located a clear methodological difference between the two jurisdictions in respect of privacy. Whilst English and Welsh privacy law has developed along narrow incremental lines, Canada has embraced the more ‘activist’ wide incremental method. Through our examination of the cases upon which we have dwelt, we have shown this methodological difference to have played a central role in the substantive difference vis-à-vis the existence of intrusion torts that persist between these two jurisdictions. The notion of incrementalism that prevails in a particular jurisdiction is crucial to the potential for developing novel heads of liability at common law.

This means that we are in a position to say that *one* significant reason why English and Welsh law continues to display a lacuna in respect of ‘pure’ intrusions into privacy is the

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<sup>165</sup> *Flood v Times Newspapers Ltd* [2012] UKSC 11, [2012] 2 WLR 760, [38].

<sup>166</sup> Even if the *Campbell* doctrine (MPI) did come to be seen as *sui generis*, there is no suggestion that it could apply in circumstances that do not involve some sort of information-based wrongdoing; it seems unlikely at this point that the courts will further develop the law to embrace ‘pure’ intrusions. But if the courts did so, that would be evidence of wide incrementalism in English and Welsh privacy law.

<sup>167</sup> *Vidal-Hall v Google, Inc* [2014] EWHC 13 (QB), [2014] 1 WLR 4155.

<sup>168</sup> *Vidal-Hall v Google, Inc* [2015] EWCA Civ 311, [2016] QB 1003.

<sup>169</sup> See, for example, *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB), [2014] EMLR 24, [19]; *Fearn v The Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch), [172].

prevailing methodology of its courts when operating in this field. The predominance of narrow incrementalism results, inevitably, in the lacuna. Moreover, we have been able to attribute the predominance of this methodology to a particular, restrictive conception of the judicial role which is itself derived from a classically formalist understanding of the rule of law. This diagnosis should enable us to drive debate in this field forward.

The diagnosis also means we are in a position to start sketching out a solution to the intrusion lacuna. Merely arguing that an intrusion tort should be developed, and even that it ought to be ‘incrementally’ developed, will not get us past the formal barrier blocking the recognition of such a tort. What is needed is a more detailed and nuanced appreciation of the impulses that lie behind the methodology which results in the formal barrier, such that those impulses themselves may be challenged.

Formalism promises certainty. But it fails abjectly to deliver it. English and Welsh law’s rigid insistence on shoe-horning all privacy claims into a single, ill-fitting vehicle – the doctrine of ‘misuse of private information’ – has actively encouraged unforeseeable and formally suspect developments within that doctrine.<sup>170</sup> Moreover, narrow incrementalism is nothing like so overtly predominant in other areas of tort law. This fact – that there is no single prevailing methodology for developing the common law applicable across the entirety of the tort law spectrum (let alone across all of private law, still less across private *and* public law) – further demonstrates formalism’s failure to deliver certainty. When privacy and defamation law are developing along different methodological lines within the same jurisdiction, formalism clearly does not have a firm grip on proceedings.

Still further, the very notion that judges should limit themselves to making ‘small’ changes to existing doctrine and avoid making ‘radical’ ones (and other similarly-worded injunctions) is itself wholly under-determinate and ultimately reliant on judicial intuition. This goes against everything that formalism counsels. It may well be that reliance upon judicial intuition in respect of the limits of judges’ legitimate law-making powers is inevitable, since (a) we are dealing with a human practice, and (b) that practice is deliverable only through systems of language that are open-textured.<sup>171</sup> But if that is the case – and it appears to be so – then the formalist quest for certainty is doomed to fail. Doctrinal developments that occur in furtherance of it are built on sand.

The development of an intrusion tort in Ontario, followed as it has been in New Zealand, shows a way forward. Canadian judges are every bit as attentive as British judges to the need to strike some sort of balance between the competing yet incompatible demands of maintaining legal certainty and ensuring justice is done in each individual case. Indeed, Robert Sharpe, who gave the judgment in *Jones*, has recently devoted a whole book to discussing his approach to that very balance.<sup>172</sup> Canada’s constitutional background is much like the UK’s. Its human rights framework – the *Charter* – operates in much the same way as our Human Rights Act. Its judges are schooled in the same common law tradition. Its judicial institutions are based on the same, precedential, adversarial system as ours. But Canada has moved beyond ‘blind and empty formalism’.<sup>173</sup> English and Welsh law has done so too, in other fields. Now it must do so in privacy. For that is the only way to a common law tort of intrusion.

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<sup>170</sup> See Thomas DC Bennett, ‘Privacy, third parties and judicial method: *Wainwright*’s legacy of uncertainty’ (2015) 7(2) *Journal of Media Law* 251, and ‘Judicial Activism’ *supra* note 14.

<sup>171</sup> Herbert LA Hart, *The Concept of Law* (3rd edn, OUP 2012) 124 ff.

<sup>172</sup> Robert J Sharpe, *Good Judgment: Making Judicial Decisions* (University of Toronto Press 2018).

<sup>173</sup> *Vetrovec v R* [1982] 1 SCR 811, 823 (Dickson J).