



City Research Online

City, University of London Institutional Repository

Citation: Bennett, T. (2022). Confidence, privacy, and incoherence. *The Journal of Media Law*, 14(2), pp. 245-256. doi: 10.1080/17577632.2022.2139571

This is the published version of the paper.

This version of the publication may differ from the final published version.

Permanent repository link: <https://openaccess.city.ac.uk/id/eprint/29086/>

Link to published version: <https://doi.org/10.1080/17577632.2022.2139571>

Copyright: City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

Reuse: Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

ISSN: (Print) (Online) Journal homepage: <https://www.tandfonline.com/loi/rjml20>

Confidence, privacy, and incoherence

Thomas D. C. Bennett

To cite this article: Thomas D. C. Bennett (2022): Confidence, privacy, and incoherence, Journal of Media Law, DOI: [10.1080/17577632.2022.2139571](https://doi.org/10.1080/17577632.2022.2139571)

To link to this article: <https://doi.org/10.1080/17577632.2022.2139571>



© 2022 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group



Published online: 02 Nov 2022.



Submit your article to this journal [↗](#)



View related articles [↗](#)



View Crossmark data [↗](#)

Confidence, privacy, and incoherence

Thomas D. C. Bennett

City Law School, City, University of London, London, UK

KEYWORDS Privacy; confidentiality; tort; equity; common law

Introduction

*Bloomberg v ZXC*¹ is only the fourth case in the (apparently²) tortious action known as ‘misuse of private information’ (MPI) to reach our highest court.³ And yet, it is entirely arguable that *Bloomberg* ought not to have been pleaded in MPI in the first place. *Prima facie*, its facts fall within the well-known *Spycatcher*⁴ formulation of the equitable action for breach of confidence (BoC). Pleading it in MPI, whilst plausible, gives rise to a wholly unnecessary debate about the relationship between our primary privacy-protecting tort and its reputation-protecting counterpart. Simply pleading the case in BoC would have avoided this. But the case was pleaded in MPI only and dealt with on that basis by the High Court, Court of Appeal and Supreme Court. Clearly, claimant counsel were convinced this was either the only or best way to put the case. This leaves us, however, with more questions than answers. For it further obscures the already murky relationship between MPI and BoC, making it even more difficult than it had already become to determine precisely what the formal lineage of each is.

2The desirability of formal coherence is often prayed in aid by jurists and legal scholars alike as an important component of the rule of law.⁵ It may be

CONTACT Thomas D. C. Bennett  thomas.bennett.2@city.ac.uk

¹[2022] UKSC 5, [2022] 2 WLR 424.

²I have written elsewhere that the judicial reasoning that led the High Court and Court of Appeal to pronounce the action for MPI a ‘tort’ in *Vidal-Hall v Google* is unconvincing. (*Vidal-Hall v Google Inc* [2014] EWHC 13 (QB), [2014] 1 WLR 4155 (High Court), and [2015] EWCA Civ 311, [2016] QB 1003 (Court of Appeal)). As a result, whilst MPI is being treated as a tort by English courts and legal practitioners, it is far from clear that this is formally appropriate. See TDC Bennett, ‘Judicial Activism and the Nature of “Misuse of Private Information”’ (2018) 23 Communications Law 74.

³The others being *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457; *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1; and *PJS v NGN Ltd* [2016] UKSC 26, [2016] 1 AC 1081.

⁴*AG v Observer Ltd* [1990] 1 AC 109 (*‘Spycatcher’*).

⁵See e.g. *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406, [26] and [31–34] (Lord Hoffmann), and J Raz, *The Authority of Law* (OUP 1979); *Practical Reason and Norms* (Princeton University Press 1990).

© 2022 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group

This is an Open Access article distributed under the terms of the Creative Commons Attribution-NonCommercial-NoDerivatives License (<http://creativecommons.org/licenses/by-nc-nd/4.0/>), which permits non-commercial re-use, distribution, and reproduction in any medium, provided the original work is properly cited, and is not altered, transformed, or built upon in any way.

that this desirability is overplayed. But so long as those driving the development of the doctrine in this field continue to make the case for formal coherence, it behoves us to expose the formal incoherencies in the doctrine they are producing. For to do so furthers the project of exposing formalism as an unworkable, mythical ideal. As I argue in this short essay, the relationship between MPI and BoC is fundamentally incoherent at the formal level, in ways that cannot be fully resolved. The best that may be formally achieved is to develop, through a process of rational reconstruction, a less incoherent rationalisation of MPI's formal basis. Doing this, however, will require hard choices to be made.

A story we all know ...

Those reading will doubtless know the widely-accepted story of how MPI came into being, for it is repeated everywhere from university lectures to student textbooks and practitioner handbooks, as well as in many an article in a scholarly journal. According to the popular story, it happened this way.

Once upon a time, there was an equitable doctrine called 'breach of confidence', which was mainly used for protecting trade secrets. Around the latter quarter of the twentieth century, inventive counsel started using confidence law to gain incidental protection for individuals' privacy interests – by fitting claims to do with people's privacy into the contours of the confidence doctrine.⁶ But the confidence doctrine remained rather limited in the protection it could offer for privacy interests – not least because what is 'confidential' is not the same as that which is 'private'. Then along came a Very Big Case called *Spycatcher*, in which the House of Lords took the opportunity to remould the elements of the confidence doctrine in a significant way: no longer would a pre-existing relationship of confidence between the parties be a pre-requisite; so long as the information was 'obviously confidential', an obligation to keep it confidential could attach to anybody who came across it. Without the need for a pre-existing relationship of confidence, the doctrine of confidence could now be deployed routinely against the media in order to protect privacy interests. And this is exactly what happened through the 1990s, whilst the governments of the day quietly discarded opportunities to legislate for better privacy protection, until, in 2000, the Human Rights Act 1998 came into force.

Thereafter, with judges 'pen-poised to develop a law of privacy',⁷ a number of academics had a Very Big Argument about 'horizontal effect', which the judges broadly ignored.⁸ In 2004, a case pleaded in confidence

⁶E.g. *Stephens v Avery* [1988] Ch 449.

⁷Lord Irvine, HL Deb 24 November 1997, vol 583, col 784.

⁸For key contributions to this debate, see M Hunt, 'The "Horizontal Effect" of the Human Rights Act' [1998] PL 423; R Buxton, 'The Human Rights Act and Private Law' (2000) 116 LQR 48; W Wade, 'Horizons of Horizontality' (2000) 116 LQR 217; A Lester and D Pannick, 'The Impact of the Human Rights Act on

(but which was really to do with her privacy) was brought by Naomi Campbell against Mirror Group Newspapers.⁹ The House of Lords (citing the HRA as its impetus) developed the confidence doctrine into a privacy one.¹⁰ Or it relabelled the doctrine a privacy one.¹¹ Or it recognised that, really, what we used to call the equitable doctrine of confidence was really now to do with privacy.¹² And called it a tort.¹³ But still the House insisted that nothing radical was being done. That ‘our law cannot, even if it wanted to, develop a novel tort of privacy’.¹⁴

And then, now that our audience looks somewhat bemused, we quickly and loudly pronounce that ‘four years later’¹⁵ the House of Lords recognised that both ‘misuse of private information’ and ‘breach of confidence’ existed as separate causes of action,¹⁶ and everyone breathes a big sigh of relief. Thus, we now have two causes of action and that’s that.

There is a major problem with this story, however: it makes no formal sense.

And in reality, of course, the story’s conclusion – that we have two separate causes of action (one tortious, one equitable) – is not anything like as clear-cut as is often presented. Indeed, the High Court¹⁷ and Court of Appeal¹⁸ have subsequently had a very difficult time trying (and, surely, failing¹⁹) to demonstrate conclusively that MPI is a tort whilst BoC is not, for the purpose of adhering to some rather complicated procedural rules about out-of-jurisdiction service.

The effect of this is to leave our widely-accepted story in formal and conceptual tatters.

Private Law: The Knight’s Move’ (2000) 116 LQR 380; N Bamforth, ‘The True “Horizontal Effect” of the Human Rights Act 1998’ (2001) 117 LQR 34; D Beylerveld and S Pattinson, ‘Horizontal Applicability and Horizontal Effect’ (2002) 118 LQR 623; J Morgan, ‘Privacy, Confidence and Horizontal Effect: “Hello” Trouble’ [2003] CLJ 444; M Du Plessis and J Ford, ‘Developing the Common Law Progressively – Horizontality, the Human Rights Act and the South African Experience’ [2004] EHRLR 286. Later contributions of note include N Moreham, ‘Privacy and Horizontality: Relegating the Common Law’ (2007) 123 LQR 373; G Phillipson, ‘Clarity Postponed: Horizontal Effect after Campbell’ in H Fenwick, G Phillipson and R Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP 2007). A further contribution was made later by G Phillipson and A Williams, ‘Horizontal Effect and the Constitutional Constraint’ (2011) 74 MLR 878.

⁹(n 3).

¹⁰This was, broadly speaking, an idea suggested in an article by G Phillipson and H Fenwick. See ‘Breach of Confidence as a Privacy Remedy in the Human Rights Act Era’ (2000) 63(5) MLR 660.

¹¹*ibid* [14] (Lord Nicholls).

¹²*ibid*.

¹³*ibid*.

¹⁴*ibid* [133] (Baroness Hale).

¹⁵*Vidal-Hall* (CA) (n 2) [24].

¹⁶*OBG* (n 3).

¹⁷*Vidal-Hall* (HC) (n 2).

¹⁸*Vidal-Hall* (CA) (n 2).

¹⁹Bennett, ‘Judicial Activism’ (n 2).

Formal incoherence

Let us start with some logical, formal basics. Tort is part of the common law; its rules are common law rules. Equity, however, is a corrective to the common law, coming into play when the harsh effects of rigid common law rules need to be mitigated in the interests of fairness and – as the name suggests – *equity*.²⁰ Because equity exists to correct common law rules, it cannot give birth to common law rules; it is a ‘different jurisprudential creature’ (to borrow a phrase from another context²¹).

An equitable tree thus cannot grow a tortious branch, at least not whilst continuing to make formal sense. So when we are told that BoC was ‘developed’²² or ‘adapted’²³ into MPI, or that BoC ‘absorbed’²⁴ Arts.8 and 10 of the ECHR into itself and thus (somehow) transformed into MPI, these analyses are not compatible with what we have subsequently been told by the courts: that BoC and MPI are separate causes of action and that BoC is equitable while MPI is tortious.²⁵ That this is problematic is made abundantly clear by the deafening silence of the courts on precisely this point when it has been expressly considered. In *Vidal-Hall*, the Court of Appeal said this:

Although the process may have started as one of “absorption” ... it is clear that ... there are now two separate and distinct causes of action: an action for breach of confidence; and one for misuse of private information.²⁶

There is a glaring omission in this account: the Court of Appeal simply does not engage with the question of how, as a matter of formal law, this process of absorption resulted in the existence of two separate causes of action. It makes no attempt to explain this process – which it identifies as taking place sometime between the judgments of the House of Lords in *Campbell*²⁷ and *OBG*.²⁸ Instead, mimicking a common (and infuriating) technique for avoiding explanations found in Hollywood movies, the Court simply gives us a dramatic ‘[f]our years later ...’.²⁹ This is extraordinary. The courts, as an institution, are either incapable of explaining, or unwilling to explain, what precisely they have done as a matter of formal law when they expanded protection for individual privacy in the early 2000s. But it seems clear that, at a formal level, either the analysts are wrong in their understanding of how MPI came into being, or the courts are wrong in calling MPI a tort.

²⁰See also (n 36), below.

²¹*Loutchansky v Times Newspapers Ltd* [2001] EWCA Civ 1805, [2002] QB 783, [35].

²²*OBG* (n 3) [255] (Lord Nicholls).

²³*ibid*, [118] (Lord Hoffmann).

²⁴*A v B plc* [2003] QB 195, [4] (Woolf CJ); *Vidal-Hall* (Court of Appeal), n 2, [21].

²⁵*Vidal-Hall* (n 2).

²⁶*ibid*, [21] (Court of Appeal).

²⁷*Campbell* (n 3).

²⁸*OBG* (n 3).

²⁹*Vidal-Hall* (n 2), [24] (Court of Appeal).

The second basic formal matter to which we must attend is the question of what happens to causes of action once their elements have been reformulated. Does the newer formulation replace the older, or does it become an additional option?

By the time *Campbell* came around, BoC had already been through a number of evolutions, culminating – formally, at least – in the *Spycatcher* formulation. If, post-2004, MPI has taken over the responsibility for dealing with cases involving personal privacy, what has happened to the elements of BoC? Have they continued to develop, keeping pace with MPI as a parallel doctrine, as we are told by the Court of Appeal in *Tchenguiz*?³⁰ Or have they remained in their pre-*Campbell*, *Spycatcher* formulation? Or, just maybe, have they reverted to their pre-*Spycatcher* formulation – the classic trilogy of elements from *Coco v AN Clark*³¹ – on the basis that the *real* point at which the ‘new branch’ started forming was the point at which counsel started pleading confidence in order to protect privacy and that, therefore, everything that happened during that period of development (including *Spycatcher*) is part of MPI’s lineage, not BoC’s?

The latter possibility might explain the decision to plead *Bloomberg* in MPI rather than BoC. For under the *Spycatcher* formulation of confidence, ZXC appeared to have a strong case: the information obtained by Bloomberg in the Letter of Request was ‘obviously confidential’ and yet it was published by Bloomberg to ZXC’s detriment. Thus, we must consider whether this is plausible.

The evidence suggests that, in the normal course of things, newer formulations of *torts* replace older ones, which then no longer form part of the jurisprudence associated with the particular cause of action. Consider: the reworking of the strict liability tort from *Rylands v Fletcher*³² in *Cambridge Water*,³³ in which the House of Lords added a remoteness element to the tort, replaces rather than provides an alternative to the older formulation. Claimants do not have an option in respect of satisfying the remoteness element – it has become a requirement. Similarly, in defamation, the reformulated defence of ‘honest comment’³⁴ replaced its predecessor, ‘fair comment’; the two did not exist in parallel.³⁵

But equity does not work this way. Since equitable rules are exceptions and mitigations to common law rules, additional ones can be recognised without necessarily replacing older ones. This is because equity does not develop in the same way that the common law develops; it *reacts* to

³⁰*Tchenguiz v Imerman* [2010] EWCA Civ 908, [2011] 2 WLR 592.

³¹*Coco v AN Clark (Engineers) Ltd* [1968] FSR 415.

³²*Rylands v Fletcher* (1868) LR 3 HL 330.

³³*Cambridge Water Co Ltd v Eastern Counties Leather Plc* [1994] 2 AC 264.

³⁴*Joseph v Spiller* [2010] UKSC 53, [2011] 1 AC 852, [117].

³⁵‘Honest comment’ was, of course, subsequently replaced statutorily by ‘honest opinion’ under s 3 Defamation Act 2013.

developments in the common law and changes in social and political context.³⁶ So there is no reason in principle why BoC, if it is indeed an equitable doctrine distinct from MPI, cannot continue to be pleaded in both its *Coco* and *Spycatcher* formulations. The decision not to do so, therefore, remains puzzling.

Writing in an earlier volume of this journal, Robert Craig and Gavin Phillipson attempt in formal terms to explain the decision to plead ZXC in MPI rather than BoC.³⁷ Their explanation is that the decision in *Axon v Ministry of Defence* effectively precludes such a claim in BoC, since any duty of confidence is owed to the producer of the information rather than its subject.³⁸ This explanation, however, is not wholly convincing. For *Axon* is a single, High Court decision that considers this particular point of law over the space of just three paragraphs, citing only two authorities in support of its conclusion that no duty of confidence was owed. The first authority is the 1969 Court of Appeal decision in *Fraser v Evans*.³⁹ *Fraser* is readily distinguishable on its facts from ZXC on the basis that the document to which it relates, which was prepared by its author for and on the instructions of the Greek government, contained no confidential information relating to the author himself. The plaintiff, thus, was not the *subject* of the information. The second authority, the 2013 High Court decision in *Abbey v Gilligan*, is similarly concerned with a claimant who was not the subject of the information and thus suffered no harm by its publication.⁴⁰ By contrast, in ZXC, the claimant is himself the subject of the information. Under these circumstances, the *Spycatcher* principle – which, by virtue of its later date and its issuance by the House of Lords, would in any event supersede *Fraser* in respect of ‘obviously confidential’ information – clearly indicates that the subject of confidential information has a good claim in BoC. On this analysis, the brief reference to this point of law in *Axon* ought to be treated with caution in cases like ZXC, in which the material facts are fundamentally different.

³⁶Writing in this issue, Robert Craig presents a rather different view of equity and its relationship to the common law. He argues that equity is actually superior to the common law. In so-doing his essay calls to mind the judgment in the *Earl of Oxford's Case* (1615) 1 Ch Rep 1 which held that, in instances where equity and the common law come into conflict, equity prevails. But the fact that equity is preferred to the common law in instances of conflict is a pragmatic measure designed to ensure that particular, undesirable outcomes that the common law *prima facie* requires can be avoided. It does not necessarily follow that equity is a superior form of law; it is merely preferred, pragmatically, in certain circumstances. Moreover, it must be remembered that equity is not in itself a complete system of law. It is by its very nature parasitic on the common law; if the common law was removed, equity would have nothing upon which to bite, and its coverage would be sparse. As such, Craig's position on these matters lies – as he himself admits – well beyond orthodoxy.

³⁷R Craig and G Phillipson, ‘Privacy, Reputation and Anonymity Until Charge: ZXC Goes to the Supreme Court’ (2021) 13 *Journal of Media Law* 153, 171.

³⁸[2016] EWHC 787 (QB); [2016] EMLR 20.

³⁹[1969] 1 QB 349.

⁴⁰[2012] EWHC 3217 (QB); [2013] EMLR 12.

Time for a new story

The relationship between BoC and MPI is marked by its formal incoherence. We have repeatedly rehearsed a story whereby BoC ‘morphed’⁴¹ into MPI in the *Campbell* case. But this story is obviously incompatible with subsequent judgments which have insisted that BoC and MPI now co-exist as two, separate doctrines. In a variant of this story, we are told that MPI grew out of BoC, as if MPI is a new branch of the BoC tree. This, again, makes little formal sense. For if the BoC tree is equitable – because BoC is an equitable action – then MPI would, surely, also be equitable. Yet we have been told – repeatedly – that MPI is tortious. As a matter of formal taxonomy, common law torts cannot grow out of equitable doctrines, because equitable rules exist as correctives to mitigate undesirable outcomes in the common law.⁴² They are of a fundamentally different order to common law rules.

At this point, then, it starts to become clear that the story we have been told before and which we have, as a collective of privacy scholars and practitioners, been retelling for the best part of twenty years, must be substantially re-written if it is to achieve any significant degree of formal coherence (something that formalists typically insist is necessary). There is not enough space to produce a detailed re-write of that sort here. But what I can do is tentatively (and non-exhaustively) sketch out three possible new storylines that we might contemplate exploring, each of which brings with it difficult formal compromises.

(1) MPI is a *sui generis* tort.

If we tell this story, we assert that MPI is a novel cause of action in tort that bears no formal relation whatsoever to BoC, although it undoubtedly takes some inspiration from BoC jurisprudence. The House of Lords created this new cause of action in *Campbell* – despite their Lordships insisting loudly that they were doing no such thing – something we can now detect only with the benefit of hindsight.

The benefit of this story is its simplicity and the fact that, if it is accepted, most of the other problems we have identified fall away. BoC can continue to exist and develop along its own equitable path (as we have been told that it does), whilst MPI carves out a place for itself in tort jurisprudence. The dis-benefit of this story is that it portrays the judges of our highest court in a less than flattering light. For either they fundamentally misunderstood what they were doing in *Campbell*, or they deliberately set out to mislead.

⁴¹G Phillipson, ‘The Common Law, Privacy and the Convention’ in H Fenwick, G Phillipson and R Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP 2007) 217.

⁴²See (n 36), above.

This story also does not resolve the question of just what the modern formulation of BoC is – that is, whether it continues to develop in lock-step with MPI⁴³ (and is thus capable of protecting personal privacy interests as well as confidential information), or whether it has reverted to an earlier formulation (and, if it has, *which* formulation⁴⁴). This conundrum may well, as we noted earlier, be answered by reference to the fact that equity develops differently from tort and later formulations need not overwrite earlier ones. But the point is that this story about MPI does not *automatically* give us that answer; it is a separate, though related, inquiry.

(1) MPI is not in fact tortious, but equitable.

This story involves returning to the story that was popularly being told in the immediate aftermath of the *Campbell* case (i.e. in the early-mid 2000s). According to this story, there was one, single cause of action – breach of confidence – and it was equitable. There are two variants of this story that might emerge. On one possible account, there is still only one doctrine, which has been relabelled as MPI. On the other, there are two, equitable causes of action existing in parallel and covering slightly different scenarios; one concerns confidences as traditionally understood and one is the extended, post-HRA action that attends to matters of privacy arising under Art.8 ECHR.

The benefits of this story are twofold. First, it resolves the incoherence that results from the suggestion that an equitable action has given birth to a tort by abandoning that suggestion entirely. Second, since this action would arise in equity's exclusive jurisdiction (rather than in its auxiliary jurisdiction), injunctive relief would be available without the need to consider the potential adequacy of damages (since damages, being a common law remedy, would not be available).

Moreover, the distinction between the two possible variants of this story might be of limited (if any) significance. For whilst, in tort, a later variant of a cause of action replaces an earlier one, we have already noted that this is not necessarily the case in equity, which – as a body of rules – works differently. So the issue of just how many causes of action now exist may be one that we no longer need to trouble ourselves with.

The disbenefits of this story, however, are substantial. First, it would upend every single judicial assertion – and by now we have had several – that MPI is tortious. Entire claims, such as that issued overseas as a result of the procedural decision in *Vidal-Hall* would be shown to be

⁴³The Court of Appeal appears to suggest this should happen in *Tchenguiz*, n 29, at [67]: '... [T]he law should be developed and applied consistently and coherently in both privacy [MPI] and "old fashioned confidence" [BoC] cases, even if they sometimes may have different features'.

⁴⁴For example, the formulation from *Spycatcher* (n 4) or that from *Coco* (n 30).

fundamentally flawed. Second, the basis of any monetary awards for BoC/MPI would not be (and never would properly have been) tortious damages, but equitable compensation instead. Whilst this distinction might be lost on tort lawyers, scholars of equity consider it highly significant.⁴⁵

- (1) BoC (in its mid-twentieth century revival version, at least) was not actually equitable, but a tort.

This would be another radical reworking of the story. For the precise formal basis for BoC has always been murky (as Richardson et al explain in great detail⁴⁶). Throughout its history, courts have frequently resorted to insisting that the doctrine is equitable, and that it fastens on to the ‘conscience’ of the confidant, but without giving much detail as to the precise basis upon which equity sees the obligation of confidence as having arisen.⁴⁷ It seems that the courts have largely brushed under the carpet any sense that BoC as a doctrine needs to be rationalised. Instead, they rely on vague and abstract assertions of its equitable nature, invoking the doctrine’s long history but not examining that history in any detail.

Generally, it seems that BoC is thought to be equitable because it provides a mechanism for obtaining a remedy (particularly injunctive relief) where D unjustly enriches himself at C’s expense by breaching a confidence. But since

⁴⁵Craig, writing in this issue, reaches a conclusion that essentially adopts and endorses the key features of this particular story, notwithstanding the critical tenor of his preceding analysis. In his version, however, the Human Rights Act 1998 and the Art 13 ECHR right to an adequate remedy play a substantial role in the development of MPI as an equitable action with a tortious remedy (damages) grafted on to it. He argues that the presence of Art 13, coupled with the s 6 HRA ‘duty ... to protect human rights’ is what ‘led’ the courts to permit damages awards in an otherwise equitable doctrine. There are two difficulties with this argument.

First, s 6 HRA does not formally impose a duty quite of the sort Craig describes; rather it prohibits the courts from ‘acting’ incompatibly with ECHR rights. In a horizontal case, this means that the courts must develop the common law (or, perhaps, equitable doctrine) in order to protect Convention rights *where the established limits of judicial creativity* – ‘incrementalism’, in common law parlance – *permit*. This, as Phillipson and Williams have written (n 8, above), is a clear constitutional principle. But where doing so would require the unorthodox and apparently unprecedented manoeuvre of grafting common law remedies onto an equitable doctrine and thereby reversing the established consensus that equity mitigates the common law, this would arguably go beyond the normal limits of incrementalism and may thus fall outside the statutory obligation upon which Craig fastens his analysis.

Second, there is no indication in the leading MPI cases, including *Campbell* (in which the MPI doctrine first emerged), that the courts have ever taken the s 6 and Art 13 obligation together to reach this result in the way Craig suggests. Indeed, there appears to be no case in which the courts have expressly linked s 6 and Art 13 in this way in any field of domestic law.

Moreover, Craig’s own insistence that we must attend closely to ‘what the courts actually did’ rightly exhorts us to pay close attention to the judges’ own accounts of what they were doing. Thus, if the doctrine we are contemplating cannot be rationally reconstructed without departing so radically from the judges’ own accounts of what they were doing (and from the pleadings laid before the courts in the cases in which these developments occurred), the core argument I am making about the failure of formal coherence in this field is bolstered.

⁴⁶M Richardson et al, *Breach of Confidence: Social Origins and Modern Developments* (Edward Elgar 2012).

⁴⁷See e.g. *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] UKSC 31, [2013] 1 WLR 1556.

the fusion of the administration of the common law and equity in the courts, it has been possible to obtain equitable remedies in some traditionally common law causes of action – injunctive relief for the tort of private nuisance being an obvious example.⁴⁸ It might thus be possible to reimagine BoC not as an equitable action fastening onto D's conscience, but as a wrongful act in breach of a common law duty which arises in circumstances where D acquires confidential information.⁴⁹

The benefits of this story would, again, include a significant boost in terms of formal coherence. The objection to the 'classic' story that a tort cannot spawn from an equitable action would fall away. In its place, we would see MPI developing as an incremental extension of (what we would now be calling) the confidence tort; this development could take place either as a reformulating of a single doctrine or the recognition of a novel branch of the tort (in a not dissimilar fashion to the relationship between private nuisance and *Rylands*, or between assault and the rule in *Wilkinson v Downton*⁵⁰). It would also explain the availability of tortious damages for MPI, and equity's much more limited role of providing injunctive relief in cases where damages would be inadequate (for instance, at the interim stage, where most MPI claims come to an end) could be seen as a not uncommon exercise of its auxiliary, rather than exclusive, jurisdiction (providing an effective remedy).

The disbenefits, however, would again be significant. We would have to re-write much of our existing understanding of BoC in tortious language, and consider whether our retrospective reclassification of BoC as a tort might, by analogy, suggest further reclassifications for other equitable doctrines that revolve around obtaining restitution for wrongs. We would also have to accept that much of the early MPI jurisprudence contains significant formal errors. And, at some point, we would still need to choose whether to view BoC and MPI as a single cause of action, or as separate ones (for this story of MPI's origin is plausibly compatible with either). If BoC and MPI are conceived of as a single cause of action, the decision by counsel in *Bloomberg* to plead the claim only in MPI makes complete sense. But the judgments of the High Court and Court of Appeal in *Vidal-Hall* would have to be regarded as fundamentally unsound (and, indeed, wholly unnecessary).

Conclusion

We can tell any one of several possible stories about the development of MPI and its relationship, if any, to BoC. However, what should immediately be

⁴⁸*Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287.

⁴⁹Notably, the New Zealand Court of Appeal labelled the English doctrine of confidence a "tort" long before *Vidal-Hall* considered the matter. See *Hosking v Runting* [2004] NZCA 34, [2005] 1 NZLR 1, [42].

⁵⁰[1897] 2 QB 57.

clear is that the story we have been telling for years is wholly inadequate as a matter of formal law. For this most popular tale, whereby a tort of MPI grew out of equitable confidentiality, is riddled with incoherence. This incoherence has led to this bizarre situation in *Bloomberg* where a case that, on its face, is obviously to do with confidentiality gives rise not to a confidence claim, but a privacy one. Whilst the alternative stories that we could tell have numerous possible variants (far more numerous and nuanced, for sure, than we have been able to sketch out here), a fundamental choice must be made that leads us down one of three paths (towards different sets of these variants). Either we must accept MPI as a *sui generis* tort created by the House of Lords in *Campbell*, or we must reconceptualise BoC as a tortious doctrine out of which a related but distinct tort could plausibly grow, or we must consider MPI equitable. None of these options will sit comfortably with those – we can call them ‘formalists’ – who take seriously matters of legal taxonomy and certainty. But the formal incoherence which besets our existing tale of MPI’s development should sit equally – if not more – uncomfortably.

Like many scholars of a broadly ‘realist’ persuasion, I have no great attachment to formal coherence *per se*, and thus no great stake in which of these alternative stories might come to be regarded as preferable. I do not believe in ‘right’ answers to these sorts of questions. But given that a highly formalised notion of the rule of law – one that prioritises the maintenance of legal certainty (whatever that means) – has driven the courts to eschew judicial ‘activism’ to the extent that, in *Campbell*, the House of Lords ended up recognising MPI in such a murky fashion that it has become wholly unclear where exactly it came from,⁵¹ it is important that the resultant formal incoherence be exposed. For it is an abject failure of a formalistic approach to judging to achieve formalism’s most basic aims. And, moreover, it is one that has resulted in real world confusion – to the extent that learned counsel in *Bloomberg* clearly felt it necessary to plead a confidentiality case in a doctrine other than that of confidence.

The task facing us now, surely, is to try to patch up the formal law surrounding MPI, so that it is more (although it will probably never be fully) internally coherent; to tell a better story, even if we cannot tell a perfect one. This is not about rescuing formalism from itself, but rather about assisting those of us who live in a world that formal ideas about law continue to dominate to be able to comprehend the doctrines to which we are subjected. Doing this will likely mean exposing some judicial chicanery, or abandoning long-held beliefs about the nature of an age-old, supposedly equitable doctrine. Doing this may not be pleasant, and the choices it will entail are hard ones. But it is high time we made a start.

⁵¹Bennett, ‘Judicial activism’ (n 2).

Disclosure statement

No potential conflict of interest was reported by the author(s).

Notes on contributor

Thomas D. C. Bennett is a senior lecturer in law at City, University of London. He has written extensively on the law relating to personal privacy, and judicial methodology in elaborating the common law. He is the co-founder and co-host of The Media Law Podcast.