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Celebrity privacy and benefits of simple history

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Introduction

Is personal revelation the right of the subject alone or can others tell the story even without consent? The question lies at the heart of recent celebrity privacy cases. When Michael Douglas and Catherine Zeta-Jones claimed their wedding party had been intercepted by underground paparazzi with the photographs to be published in *Hello!*, their complaint was not that they should be let alone completely. Indeed they had contracted with *OK!* to give the public account of their celebration with carefully vetted authorised pictures. Yet they claimed their privacy was implicated and the equitable action for breach of confidence was the way to protect this; a claim partly and with some reservations accepted by the courts, which refused an interlocutory injunction[1] but subsequently allowed damages for the unauthorised publication (at the time suggesting the injunction should have been awarded).[2] When Naomi Campbell found herself the subject of an article in the *Mirror* revealing details of her treatment for a drug addiction, with covertly taken photographs in support, her essential complaint was that the story had been obtained and published without her knowledge or approval (although conceding that her own previous false accounts meant she was in no position to prevent telling about her addiction). Further, the House of Lords left her the option in finding her confidence breached.[3] In the New Zealand case of *Hosking* v. *Runting*, where a tort of public disclosure of private facts was recognised

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[1] *Douglas* v. *Hello! Ltd* [2001] QB 967.

[2] *Douglas* v. *Hello! Ltd* [2006] QB 125, approving in part the decision of Lindsay J in *Douglas* v. *Hello! Ltd* [2003] 3 All ER 996.

[3] *Campbell* v. *MGN Ltd* [2004] 2 AC 457.

(a doctrine rather similar to breach of confidence in other jurisdictions),[4] the Court of Appeal might have given a remedy against publication in *New Idea* of the defendant's surreptitious photographs of the normally self-publicising celebrity plaintiffs' family outing had the information been treated as private and confidential by the parties involved.[5] *Von Hannover* v. *Germany* involved a claim about Princess Caroline's entitlement to determine when aspects of her personal life should be told to the public through the press and when they should not – and although the European Court suggested the more serious violation of Article 8 of the European Convention on Human Rights[6] lay in the paparazzi's intrusive practices of constant surveillance, it also accepted this basic entitlement continued notwithstanding her celebrity status.[7]

The privacy claims in these cases seem far removed from the right to be 'let alone' talked of in classic texts.[8] Has the language of 'privacy' become a mask for protection of other interests not really to do with privacy at all – a de facto publicity right perhaps? Or is it rather that privacy can no longer, if ever it could, be simply about the right to be let alone? We contend the latter and, moreover, that the equitable breach of confidence doctrine is well-suited to embrace and sustain the controlled self-revelatory aspect of modern celebrity privacy cases. Nor should this surprise: early cases in which the doctrine was established were in subject matter, situations, themes, and even language more notable for their similarities with than differences from the recent cases.

Prince Albert v. *Strange*: a case study in celebrity privacy

The case of *Prince Albert* v. *Strange*[9] was, as Lord Cottenham LC said, distinguished more by the 'exalted station of the Plaintiff' than by any difficulty in the principle to be applied. Indeed, there were several.

[4] Especially those jurisdictions which accepted surreptitious obtaining as giving rise to a confidentiality obligation (a position New Zealand courts had ruled out): see Megan Richardson, 'Privacy and Precedent: The Court of Appeal's Decision in *Hosking* v. *Runting*' (2005) 11 *New Zealand Business Law Quarterly* 82.

[5] *Hosking* v. *Runting* [2005] 1 NZLR 1.

[6] Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 June 1952).

[7] *Von Hannover* v. *Germany* (2005) 40 EHRR 1.

[8] Most famously Samuel Warren and Louis Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193, who said 'the principle which protects personal writings and other personal products . . . against publication in any form, is in reality . . . a principle of inviolate personality': at 196–7.

[9] *Prince Albert* v. *Strange* (1849) 1 H & TW 1; 47 ER 1302.

Breach of trust and confidence

Breach of 'trust, confidence or contract' was an obvious basis for the grant of an injunction to prevent sales of a catalogue containing descriptions of family etchings which Queen Victoria and the Prince Consort had executed for private enjoyment[10] – at least once it was clear how the information had come into the hands of the defendant, William Strange. There was some doubt about this initially; as a result, discussion of trust and confidence featured little in the first instance judgment of Knight Bruce V-C.[11] However, it eventually emerged that copies of the etchings, entrusted to a printer for the purpose of having limited copies made for private circulation, had been passed by an employee of the printer to a journalist, Jasper Judge, who passed them to Strange for the purpose of mounting a public exhibition. The plan was abandoned once it was clear that royal permission would not be given, but Strange sought to publish the descriptive catalogue he had prepared so as to recover the costs incurred. He argued his innocence but as Lord Cottenham LC noted, he could 'not suggest . . . any mode by which [the etchings] could have been properly obtained'.[12] The facts as found were enough to find breach of a relationship of trust and confidence entered into with the printer, with liability extending to Judge and to Strange through the latter's tacit complicity in the wrongdoing. Even so, it was already clear by 1849 that there were many possible ways in which a person's private activities might be exposed to the world, ways which themselves might be secret and never fully disclosed.[13] Thus Lord Cottenham LC, taking a strand of authority suggested in *Abernethy* v. *Hutchinson* (a case similarly unclear as to the precise origins of the unauthorised publication),[14] referred to the wrongful 'surreptitious' character of the obtaining by Judge; a wrong

[10] The etchings which dated back to 1840 and were signed as being by Queen Victoria or Prince Albert, were domestic in character, described in *The Times* (permitted advance viewing, and apparently at that stage ignorant of the royals' lack of knowledge of events) as including 'several portraits of the Princess Royal, taken from life by her Majesty . . . in the arms of her nurse, playing and rolling on the carpet with her doll and other toys, amusing herself with the Prince of Wales' and 'portraying other domestic and interesting scenes in the Royal nursery': *The Times* (London), 7 September 1848, p. 5.

[11] *Prince Albert* v. *Strange* (1849) 2 De G & SM 652; 64 ER 293.

[12] *Prince Albert* v. *Strange* (1849) 1 H & TW 1 at 23; 47 ER 1302 at 1310.

[13] Indeed, the original claim by Prince Albert, later amended, was that the etchings had been stolen from the plaintiff's private apartment: *Prince Albert* v. *Strange* (1849) 2 De G & SM 652 at 652–7; 64 ER 293 at 293–5.

[14] *Abernethy* v. *Hutchinson* (1825) 3 LJ 209; 47 ER 1313, a case concerning the unauthorised publication of Abernethy's lectures, most likely but not necessarily originating in one of his pupils.

in which Strange was implicated by his knowledge.[15] Such language left the way open in later cases for wrongful obtaining in itself to become the basis of a trust obligation – albeit this took some time, and not all courts in all jurisdictions were ready or able to accept the position. (Even in the United Kingdom it was only finally confirmed at the highest level with the House of Lords decision in *Campbell* v. *MGN Ltd.*[16])

Violation of property right

The Lord Chancellor did not restrict his grounds to breach of trust and confidence, for he referred also to the 'right and property' in the etchings, which the plaintiff was 'entitled to keep wholly for his private use and pleasure', as justifying an injunction against unauthorised publication.[17] Knight Bruce V-C had reached a like conclusion.[18] The language of 'property' is reflective of the times. By the mid-nineteenth century, property was understood to be the starting point of a market economy. Having something to trade was seen as fundamental to participation in its commercial and social institutions and a particularly respected source of wealth was labour and ingenuity which, marshalled to the needs of the market, could become a pathway to prosperity and progress.[19] Enabling a market lay at the heart of many nineteenth-century cases of confidential information. Trade secrets were often labelled 'property'.[20] So too were unpublished texts, including texts of a more personal kind as with the royal family etchings – even if here it was acknowledged that value might be found not

[15] *Prince Albert* v. *Strange* (1849) 1 H & TW 1 at 23; 47 ER 1302 at 1311.

[16] *Campbell* v. *MGN Ltd* [2004] 2 AC 457. It may be noted that the Law Lords were not always entirely clear that the reasoning was not premised on a very extended idea of the relationship of confidence: see, e.g., Lord Hope at para. 85. In this respect Australian courts have been clearer, positing that surreptitious obtaining is in itself a violation of an obligation of trust and confidence, arising even as between strangers: see *Australian Broadcasting Corporation* v. *Lenah Game Meats* (2001) 208 CLR 199 at paras. 39–40 (Gleeson CJ), para. 123 (Gummow and Hayne JJ) and para. 223 Callinan J. On the other hand Australian courts may yet find other reasons to consider breach of confidence a limited vehicle for celebrity privacy protection; and the possibility of a tort of privacy was not foreclosed in *Lenah Game Meats*.

[17] *Prince Albert* v. *Strange* (1849) 1 H & TW 1 at 22; 47 ER 1302 at 1310.

[18] *Prince Albert* v. *Strange* (1849) 2 De G & SM 652 at 697–8; 64 ER 293 at 312–13.

[19] See Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law* (Cambridge: Cambridge University Press, 1999) chap. 9 (although putting fuller development later than the middle of the century).

[20] As, for instance, in the secret recipe case *Morison* v. *Moat* (1851) 9 Hare 241; 68 ER 492 (although Turner V-C noted the basis might equally be breach of contract or trust or confidence).

just in market exchange but in private use, including private circulation among family and friends, as was common at the time.[21] Recognised as 'the produce of mental labours, thoughts and sentiments recorded and preserved by writing' and 'desired by the author to remain not generally known',[22] the right of publication of such texts was reserved to the author on the basis of a property right in the unpublished work, supplementing the various statutory copyrights in published works. 'Common law copyright' has now been abolished by the statutory copyright system,[23] but in 1849 it was well-established. As Lord Cottenham LC said, '[t]he property in an author or composer of any work, whether of literature, art or science, such work being unpublished and kept for his private use or pleasure, cannot be disputed after the many decisions in which that proposition has been affirmed or assumed'.[24] The issue was simply its scope. It was clear that it prevented publication of the etchings after royal permission was refused, as Strange conceded. Nevertheless he contested the right to prevent publication of the descriptive catalogue, arguing this gave information about but did not publish the etchings themselves. The argument failed to persuade either the Vice-Chancellor or the Lord Chancellor who observed that 'a copy or impression of the etchings could only be a means of communicating the knowledge and information of the original'.[25] The conclusion: the choice to exploit publicly the property or else to keep it for 'private use or pleasure' was the author's choice alone.[26]

One common conception about nineteenth-century literary and artistic property is that the romantic idea of the author-genius exerted some

[21] Certainly in the case of Queen Victoria whose attachment to multiplying images was legendary: Winslow Ames, *Prince Albert and Victorian Taste* (London: Chapman & Hall, 1968) pp. 23–4.

[22] The language is Knight Bruce V-C's in *Prince Albert* v. *Strange* 2 De G & SM 652; 64 ER 293 at 311–12. Sherman and Bently suggest that references to 'mental labour' in nineteenth-century cases revealed a lingering pre-industrial natural rights style of reasoning, eventually to be largely superseded by a more overtly utilitarian judicial focus on the value of the product: see above n. 19. But in fact Knight Bruce V-C was quite concerned with the value of the product: see below n. 31.

[23] Copyright Act 1911 (UK), s. 31. See generally Francis E. Skone James, *Copinger on the Law of Copyright* (6th edn, London: Sweet & Maxwell, 1927) pp. 21–2.

[24] *Prince Albert* v. *Strange* (1849) 1 H & TW 1 at 21; 47 ER 1302 at 1310.

[25] 1 H & TW 1 at 22; 47 ER 1302 at 1310. As Skone James notes herein lies one important point of difference with statutory copyright in unpublished works after the 1911 Act, since by that Act the right of publication given to the author (under s. 1(2)) was restricted to the right to circulate copies of the work to the public: *Copinger*, above n. 23, pp. 33–4.

[26] 1 H & TW 1 at 22; 47 ER 1302 at 1310 (Lord Cottenham LC).

influence over the principles applied.[27] In reality, in these utilitarian times the emphasis was on the value to be found in the work by its audience. As early as 1741 Lord Hardwicke LC in *Pope* v. *Curl*[28] avoided references to the brilliance of Alexander Pope (although Pope himself did not)[29] in concluding his letters could not be made the subject of unauthorised publication by the printer Curl, observing that letters written on 'familiar subjects', 'perhaps never intended to be published', may be of 'more service to mankind', than any that are 'elaborately written and originally intended for the press'.[30] By the time of *Prince Albert* v. *Strange* any residue of eighteenth-century romantic reasoning about authorial genius that might be discerned in earlier cases was actively disclaimed. 'The author of a manuscript, whether he is famous or obscure, low or high' and whether the work is 'interesting or dull, light or heavy, saleable or unsaleable' has 'a right to say of them', Knight Bruce V-C concluded at first instance, adding the law's foundation was 'not . . . referable to any consideration peculiarly literary';[31] a sentiment apparently endorsed in Lord Cottenham LC's words that 'the property in *any* work, whether of literature, art or science, such work being unpublished and kept for his private use or pleasure cannot be disputed' (emphasis added).[32] In part, these statements may have been given in response to a suggestion in the descriptive catalogue that the etchings' superior quality warranted their publication,[33] a suggestion evidently contested by Prince Albert. Yet it was already clear in mid-Victorian England that there were many reasons why a work might be popular – reasons which might have little to do with the superior quality of the work and a great deal to do with the celebrity of the author. When it came to material of a personal kind, Knight Bruce V-C intimated, what was really desired was authenticity – an insight into 'the bent and turn of the mind, the feelings and taste of the artist, especially if

[27] For the romantic idea of the author-genius, which was actively promoted by some Victorian authors, such as Wordsworth, see Peter Jaszi, 'Introduction' in Martha Woodmansee and Peter Jaszi, *The Construction of Authorship: Textual Appropriation in Law and Literature* (Durham: Duke University Press, 1994) p. 1 at pp. 4–6 especially.

[28] *Pope* v. *Curl* (1741) 2 Atk. 342; 26 ER 608.

[29] The story of the case is told in Mark Rose, 'The Author in Court: *Pope* v. *Curll* (1741)' in Woodmansee and Jaszi, *Construction of Authorship*, above n. 27, p. 211.

[30] *Pope* v. *Curl* (1741) 2 Atk. 342 at 343; 26 ER 608 at 608.

[31] *Prince Albert* v. *Strange* (1849) 2 De G & SM 652 at 694–5; 64 ER 293 at 311.

[32] *Prince Albert* v. *Strange* (1849) 1 H & TW 1 at 21; 47 ER 1302 at 1310.

[33] See *Prince Albert* v. *Strange* (1849) 2 De G & SM 652 at 653; 64 ER 293 at 294 (recording that the title page of the catalogue referred to the public's interest in admiring and appreciating 'the eminent artistic talent and acquirements of both Her Majesty and her illustrious Consort').

not professional' but rather 'a man on account of whose name alone . . . [the information] would be a matter of general curiosity'.[34]

Passing off

Of course, once it was accepted that insight into a celebrity's 'bent and turn of the mind' and 'feelings and taste' was the public's true desire it was a small step to acknowledge that authenticity may not require authorship, at least in any obvious sense of 'clothing our conceptions in words' (as William Blackstone put it in *Tonson* v. *Collins*).[35] A third claim in *Prince Albert* v. *Strange*, introduced before Lord Cottenham LC, was not based on violation of a property right in the etchings (or even breach of trust), but on a statement in the defendant's catalogue giving the false impression that both the catalogue and the exhibition it purportedly accompanied were authorised, and therefore authentic. In this early age of character merchandising, especially as to royal memorabilia,[36] it was plainly thought a ready market could be found both for the exhibition and for the catalogue, especially if the latter not only gave a list and description of the works but also had inscribed on its title page that:[37]

> Every purchaser of this Catalogue will be presented (by permission) with a facsimile of the autograph of either Her Majesty or of the Prince Consort, engraved from the original, the selection being left to the purchaser.
>
> Price Sixpence

If Knight Bruce V-C had earlier expressed doubts as to the genuineness of the defendant's assumption that permission would be obtained before the exhibition went ahead (voicing a suspicion that the entire rather bizarre

[34] *Prince Albert* v. *Strange* (1849) 2 De G & SM 652 at 694; 64 ER 293 at 311. Certainly this appeared to be *The Times*' perception of the public's interest in the exhibition, commenting in enthusiastic detail on the subject matter of the etchings rather than any perceived expertise exhibited in the artwork (especially in the case of those done by Queen Victoria): see above n. 10.

[35] (1760) 1 Black W 301 at 323; 96 ER 169 at 181.

[36] See 'Victorian Collectibles' and 'Craze for Royal Relics' published by Collector Cafe at http://www.collectorcafe.com/article.asp?article = 650 (noting that the craze 'seems to have developed in the mid-nineteenth century, reflecting a restoration of the British royal family in the public esteem'). For commemorative plates, cups and saucers as a particular category of collectibles in this newly industrial age, see G. Bernard Hughes, *Victorian Pottery and Porcelain* (London: Country Life, 1959) pp. 87, 143 and 149 especially. Dedications 'by permission' were also not uncommon in this period: see, e.g., John Gould, *Birds of Australia* (Part XXVI, London: John Gould, 1847) where the inscription reads 'dedicated by permission to her Majesty'.

[37] See *Prince Albert* v. *Strange* (1849) 2 De G & SM 652 at 653; 64 ER 293 at 294.

project was a ploy erected around a plan to be 'bought off'), the proceedings continued on the basis of the 'overt acts'.[38] These, Lord Cottenham LC held, were enough to establish a 'falsehood on the public', for 'as permission so to accompany each catalogue sold necessarily implies permission to sell the catalogue itself, the case is complete of an intention to sell under a false representation that the whole transaction is not only with the knowledge but with the approbation of the Plaintiff'.[39] The reference to 'false representation' evokes the emerging action of passing off.[40] In the twenty-first century we have become accustomed to think the practice of character merchandising a recent phenomenon, and with that the extension of laws about false representations to representations of sponsorship or approval.[41] Yet, in this early case, we can already see the beginnings of an understanding that if the purchasing public places value on a celebrity's personal endorsement of goods or services, there may be more than one reason to insist that a claimed endorsement be given.

Admittedly, in *Clark* v. *Freeman*,[42] decided the year before, an eminent royal physician and expert on consumptive complaints could not prevent an apothecary selling a quack medicine promoted as 'Sir J Clarke's consumption pills' – the case later taken as authority for a 'common field of activity' rule which dogged the law of passing off through much of the twentieth century.[43] A merely libellous publication was not thought by Lord Langdale MR, who recalled the dark days of the Star Chamber, to warrant an injunction. Such conduct was, it was said, 'one of the taxes' to

[38] *Prince Albert* v. *Strange* (1849) 2 De G & SM 652 at 688; 64 ER 293 at 308.

[39] *Prince Albert* v. *Strange* (1849) 1 H & TW 1 at 9; 47 ER 1302 at 1309, continuing that the case was like one of 'manufacturers [who] are, as a matter of course, restrained from selling their goods under similar misrepresentations, tending to impose on the public and to prejudice others'. *The Times* agreed that 'why indeed' should the defendant be exempt from the rule applying to manufacturers: *The Times* (London), 9 February 1849, p. 5.

[40] See William Morison, 'Unfair Competition and Passing Off' (1956) 2 *Sydney Law Review* 50 at 53–5, pointing out that this was a strange action in fraud which, though based in public deception, gave a right to a person complaining of a name falsely used.

[41] See, e.g., *Re American Greetings Corp's Application; sub nom Holly Hobbie Trade Mark* [1984] RPC 349, Lord Bridge at 350, Lord Brightman at 356 referring to what is 'now widely known as "character merchandising"' as having 'become a widespread practice'; and *Pacific Dunlop Ltd* v. *Hogan* (1989) 14 IPR 398 at 429 (Burchett J) (attributing the rise of the practice to television).

[42] (1848) 11 Beav. 112; 50 ER 759.

[43] See Morison, 'Unfair Competition', above n. 40, 60–1. Australian courts were among the first not to follow the authority of *McCulloch* v. *May* (1945) 65 RPC 48, in which the 'common field of activity' rule was stated, based on a narrow reading of *Clark* v. *Freeman*: see *Radio Corporation* v. *Henderson* [1960] NSWR 279. This opened the way for passing off to extend to unauthorised character merchandising at a much earlier stage than in the United Kingdom: see generally *Irvine* v. *Talksport Ltd* [2002] 2 All ER 414 at 421–6 (Laddie J).

which persons of high station become subject 'by the very eminence they have acquired in the world'.[44] However, in seeking the injunction Clark could not show his professional income prejudiced from such statements, which by his own account were unlikely to be believed by the medical professionals who might ask his advice. In the different circumstances of *Prince Albert* v. *Strange*, royal patronage of public events, especially of the arts, was established,[45] and the misrepresentation was directed to the paying public who might be misled by a falsehood that consent had been obtained. Further, the possibility of the plaintiff wishing to give his endorsement in more suitable circumstances was not foreclosed. The Solicitor-General posited that at some later date a royally approved exhibition of the etchings might be permitted, say for charitable purposes, adding 'if that so happened, could it be doubted that a descriptive catalogue . . . would be a very important ingredient of the profit to be derived for such a purpose, or that the property or value would have been materially deteriorated by a premature circulation which had tended to satiate the public interest in the circumstance?'[46] For Lord Cottenham LC, considerations of property – at least in the etchings and perhaps in some broader sense of tradable patronage – made it possible to distinguish *Clark* v. *Freeman* and to bring the case within the boundaries of established authority.

Had there been a need to resolve the issue of passing off in *Prince Albert* v. *Strange*, a more precise account of the property at stake might have been given. It might have been made clearer that this lies, as is now largely accepted, in tradable goodwill, defined as 'the attractive force that brings in custom'.[47] Further, that for celebrities, their ability to provide patronage – to give authority, and through that authenticity, to claims made by traders about their goods or services (including especially those that reveal something of the celebrity's own 'bent and turn of the mind, . . . feelings and taste') – is a form of goodwill.[48] But, perhaps anticipating what would come after the award of an injunction narrowly framed to

[44] (1848) 11 Beav. 112 at 119; 50 ER 759 at 762.

[45] In commenting *The Times* (London), 30 October 1848 p. 6, notes that 'Her Majesty and the Prince are well known as patrons of the arts'. See also Ames, *Prince Albert*, above n. 21, pp. 24–5, although it may be noted that Prince Albert's greatest event of public patronage (the Great Exhibition of 1851) was still to come.

[46] 2 De G & SM 652 at 676–7; 64 ER 293 at 304.

[47] See *Erven Warnink BV* v. *J Townend & Sons (Hull) Ltd* [1979] AC 731 at 741 (Lord Diplock).

[48] It was clear at least in *Radio Corporation* v. *Henderson* [1960] NSWR 279 that a celebrity might trade in the opportunity to 'bestow their name', at 285 (Evatt CJ and Myers J); cf. *Irvine* v. *Talksport* [2002] 2 All ER 414 at 424 (Laddie J), not disapproved on appeal: *Irvine* v. *Talksport Ltd* [2003] 2 All ER 881. Note also the statement of Burchett J in *Pacific Dunlop* v.

prohibit sales *only* of catalogues inscribed *as permitted*, the issue was left there. No doubt the market for unauthorised character merchandising was less developed in Victorian times than now, when authority is no longer considered a particularly reliable guarantee of authenticity. If anything the opposite, as in *Douglas* v. *Hello!* where the unauthorised publication was presented as giving 'real' wedding pictures that the celebrity couple would *not* necessarily wish to have shown.[49] Even so it would seem the desire for royal relics that then existed was such that an audience of sorts could probably be found.[50] Thus, as in modern character merchandising cases where a misrepresentation of endorsement or approval is still an element of passing off, at least in the legal discourse,[51] it was decided a broader basis had to be found in Prince Albert's case for grant of an injunction against the authorised exploitation of material of a private and personal kind – a basis found in common law copyright and breach of trust and confidence.

Invasion of privacy

Privacy was not a cause of action in *Prince Albert* v. *Strange*; nor was it clear what function, if any, privacy should have. Was privacy protection incidental to a property right, as the Solicitor-General maintained;[52] or was privacy, as Strange argued, an interest distinct from property and one not yet recognised in equity or law?[53] In response to the latter argument, Knight Bruce V-C observed that 'there are several offences against

Hogan (1989) 14 IPR 398 that what character merchandising sells is the 'association of some desirable character with the product'.

49 The cover of the relevant issue of *Hello!* indeed bore the words: 'From New York: The Full Story – Catherine and Michael's Wedding': *Douglas* v. *Hello! Ltd* [2003] 3 All ER 996 at para. 6.

50 See 'Craze for Royal Relics' above n. 36, noting, e.g., the existence of a market for sales of bloomers with the Queen's monogram, which abated only when it was realised that these were issued to everyone in the royal household 'down to the scullery maid'.

51 Although Australian courts have certainly been particularly liberal in their readiness to find a misrepresentation established; see, e.g., *Pacific Dunlop Ltd.* v. *Hogan* (1989) 14 IPR 398, passing off (as well as misleading or deceptive conduct under the Trade Practices Act 1974 (Cth)) found on very little evidence of confusion to subsist in a false suggestion of Hogan's agreement to his Crocodile Dundee character being spoofed by a look-alike character in the defendant's advertisements for shoes. The remedy there was limited to damages or account of profits plus a suitable disclaimer; but in other cases, including *Radio Corporation* v. *Henderson* [1960] NSWR 279, a full injunction has been granted.

52 *Prince Albert* v. *Strange* (1849) 2 De G & SM 652 at 671; 64 ER 293 at 301; reiterated in *Prince Albert* v. *Strange* (1849) 1 H & TW 1 at 13; 47 ER 1302 at 1307.

53 *Ibid.* 2 De G & SM 652 at 680–1; 64 ER 293 at 305; reiterated *Prince Albert* v. *Strange* (1849) 1 H & TW 1 at 12; 47 ER 1302 at 1306.

propriety and morals, which, though causing most serious discomfort, pain and affliction to individuals, the law refuses to treat as actionable, unless those offences have occasioned some recognisable damage of a particular kind'.[54] However, the Vice-Chancellor added, 'the principle of protecting property . . . shelters the privacy and seclusion of thoughts and sentiments committed to writing and desired by the author to remain not generally known'.[55] In such cases, the Vice-Chancellor acknowledged, reaping public reward from mental labour may not really be the claimant's object, for 'a man may employ himself in private in a manner very harmless, but which, disclosed to society, may destroy the comfort of his life', revealing as it does an aspect of himself 'of a kind squaring in no sort with his outward habits and worldly position'.[56] Nevertheless, the vindication of privacy by a property right was rationalised under the rubric of property – identifying a sphere of 'private use or private amusement' for the 'various forms and modes of property which peace and cultivation might discover and introduce'.[57] The Lord Chancellor went further, suggesting that where a composition is of a 'private character'[58] and 'kept private',[59] the author has 'a right to the interposition of this Court to prevent any use being made of it' in breach of confidence,[60] adding that where 'privacy is the right invaded' delaying an injunction is equivalent to 'denying it altogether'.[61] The statement reveals some quite interesting thinking. Unlike a property right where the ability to restrain publication was in

[54] Ibid. 2 De G & SM 652 at 689–90; 64 ER 293 at 309, adding however that if a remedy can otherwise be granted the breach of propriety and morals may then be brought into account.

[55] Ibid. 2 De G & SM 652 at 695; 64 ER 293 at 312.

[56] Ibid. 2 De G & SM 652 at 694; 64 ER 293 at 311.

[57] Ibid. 2 De G & SM 652 at 695–6; 64 ER 293 at 311–12.

[58] *Prince Albert* v. *Strange* (1849) 1 H & TW 1 at 23; 47 ER 1302 at 1309. Is 'private character' to be taken as more than simply confidential, or non-public: connoting personal intimacy? It is not entirely clear but the *Oxford English Dictionary Online* suggests such a meaning was in use ('privacy' defined to include 'a private matter, a secret; in *pl.* private or personal matters or relations').

[59] The words 'kept private' used in the sense that 'any licence or authority for publication is negatived' (disclosures to 'private friends' not implying 'any such licence or authority') as is the possibility of access by others except by surreptitious or improper means: *Prince Albert* v. *Strange* (1849) 1 H & TW 1 at 23; 47 ER 1302 at 1311.

[60] Ibid. 1 H & TW 1 at 25; 47 ER 1302 at 1311, although going on to state in language more redolent of property that what is meant is that '[the author] is entitled to be protected in the exclusive use and enjoyment of that which is exclusively his own' – suggesting Lord Cottenham may not be entirely sure of his more unqualified pronouncements that the entitlement which breach of confidence recognises does (or should) not depend on whether the privacy claimant would use or enjoy the information.

[61] Ibid. 1 H & TW 1 at 26; 47 ER 1302 at 1312.

this utilitarian age premised on rewarding and encouraging activities the products of which may be found enjoyable or useful by an audience (if only of private friends or even the author alone), when it comes to breach of trust and confidence the choice not to publish 'private' information 'kept private' may be a matter of personal choice which others should be trusted to respect on this account alone.

The reasons for giving accord to personal choice over private matters were not articulated in *Prince Albert* v. *Strange* and may not even have been fully understood in the very middle of the nineteenth century.[62] John Stuart Mill's influential argument in *On Liberty* that individual flourishing in an atmosphere of freedom is good not only for the individual but for society, was still to come. It was only in 1859 that Mill was to elaborate the idea that:

> [T]here is a sphere of action in which society, as distinct from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself . . . [by which] I mean directly, and in the first instance; . . . [and t]he only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it.[63]

Nevertheless the germ of Mill's thinking was to be found in writings of David Hume and Adam Smith who held that a civil society could only benefit from a high level of respect for individual freedom and control.[64] The early English utilitarians who employed the greatest happiness of the greatest number as the measuring stick of value also argued that happiness for each person is a matter of individual choice.[65] And Mill himself referred to a 'Greek idea of self-development . . . [that i]n proportion to

[62] Certainly *The Times* (the major daily newspaper of the day) in commenting on the case initially offered little further explanation of why Prince Albert and his consort should be protected from 'intrusive vulgarity', in later commentary on Lord Cottenham's judgment referring somewhat more firmly to a 'public's sympathy' with the Royals' feelings that they 'can no longer endure living in a glass house': see above nn. 39 and 45.

[63] 'On Liberty', in John Stuart Mill, *Utilitarianism, On Liberty, Essay on Bentham*, ed. and intro. Mary Warnock (London: Collins, 1962) pp. 126–250 at pp. 137–8.

[64] Indeed Hume and Smith doubted that individual welfare could be promoted otherwise than by each person assuming, as 'befits the narrowness of his comprehension', care of 'his own happiness, or that of his family, his friends' (Smith's words in *Theory of Moral Sentiments*, 1759, VI, ii.3.6); see Jerry Muller, *Adam Smith in His Time and Ours: Designing the Decent Society* (Princeton: Princeton University Press, 1995) chap. 3. Mill himself doubted whether the care of family and friends should even be assumed; see especially 'On Liberty', above n. 63, pp. 205–25.

[65] Mill criticised Bentham for thinking of 'all the deeper feelings of human nature' as 'idiosyncrasies of taste, with which neither the moralist nor the legislator has any concern',

the development of his individuality, each person becomes more valuable to himself, and is therefore capable of becoming more valuable to others'.[66] With such a rich potential base of utilitarian support for privacy as a species of liberty, English courts did not have to embrace the theories of continental European philosophers which treated privacy as an integral part of human dignity and dignity as an immutable end of human existence.[67] Acknowledging privacy as a legitimate matter of individual choice in *Prince Albert* v. *Strange* did not preclude acknowledgment of other legitimate choices that might be made about material of a private personal kind. Even within privacy a choice of private use and enjoyment or simply no use at all could now be imagined. The possibility of the author-subject choosing free public expression, the choice exercised by Mill in writing his *Autobiography* as a means of 'stopping the mouths of enemies hereafter', who whispered scandalous things about his relationship with Harriet Taylor,[68] might also be contemplated. So too could commercial exploitation of the exchange value of any property that might be identified, anticipated in discussions in Prince Albert's case about the prospect of an authorised exhibition. Since privacy was an aspect of liberty whose value was defined in utilitarian terms, grounded according to Mill 'on the permanent interests of a man as a progressive being',[69] recognising the value of privacy did not prevent recognition of other freedoms as important as well. Further, Mill could easily accept that the ability to exercise all these freedoms in a forward looking way and plan

maintaining that there are higher pleasures that are of more enduring happiness than lower pleasures, which those who have experienced both could appreciate: 'Essay on Bentham' in Mill, *Utilitarianism*, above n. 63, pp. 78–125 at p. 101; 'Utilitarianism' in Mill, *Utilitarianism*, ibid. pp. 251–321 at pp. 259–62. Nevertheless in accord with his liberal views, Mill held that it is for the individual to make the ultimate judgment in matters that concern only themselves; and in this respect he was more like Bentham than he cared to admit.

[66] 'On Liberty' in Mill, *Utilitarianism*, above n. 63, p. 191.

[67] Especially Immanuel Kant, 'Groundwork of the Metaphysics of Morals' in Immanuel Kant, *The Moral Law: Kant's Groundwork of the Metaphysic of Morals*, translated and analysed by H. J. Paton (London: Hutchinson University Library, 1948) pp. 90–1, whose precept that persons should be treated as ends in themselves and not means to ends of others was to become the basis of a 'dignitary' idea of privacy in continental Europe and to a lesser extent, under the influence of Warren and Brandeis, the United States: see James Q. Whitman, 'The Two Western Cultures of Privacy: Dignity versus Liberty' (2004) 113 *Yale Law Journal* 1151. But as Mill pointed out, whether Kant's dignitary ideas were truly non-utilitarian, or rather represented his (very extreme) idea of what made for a happier society, is another question: 'Utilitarianism' in Mill, *Utilitarianism*, above n. 63, p. 308.

[68] See Jack Stillinger, 'Introduction' in John Stuart Mill, *Autobiography* (London: Oxford University Press, 1971), p. vii.

[69] 'On Liberty' in Mill, *Utilitarianism*, above n. 63, p. 136.

'beyond the passing moment', capturing value over time, depended on a measure of trust that others would 'join in making safe for us the very groundwork of our existence'.[70] Indeed such ideas were – and continue to be – intricately connected with the development of the equitable action for breach of confidence as a doctrine essentially about freedom (and with that security) of choice.

How little has changed

Table 10.1. *Instances of 'privacy' and 'private' in judgments*[71]

	'privacy'	'private'
Prince Albert v. *Strange* (1849), Cottenham LJ	1	10
Douglas v. *Hello!* (2000), Sedley LJ	50	10
Hosking v. *Runting* (2004), Gault P & Blanchard J	259	102
Campbell v. *MGN* (2004), Lord Hope	26	42
Von Hannover v. *Germany* (2004), the court	32	84

Privacy is more greatly emphasised (and property less) in the recent celebrity privacy cases compared with *Prince Albert* v. *Strange*. As Table 10.1 shows, there was but one reference to 'privacy' and ten to 'private' in the judgment of Lord Cottenham LC, whereas a comparable appellate

[70] Mill is justly famous for his utilitarian arguments for freedom of speech, conduct and property but his argument that 'security, to everyone's feelings the most vital of interests' is also of utilitarian import is equally powerful, and allows us to recognise that the ability to trust in the conduct even of strangers is the basis of a modern liberal welfare society: see 'Utilitarianism' in Mill, *Utilitarianism*, above n. 63, pp. 309–10.

[71] Recorded simply are instances of 'privacy' and 'private' as reported or used in each of the judgments surveyed. To the extent judges simply report what others have said without lending their support, the tallying process may overstate the value accorded by the particular judges, but nevertheless shows something of the value others place on privacy. Undoubtedly some of the increased referencing to privacy/private in English judgments is due to the United Kingdom's implementation of the European Convention on Human Rights with its Article 8 right of 'private life', but New Zealand has no right of privacy in its Bill of Rights and even Australia – which has no Bill of Rights – has seen increased use of privacy language in modern breach of confidence cases: see, e.g., the judgment of Gleeson CJ in *Australian Broadcasting Corporation* v. *Lenah Game Meats* (2001) 208 CLR 199 (15 references to 'privacy', 32 to 'private').

judgment in a modern case can easily multiply such references many times.[72] Thus the conclusion might be drawn that privacy is now a more significant social value than before – or at least that privacy was an emerging value in the Victorian age, whereas its importance is now clearly established.

Whether the current emphasis on privacy supports a conclusion that a shift has occurred towards a dignitary conception, in which privacy is purely and simply a right to be 'let alone', a right of 'inviolate personality', is another matter. In general little support can be found in the cases. Rather, the new talk of privacy appears to reflect a judicial consensus that, as Mill claimed, '[a]mong the works of man which human life is rightly employed in perfecting and beautifying, the first in importance surely is man himself'.[73] Indeed in *Von Hannover* v. *Germany* it was simply stated that the European Convention's right of private life was 'primarily intended to ensure the development of each individual in his relations with other human beings'[74] – suggesting that dignity is not an immutable end of human existence (although it may be a component of flourishing).[75]

Equally, while it is now commonly accepted that 'stars are made for profit' and 'different star images' are presented to the world, from which 'the audience selects . . . the meaning and feelings, the variations, inflections and contradictions, that work for them',[76] the utilitarian logic of treating celebrity stories as warranting protection has not escaped the

[72] By contrast there are no explicit references to 'property' in private information in the above judgments, including the interlocutory judgment of Sedley LJ in *Douglas* v. *Hello!* [2001] QB 967, which refers to the celebrities' privacy as 'sold': at paras. 140–1. In its subsequent decision the Court of Appeal went further in suggesting that the language of property is inappropriate: Lord Phillips MR for the court, [2006] QB 125 at para. 119ff. The conclusion, resting on a rather narrowly confined idea of what constitutes a 'property' right (treating assignability as the *sine qua non* and an option not available to 'owners' of confidential information), may be too strong: see further Megan Richardson, 'Owning Secrets: "Property" in Confidential Information?' in Andrew Robertson (ed.), *The Law of Obligations: Connections and Boundaries* (London: UCL Press, 2004) chap. 9.

[73] 'On Liberty' in Mill, *Utilitarianism*, above n. 63, p. 188.

[74] (2005) 40 EHRR 1 at para. 50.

[75] Similarly, in the privacy tort case *Hosking* v. *Runting* [2005] 1 NZLR 1 dignitary references are interspersed with references to personal flourishing, leading one of us to conclude that a modicum of dignity may be coming to be treated as a component of flourishing and therefore utility: see Richardson, 'Privacy and Precedent' above n. 4, 93. The closest the cases reviewed have come to enouncing a dignitary conception is Lord Sedley's reference to privacy as 'a fundamental value of personal autonomy' in his interlocutory judgment in *Douglas* v. *Hello!* [2001] QB 967 at para. 136 – language avoided by Lindsay J in his judgment, who spoke of confidentiality as a matter of 'control': *Douglas* v. *Hello! Ltd* [2003] 3 All ER 996 at para. 216. In their most recent judgment in the case, the Court of Appeal appeared to support Lindsay J's position in this respect: [2006] QB 125 at para. 118.

[76] Richard Dyer, *Heavenly Bodies: Film Stars and Society* (London: MacMillan, 1987) p. 5.

courts. Thus in *Douglas* v. *Hello!* the celebrities were held entitled to control the way their wedding was portrayed to their public, their right to 'profit from information about themselves' acknowledged.[77] The information shared some characteristics of copyright works, its story-telling quality lying in the myth of the perfect wedding between the perfect couple told to an audience that is at some level aware of the myth.[78] But the more obvious analogy is to trade secrets is in line with references to 'profit to be derived' and 'value . . . materially deteriorated by a premature circulation' in *Prince Albert* v. *Strange*.[79]

Finally, courts working in the tradition of *Prince Albert* v. *Strange* have found it relatively easy to accept that a celebrity may choose to reveal selectively certain personal information, including for profit, yet maintain the privacy of the rest,[80] giving little credence to the idea that privacy cannot be 'wrapped up and sold': the penalty for doing so being privacy obliteration.[81] Celebrities may find themselves subject to certain trust obligations, as Campbell found to her cost in publicly lying about her drug addiction,[82] but courts have stopped short of treating self-publicity as engendering an automatic obligation of utter transparency.[83] Even the language of 'reasonable expectation' of privacy, which features in some

[77] See the Court of Appeal [2006] QB 125 at paras. 113–19ff. and further above n. 72.

[78] Such stories fit a broad idea of literature as 'an organ of myth-making, a part of man's dream of self-definition': see Rene Wellek, 'The Attack on Literature' in Rene Wellek (ed.), *The Attack on Literature and Other Essays* (Chapel Hill: University of North Carolina Press, 1982) p. 3 at p. 10 (referring to Northrop Frye, *Anatomy of Criticism* (Princeton: Princeton University Press, 1957)). Wellek rightly adds they may not be very *good* literature, at p. 17.

[79] 2 De G & SM 652 at 676–7; 64 ER 293 and also (for an analogy drawn to passing off as between 'manufacturers') above n. 39.

[80] See the Court of Appeal in *Douglas* v. *Hello!* [2006] QB 125 at para. 118 where this was stated – although the court appeared later to doubt that significant damages could be obtained for breach after commercialisation, confirming Lindsay J's modest award for 'mental distress' to Douglas and Zeta-Jones and rejecting their argument for a notional licence fee after exclusive rights had been sold to *OK!*: at para. 237ff. and further para. 107 (if anything suggesting there may be reason to reduce damages for mental distress based on the earlier authorisation of filming and publication by *OK!*). The reasoning on remedies may be questioned and no doubt will be the subject of further comment.

[81] Per Jane M. Gaines, *Contested Culture: The Image, the Voice, and the Law* (Chapel Hill: University of North Carolina Press, 1991) p. 186. Cf. the suggestion by Warren and Brandeis, 'The Right to Privacy' above n. 8, at 214–16 that public figures abdicate privacy (in Mill's terms an unacceptable slavery contract: 'On Liberty' in Mill, *Utilitarianism*, above n. 63, p. 236).

[82] *Campbell* v. *MGN Ltd* [2004] 2 AC 457. Query how far such reasoning may be taken.

[83] *Douglas* v. *Hello!* gives a partial exception in the refusal of an interlocutory injunction against publication of the unauthorised wedding pictures on the ground that the claimants' privacy had been 'sold': see above n. 72 (although limiting the qualification to other wedding pictures). Lindsay J in the final proceedings would have allowed the injunction: see *Douglas* v. *Hello! Ltd* [2003] 3 All ER 996 at para. 278; as would the Court of Appeal in

of the recent cases, has not been taken to allow those curious to know to override a privacy subject's choice to maintain privacy if the choice is one that might equally have been made in the privacy subject's place.[84] The conclusion is one that Mill, who hated the 'despotism of custom', would have approved.[85]

On the other hand, more to the foreground now is the role played by the not entirely disinterested agents of public 'exposure' of private, personal celebrity information: the modern self-styled arbiters of custom. Now it is publicly acknowledged by those well-accustomed to its inner workings that 'Fleet Street has always had a two-way relationship with the celebrities. One day you are cock of the walk and the next day you are a feather duster.'[86] However, already by the time of *Prince Albert* v. *Strange* some of the basic features of the modern British media at work could be observed: the itinerant disaffected journalist (the forebear of the modern paparazzi), the profit-motivated publisher, a burgeoning public avid for news – as well as the technologies that permitted not only mass speed printing but also mass distribution of its products.[87] When newspapers were widely available, cheap to read, even cheaper if their contents could be shared in 'the new urban conditions', and popular in reliance on 'habitual tastes and markets' of an increasingly literate public, it is not surprising that they were gathering a substantial following.[88] They commented on

its most recent judgment in the case, especially with the benefit of the decisions that came after in the *Naomi Campbell* and *Von Hannover* cases: [2006] QB 125 at para. 253 ff.

[84] See *Campbell* v. *MGN Ltd* [2004] 2 AC 457 at paras. 94–5 (Lord Hope); *Douglas* v. *Hello!* [2006] QB 125 at para. 107. Gleeson CJ was less clear as to whose judgment should be applied in *ABC* v. *Lenah Game Meats* (and was the first to suggest that a standard of 'highly offensive to a reasonable person' should be adopted, borrowing from US privacy tort cases, and might be part of the test of confidentiality in a breach of confidence/privacy case): (2001) 208 CLR 199 at paras. 39–42.

[85] 'On Liberty' in Mill, *Utilitarianism*, above n. 63, p. 200.

[86] Statement of well-known former Fleet Street tabloid editor Piers Morgan quoted in *Fraser-Woodward Ltd* v. *British Broadcasting Corporation* [2005] EMLR 22 at para. 16 (Mann J).

[87] Steam printing of *The Times* began in 1819, according to Raymond Williams, and this combined with access to a railway network gave established newspapers the possibility of reaching a wider readership (the same technologies facilitating the introduction and spread of alternative publications aimed at new markets): 'The Press and Popular Culture: An Historical Perspective' in George Boyce, James Curran and Pauline Wingate (eds.), *Newspaper History from the Seventeenth Century to the Present Day* (London: Constable, 1978) chap. 2.

[88] See generally Williams, 'The Press and Popular Culture', above n. 87 and further Ivon Asquith, 'The Structure, Ownership and Control of the Press, 1780–1855' in Boyce, Curran and Wingate, *Newspaper History*, ibid. ch 5.

everything including the minutiae of cases before the courts, and on virtually every occasion where an opinion might be given it was expressed; nor was this inevitably favourable to those considered celebrities, especially if the celebrity in question was not an irrevocable part of the establishment – at risk particularly foreigners and anyone whose opinions or beliefs were different from the mainstream.[89] Then, as now, there was also the feverish excitement of the story unfolding from day to day, the future never able to be foretold by an audience hooked on the drip-feed of serialisation through the writings of Charles Dickens and other relaters of fictional yet lifelike stories,[90] with the opportunity for a judgmental response ever-present. A. N. Wilson observes that 'one of the strangest legacies left to the world by the Victorians is the popular press . . . fuelled by sensationalism and moralism', its treatment of information turned into a business enterprise applying a broad Victorian ethos of 'money-making'.[91] The sheer entrepreneurship of the enterprise could be admired – and some of those involved took great personal risks in their efforts to break new ground in the collection and reporting of material.[92] For a while it might have perhaps been imagined that freedom of thought and discussion were

[89] Even figures such as Prince Albert, a German of highbrow taste, were not immune from the perils of changing public opinion: see Reginald Pound, *Albert: A Biography of the Prince Consort* (London: Michael Joseph, 1973) p. 184 and *passim*. (Certainly support for his claim in *The Times* firmed after his success before Lord Cottenham LC: see above n. 62.) Query whether women formed another 'at risk' category: some have observed that modern female stars are particularly vulnerable to critical public opinion: see Richard Dyer, 'Stars as Specific Images', in Dyer (ed.), *Stars*, above n. 76, and this may explain the targeting of Catharine Zeta-Jones and Naomi Campbell for particular media criticism as their cases went to court.

[90] Including George Reynolds (editor of the popular Sunday newspaper *Reynolds's News*), 'who for a number of years outsold even Dickens with his serialised sensational fiction, centred on aristocratic scandals': Williams, 'The Press and Popular Culture', above n. 87, p. 49.

[91] A. N. Wilson, *The Victorians* (London: Arrow Books, 2003) pp. 461–3. Wilson is referring here particularly to the tabloid press that emerged in the second half of the nineteenth century after abolition of stamp duties. But as Williams and others have pointed out, there were ways around the stamp duties and a popular Sunday press could be found earlier in the century: Williams, 'The Press and Popular Culture', above n. 87, pp. 48–50; Asquith, 'Structure, Ownership and Control', above n. 88, 106–7 and Virginia Berridge, 'Popular Sunday Papers and Mid Victorian Society' in Boyce, Curran and Wingate, *Newspaper History*, above n. 87, chap. 13.

[92] Including Judge and Strange from *Prince Albert* v. *Strange*, both of whom became exposed to bankruptcy as a result of the case (even though damages were not claimed and costs were waived or paid by others, a far cry from the situation with modern celebrity privacy cases where costs awards may be even more financially significant than damages): see letters to *The Times* (London), 11 August 1849 (J. T. Judge) and 17 January 1851 ('Justitia').

necessarily promoted by freedom of the press, as contended by Strange in *Prince Albert* v. *Strange*.[93] But even Victorian liberals ultimately had difficulty justifying the press's more muckraking activities in terms of free speech. If anything these could be viewed as efforts at controlling meaning not facilitating greater public understanding, the utilitarian justification for free speech put forward by Mill.[94] And in this, Mill concluded, they were largely successful – referring to:

> ... [the] mass, that is to say, collective mediocrity ... [which] do not now take their opinions from dignitaries in Church or State, from ostensible leaders, or from books ... Their thinking is done for them by men much like themselves, addressing them or speaking in their name, on the spur of the moment, through the newspapers.[95]

However, these concerns were not to be expressed for a decade to come; and it took until after the end of the following century for courts finally to address the problematic question of the public interest in knowing information that is neither political nor especially literary or artistic, but is simply, as Knight Bruce V-C said in *Prince Albert* v. *Strange*, a matter of 'general curiosity'.[96]

By that time, of course, the equitable obligation was already being framed as a filter for acts of 'falsehood or duplicity [as well as] unfair or ungenerous use of advantage' in obtaining and/or using private personal information, being acts which according to Mill 'require a totally different treatment'[97] – and modern courts continue to abide by the dictum in their assessments of whether a breach of confidence has occurred for which a remedy should be given.[98] If anything the language of trust has entered the vernacular of privacy itself – shown by the European Court's emphasis in

[93] *Prince Albert* v. *Strange* (1849) 2 De G & SM 652 at 667; 64 ER 293 at 300 (the argument did not succeed of course).

[94] 'On Liberty' in Mill, *Utilitarianism*, above n. 63, pp. 141–83.

[95] Ibid. 195.

[96] See *Campbell* v. *MGN Ltd* [2004] 2 AC 457 at para. 117 (Lord Hope) (freedom of speech less convincing where 'there are no political or democratic values at stake' and 'no pressing social need' for publication) and *Von Hannover* v. *Germany* (2005) 40 EHRR 1 at paras. 60–6 (if the 'sole purpose [of publication] was to satisfy the curiosity of a particular readership regarding the details of the applicant's private life, [this] cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public' and 'in these circumstances freedom of expression calls for a narrow interpretation').

[97] 'On Liberty' in Mill, *Utilitarianism*, above n. 63, p. 209.

[98] See Lindsay J in *Douglas* v. *Hello!* (emphasising the surreptitious and deceitful character of the paparazzi's obtaining of unauthorised wedding photographs, and the defendants' knowledge/notice of this as 'tainting' their conscience and undermining their arguments that the public interest lay with publication): [2003] 3 All ER 996 at para. 198 and paras.

the *Von Hannover* case on the climate of 'continual harassment' suffered by celebrities at the hands of the tabloid press as supporting a claim under Article 8 of the European Convention.[99] It remains to be seen whether trust will become less a part of our confidentiality doctrine in the foreseeable future, as privacy comes more to the fore.

204–5; the Court of Appeal seemed to think that consent to filming by *OK!* reduced the 'offensiveness' of *Hello!*'s action but accepted that 'the intrusion into the private domain is, of itself, objectionable': [2006] QB 125 at para. 107. In *Campbell* v. *MGN Ltd* Lord Hope observed that '[t]he message that [the Mirror's publication] conveyed was that somebody, somewhere, was following [Campbell], was well aware of what was going on and was prepared to disclose the facts to the media'; a factor pertinent to 'confidentiality' and 'an additional element in the publication' that was 'more than enough to outweigh the right to freedom of expression which the defendants are asserting in this case': [2004] 2 AC 457 at paras. 98 and 124; cf. also para. 155 (Baroness Hale).

[99] [2004] EMLR 21 at paras. 59 and 68 (noting that although the present application concerned only publications, 'the context in which these photos were taken without the applicant's knowledge or consent and the harassment endured by many public figures in their daily lives cannot be fully disregarded').