

**CORRECTIVE JUSTICE AND HORIZONTAL PRIVACY:
A LEAF OUT OF WRIGHT J'S BOOK**

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Introduction

In Hutchinson and Morgan's 'The Canengusian Connection: The Kaleidoscope of Tort Theory', Wright J (one of their five fictive judges) is a committed defender of corrective justice.¹ In his 'judgment', he examines two ways in which tort can give effect to this ideal: negligence liability and strict liability. Wright J's readiness to engage with a matter of institutional design is highly relevant to the concern that occupies a central place in this essay: how to secure protection for the right to privacy? Central to this essay is the claim that the body of law it focuses on (Article 8 of the European Convention on Human Rights and lower-order (municipal) private law) affords means by which to protect privacy in ways that reflect (a Wright J-like) commitment to corrective justice.²

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¹ A.C. Hutchinson and D. Morgan, 'The Canengusian Connection: The Kaleidoscope of Tort Theory' (1984) 22 *Osgoode Hall Law Review* 69

² Reference is made in this introduction to 'lower-order private law', and in this context it means the body of law built up by the municipal courts which is shaped by the 'higher-order public law' of the ECHR. (This is a model that is similar to the model termed 'subordination' in O. Cherednychenko, 'Fundamental rights and private law: A relationship of subordination or complementarity' (2007) 3(2) *Utrecht Law Review* 1. In that essay, Cherednychenko discusses various types of horizontal effect, taking examples from German, Dutch and English constitutional orders. That essay argues that the various models of horizontal effect (that is, the relationship between 'public' and 'private' law) are best described by use of the terms 'subordination' and 'complementarity'.) This (my) essay does not accommodate a discussion of whether the term 'private' within 'lower-order private law' is appropriate, though the author recognises that it may well not be. For a body of law that is shaped and moulded by public law principles may lose some of its private nature, in which case it might be thought of as a form of public-private 'hybrid', though such a classification is also not without its problems. (For a useful discussion of these see B. Markesinis, 'Privacy, freedom of expression, and the horizontal effect of the Human Rights Bill: lessons from Germany', (1999) 115 *LQR* 47.) Alternatively, it may be (though it is also not discussed in the space available in the essay) that the traditional classificatory terms 'public law' and 'private law' are no longer particularly helpful in an age where the shaping of the latter by the former inevitably leaves traces of 'public law'

This essay also stakes out positions on four more particular points concerning the relationship between privacy protection in England and Wales and the concept of corrective justice. It takes as its starting point the new, post-*Campbell* privacy action, commonly labelled ‘misuse of private information’.³ The essay’s first aim is to demonstrate how and why this new cause of action fundamentally differs from torts in the traditional mould, giving it an awkward and uncomfortable position in English tort law. In proceeding in this way, the essay lays the foundations for an explanation of how, despite obvious differences between the new action and more traditional torts, principles of corrective justice can still be located within it. The essay then goes on to make use of ‘The Canengusian Connection’ more directly, by comparing the methodology of the hypothetical Wright J with that of the English High Court judge, Eady J, who has found himself at the forefront of privacy law in England and Wales in recent years, and locating common ground between them.

The essay now moves to consider each of the four positions in turn, before drawing some general conclusions.

1. ‘Misuse of private information’: the child of direct horizontal effect

[The] new balancing approach [in ‘misuse of private information’] is a fundamental shift in the way we do things. I think that as yet we may not have fully realised quite how fundamental ... The truth may be [simple], namely that the law of privacy is a new creature deriving from the Strasbourg way of doing things, thus requiring language and terminology of its own.⁴

Traditionally, English law has protected privacy interests indirectly through a rather bewildering assortment of legal mechanisms.⁵ In terms of protecting private information, however, the mechanism most obviously related to the new action is

principles within the newly ‘shaped’ causes of action. This is an issue that is tentatively returned to in more depth at n 98, below.

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

⁴ Eady J, ‘Protecting Freedom of Expression in the Context of the European Convention of Human Rights’, a public lecture given at City University, London, 10th March 2010. The transcript is available at: www.judiciary.gov.uk/docs/speeches/eady-j-city-university-10032010.pdf

⁵ Including, *inter alia*: data protection legislation, protection from harassment legislation, common law actions for trespass to the person and property, nuisance and the equitable doctrine protecting confidences.

the old equitable doctrine designed to protect confidences.⁶ That it could be used to protect private, as opposed to merely confidential, information was for many years the subject of heated debate, and there was some fierce opposition to any expansion of the law of confidence.⁷ The Human Rights Act 1998 (HRA), however, introduced a new element into English law. By ‘bringing home’ the rights of the European Convention on Human Rights, and giving Convention rights further effect on the plane of municipal law, the HRA required English law to provide protection for individuals’ Article 8 (ECHR) right to private life.⁸ The House of Lords’ decision in *Campbell* laid the foundations for a new cause of action which has come to be known by the name given to it by Lord Nicholls: ‘misuse of private information’.⁹ This cause of action has subsequently been used on several high-profile occasions, notably in the cases of *Murray v Big Pictures*¹⁰ and *Mosley v NGN*.¹¹ Just why the courts created the new cause of action remains the subject of some debate. There are those who argue that ‘misuse of private information’ is no more than an expansion of the traditional doctrine of confidence.¹² Typically, these arguments come from analysts of the law who reject the view that the HRA has (or is capable of having) ‘direct horizontal effect’.¹³ This author has previously argued

⁶ N. Richards and D. Solove, ‘Privacy’s Other Path: Recovering the Law of Confidentiality,’ (2007) 96 *Georgetown Law Journal* 123

⁷ See R. Wacks, ‘The Poverty of Privacy’ (1980) 96 *LQR* 73

⁸ *Rights Brought Home*. The Human Rights Bill, CM 3882 (1997). For some useful background, see J. Wright, *Tort Law and Human Rights* (Oxford: Hart Publishing, 2001).

⁹ n 3, above, [14]. In *Campbell*, the supermodel, Naomi Campbell, successfully claimed damages for ‘misuse of private information’ regarding the publication of photographs taken of her on a public street as she left a Narcotics Anonymous meeting, and an accompanying article detailing the treatment she was receiving for a drug addiction.

¹⁰ [2008] EWCA Civ 446. In *Murray*, the claimant, the three year-old son of author J.K. Rowling, successfully appealed against a decision at first instance to strike out his claim for ‘misuse of private information’ in respect of the surreptitious taking (by a freelance photographer with a long-lens camera), retaining and publication of photographs taken of him in public with his parents. The Court of Appeal unanimously held that the claimant had a reasonable expectation of privacy in the circumstances, and moreover went so far as to remark that if the claim were brought in the ECtHR, it would likely succeed.

¹¹ [2008] EWHC 1777 (QB). In *Mosley*, the then Formula 1 racing chief, Max Mosley, brought a successful claim for ‘misuse of private information’ in respect of material published in a national tabloid newspaper. The material published included pictures (and a link to a website containing a video) of Mosley engaging in sado-masochistic sexual activity with several women (who were alleged by the defendants to be prostitutes), along with some graphic descriptions of the contents of both the pictures and the video.

¹² See B. Pillans, ‘Thus far and no further: are we saying it loudly enough?’ (2007) 12(6) *Communications Law* 213.

¹³ See R. Buxton’s outright rejection of Wade’s model for direct horizontal effect of the HRA in R. Buxton, ‘The Human Rights Act and private law’, (2000) 116 *LQR* 48. For a more nuanced rejection of direct horizontality, and an argument in favour of a form of indirect horizontal effect, see G. Phillipson, ‘Clarity postponed: Horizontal Effect after

that such arguments are not attuned to the true state of affairs – that the HRA is not only capable of being directly horizontally effective, but that the creation of the new privacy action is a hallmark of such horizontality.¹⁴

‘Direct horizontality’ is being used in this essay as a term of art to describe the relationship between the higher-order public law of the ECHR and the HRA, and the lower-order private law of the domestic common law. With higher-order public law providing the impetus for the courts to fashion new causes of action and exerting a shaping force over the form they take, and with these new causes of action providing scope for horizontal actions (that is, actions between private parties) to protect Convention rights, the relationship can be said to be one of ‘direct horizontal effect’.¹⁵

It appears to be common ground that if the HRA were merely ‘indirectly’ horizontally effective, such indirect effect could not result in the creation by the courts of new causes of action, but only in the expansion of existing ones.¹⁶ By contrast, ‘direct horizontal effect’ has the potential to “threaten whole swathes of the common law with replacement by private HRA actions.”¹⁷ Putting it in such a manner, as Phillipson does, direct horizontality comes under attack from common law traditionalists, who have an instinctive aversion to it.¹⁸ A ‘common law

Campbell and Re. S’, in Fenwick, Masterman and Phillipson (Eds.) *Judicial Reasoning under the UK Human Rights Act*, (Cambridge: Cambridge University Press, 2007), and also G. Phillipson, ‘Judicial reasoning in breach of confidence cases under the Human Rights Act: not taking privacy seriously?’ (2003) *European Human Rights LR* 54. By 2009, Buxton had modified his position, accepting that there is some indirect horizontal effect of the HRA, but maintaining his view that the new privacy action is merely an extension of the old equitable doctrine of confidence: see R. Buxton, ‘Private Life and the English Judges’, (2009) *Oxford Journal of Legal Studies* 413.

¹⁴ See T. Bennett, ‘Horizontality’s New Horizons – Re-Examining Horizontal Effect: Privacy, Defamation and the Human Rights Act – Part 1’ (2010) 21(3) *Entertainment LR* 96 and T. Bennett, ‘Horizontality’s New Horizons –Part 2’ (2010) 21(4) *Entertainment LR* 145, both of which build upon the argument that the HRA would have direct horizontal effect advanced in W. Wade, ‘Horizons of Horizontality’, (2000) 116 *LQR* 217.

¹⁵ This echoes closely Wade’s model of direct horizontal effect. See W. Wade, n 14, above.

¹⁶ M. Du Plessis and J. Ford, ‘Developing the common law progressively - horizontality, the Human Rights Act and the South African experience’, (2004) *European Human Rights LR* 286; N. Bamforth, ‘The true “horizontal effect” of the Human Rights Act 1998’, (2001) 117 *LQR* 34; see also G. Phillipson, n 13, above.

¹⁷ G. Phillipson, n 13, above, 152. For another alternative view favouring a ‘direct horizontal effect’ view of the HRA, and making reference to the *sui generis* nature of causes of action that result from direct horizontality, see D. Beylveld and S. Pattinson, ‘Horizontal Applicability and Horizontal Effect’ (2002) 118 *LQR* 623.

¹⁸ Just where this ‘instinctive’ aversion comes from may be open to debate. It is used in this essay since the author has in mind the notion that common law traditionalists are,

traditionalist' locates substantial value in the wealth of experience and knowledge inherent in the several hundred years' worth of reasoning in the common law.¹⁹ He sees the common law as a valuable decision-making and certainty-ensuring legal tool which derives value from its longevity, and places trust in it; he is reluctant to see it subverted, altered or replaced by any alternative. By contrast, a 'Strasbourg-enthusiast' sees direct horizontality as a positive step forward.²⁰ The potential of direct horizontality might thus equally be described by a Strasbourg-enthusiast in terms of its ability to secure the fundamental rights of individuals without getting 'bogged-down' in the complexities of the elements within traditional common law torts. It is difficult to resist the attractive simplicity of stating that a common law traditionalist asks: 'why?', whilst a Strasbourg-enthusiast asks: 'why not?' Perhaps it is more useful, though, to put the sides of the argument the way Eady J has: "[d]epending which way you look at it, we now have the advantage of flexibility, or we have to struggle with ... uncertainty."²¹

Taking the apparent consensus that 'indirect horizontal effect' cannot produce new judge-made causes of action, whilst 'direct horizontal effect' does have the potential for the creation of new heads of liability (desirable or otherwise), we can ask what precisely the new 'misuse of private information' action is. Is it a brand new cause of action? Whilst there is still a tendency amongst some members of the judiciary to talk about it in terms of it being an expansion of the equitable doctrine of confidence, such talk does not properly reflect the breadth of the new action's reach – either its already-evidenced or its potential breadth.²² Nor, more straightforwardly, does it recognise that the new action is "... new in formulation, new in terms of its applicability, new in its particular reliance upon guidance from the ECtHR, new in terms of the relief it can provide, and new in terms of the

amongst other things, proponents of historical reason, and that much of what a common law traditionalist values comes from a personal embedding in common law culture. Whether a common law traditionalist's aversion to direct horizontality is the result of a conscious decision to demure it, or is a subtler, sub-conscious reaction, is a question worth considering (though there is insufficient space to do so here), given the context of the collection in which this essay appears.

¹⁹ See J.G. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986) Ch.1

²⁰ See P. O'Callaghan, 'Monologism and Dialogism in Private Law' (2010) 7 *The Journal Jurisprudence* 405: ('The Strasbourg Enthusiasts: Monologism in Action?'). It is worth noting that although this essay has very briefly placed Phillipson's work into a category outside that of Strasbourg-enthusiasm, O'Callaghan regards Phillipson as a Strasbourg-enthusiast.

²¹ Eady J, n 4, above, p.11

²² R. Buxton, 'The Human Rights Act and private law', (2000) 116 *LQR* 48

defence it is subject to.”²³ As such, we can, and should, view the existence of the new action as evidence of direct horizontality.

This is a view from which Patrick O’Callaghan would dissent. For, writing in this issue, he takes the view that the new privacy action is the result of ‘indirect horizontal effect’.²⁴ It is suggested here that the difference between O’Callaghan and myself in our description of the new action’s effect is actually less great than it may at first seem. O’Callaghan recognises the existence of ‘elements’ within the new privacy action that resemble the elements of more traditional torts, at least at first glance. In contrast to a more openly acknowledged type of constitutional (or *sui generis*) tort – for example, of the kind that exists in Ireland – the new privacy action has a traditional tortious look to it.²⁵ It does not look like a mechanism by which a claimant may simply arrive at court alleging a violation of a Convention right and successfully demand a remedy. O’Callaghan also considers the new cause of action to be severely limited both in terms of the nature of the information that can form the basis of an actionable claim, and in terms of the types of claimants who are practically able to avail themselves of a remedy under it.²⁶ This (O’Callaghan’s) analysis supports the view that the new action is not expansive enough, nor sufficiently overtly labelled in *sui generis* language to be properly described as being the result of ‘direct horizontal effect.’ On such a view, ‘direct horizontal effect’ as a phrase should be reserved for newly created causes of action that provide a simple forum for claimants to directly litigate alleged violations of the Convention without reference to traditional-style tortious elements.

This view can, however, be challenged. In terms of the types of information that the new action protects, O’Callaghan rightly points out that the range of such information has been of a limited nature in cases that have come before the courts since *Campbell*. It may not, however, be quite as limited as he suggests. In *Applause Store Productions Ltd v Raphael*,²⁷ the court accepted that a person’s date of birth and

²³ See T. Bennett, n 14, above. In that two-part essay, the argument that the new privacy action is the result of direct horizontal effect is made in greater depth than the space in this essay allows for.

²⁴ P. O’Callaghan, n 20, above, section 7: (‘Human Rights and Private Law: ‘Multicity in Unity?’)

²⁵ See *Meskeil v. Coras Iompair Eireann* [1973] IR 121, 133 where it was stated that: “... if a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who infringed that right ...”, per Walsh J. For a discussion of constitutional tort models in general, including the Irish model, see S. Gardbaum, ‘The “Horizontal Effect” of Constitutional Rights’, (2003) 102 *Michigan Law Review* 387.

²⁶ *Ibid* p.27

²⁷ [2008] EWHC 1781 (QB)

religious views are matters over which he would have a reasonable expectation of privacy. This ruling is the most expansive assessment in England of the range of material capable of engaging Article 8 rights thus far, and goes far beyond that which was envisaged in *Campbell*. This is much more than mere incremental elaboration on the old confidence doctrine. Equally relevant in *Applause Store* is the fact that the claimant was neither a celebrity nor a public figure but rather a lay businessman. Clearly then, the new action – whilst most famously (or infamously) used by celebrities – is open to a much broader range of potential claimants. This is precisely what we would expect from a *sui generis* ‘constitutional tort’.

As for the label attached to, and the existence of *prima facie* traditional-looking ‘elements’ within, the new action, these may be described as something of a disguise.²⁸ Let us hypothesise for a moment that, in a novel claim where a Convention right is alleged to have been unlawfully interfered with, a judge comes to the conclusion that he is both empowered and required to create a new cause of action, horizontally, under the HRA.²⁹ He is also acutely aware that the case before him has quite easily definable factual parameters (as in *Campbell*) and of the

²⁸ Or perhaps even the judicial equivalent of Frodo Baggins’ Elven cloak from J.R.R. Tolkien’s *The Lord of the Rings*. Frodo is given the cloak by the Elf Queen, Galadriel, in Lothlórien. In the movie version of the second part (*The Two Towers*, Dir. Peter Jackson. Perf. Elijah Wood, Viggo Mortensen, Ian McKellan. New Line Cinema, 2002) – though not explicitly in the original novel – Frodo uses the cloak as a disguise which masks his true form; when agents of the dark lord, Sauron, see Frodo in the cloak, they mistake him for a rock. Tolkien purists (who may object to the use of the film version as canon) might feel happier using a comparison with the wolf’s disguise from the Grimm Brothers’ fairy tale, *Little Red Riding Hood*. In the story, the wolf dresses up as ‘Grandma’, (the heroine’s grandmother) and thereby appears unthreatening. The ‘magic cloak’, which has appeared in various forms throughout literary history (recently in J.K. Rowling’s *Harry Potter* series), has its roots in ancient Norse mythology as the *Tarnhelm*. It features in Richard Wagner’s *Ring Cycle* (*Der Ring des Nibelungen*) in the first of the four operas that comprise the work, *Das Rheingold*, where it is used by Alberich as a cloak of invisibility. The most pertinent of these analogies remains, perhaps, Frodo’s cloak, since it is in that incarnation that the *Tarnhelm* acts as a form of camouflage, making that which it covers appear both unthreatening and innocuous, and – importantly – utterly different from its true nature.

²⁹ See T. Bennett, n 14, above, for a lengthier discussion of the root of the courts’ authority to create new causes of action directly horizontally. See also W. Wade, n 14, above, which arguably heralded the beginning of the ‘horizontal effect debate’ and which sets out an argument for a statutory basis for direct horizontality. The language of direct horizontal effect has its roots in the ECJ ruling in *Van Gend en Loos v Neder-Landse Tariefcommissie* (Case 26/62); [1963] ECR 1, and there has since been something of a (linguistic) ‘spill-over’ effect into municipal law, making use of ‘horizontal effect’ and ‘vertical effect’ as terms of art to describe the relationship between higher-order public law and both private individuals and the state respectively.

potential backlash against him if he is seen to be acting in an ‘activist’ fashion.³⁰ What is he to do? He does not want to set a precedent that looks like a brand new, alien type of action with seemingly boundless breadth, so he rejects an absolutely direct application of Strasbourg methodology; that is, he decides against overtly following the method of considering: (a) the engagement of; (b) interference with; and, (c), proportionality of any interference with the Convention right. Instead, in a flash of inspiration, he disguises the Strasbourg methodology inside more traditional-looking ‘elements’, giving the new action the appearance of a more traditional tort.³¹ So, to use ‘misuse of private information’ as an example: ‘engagement of Article 8 rights’ becomes ‘reasonable expectation of privacy’; ‘interference’ becomes ‘misuse’ and the ‘proportionality’ question becomes a defence of ‘publication in the public interest’. These ‘elements’ are less frightening to the common law traditionalist than their Strasbourg equivalents. They look narrower, seemingly limiting the range of circumstances in which the new action can be utilised. As such, they are effective, if superficial, guards against accusations of activism which have the added bonus of appeasing common law traditionalists.³²

But as seen in *Applause Store*, the judges will protect a wide range of information beyond that envisaged in *Campbell*. As shown by *Murray*, the judges will extend the

³⁰ See D. Eady, ‘A statutory right to privacy’, (1996) *European Human Rights LR* 243 at 247; also see Eady J’s remarks concerning ‘activist judges’ in *Mosley*, n 11, above. The attacks on the ‘activism’ of judges by the press have been vehement in recent years. In particular, in the context of privacy rights, Eady J has been singled out for stringent criticism. Speaking at the Society of Editors Conference in Bristol on November 10, 2008, and referring to Eady J and his judgment in *Mosley*, Paul Dacre, Editor of the *Daily Mail*, stated: “The freedom of the press, I would argue, is far too important to be left to the somewhat desiccated values of a single judge who clearly has an animus against the popular press and the right of people to freedom of expression.”

³¹ This may be something that O’Callaghan would identify as ‘monologue-creep’, see P. O’Callaghan, n 20, above, section 5: (‘Monologue-Creep’).

³² Recognising that the ‘elements’ within ‘misuse of private information’ may in reality be no more than ‘labels’ that disguise the true potential reach of the action echoes remarks made by Lord Roskill in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 628, where, in the context of establishing a duty of care test for novel situations in the tort of negligence, he stated: “[p]hrases such as ‘foreseeability,’ ‘proximity,’ ‘neighbourhood,’ ‘just and reasonable,’ ‘fairness,’ ‘voluntary acceptance of risk,’ or ‘voluntary assumption of responsibility’ will be found used from time to time in ... different cases. But ... such phrases are not precise definitions. At best they are but labels or phrases descriptive of the very different factual situations which can exist in particular cases and which must be carefully examined in each case” The need for ‘careful examination’ in each case, which Lord Roskill referred to in *Caparo*, is equally applicable to the action for ‘misuse of private information’, and the ‘careful examination’ itself might be thought to mirror the ‘new methodology’ expounded by Eady J (discussed below). It also (as noted at n 72, below) bears some resemblance to the ‘salient features’ test adopted by the Australian High Court as an alternative means of establishing novel duties of care in negligence.

protection of a ‘reasonable expectation of privacy’ to claimants (in that case, a young child) that have no *actual* expectation of privacy.³³ O’Callaghan argues that the case of *Wainwright v Home Office*³⁴ demonstrates that the new privacy action does not extend to physical interferences with Article 8 rights.³⁵ But on the model outlined above, where the ‘elements’ are little more than names given to aspects of the ECtHR’s methodology in order to disguise their application within the domestic jurisdiction, claimants in a case along *Wainwright* lines may now have an actionable claim. Further, considering that in the subsequent Strasbourg case of *Wainwright v UK*, a violation of Article 8 was found to have occurred, and that it has been made clear that “... Arts 8 and [where relevant] 10 of the Convention are now the very content of the domestic tort that the English court[s] must enforce,” it may be unsustainable to argue that the domestic courts could now rule on a *Wainwright*-style case in any way other than that which follows the Convention jurisprudence.³⁶ The well-known principle that the law looks to substance rather than to form springs to mind: what is important is not how the new action is described, but what it is actually capable of doing.³⁷

Of course, what the directly horizontally effective new action, cloaked in traditional-looking tortious elements, has done is introduce substantial confusion to both judicial application of, and academic commentary on, the branch of law we are examining.³⁸ This essay suggests that the confusion comes from two main sources: the disguised direct horizontality described above, and the problems that then become inherent in trying to understand the new action by analysing it as if it were a tort in the traditional mould. While there is much that remains murky in this area of law, we have at least established that the process of development we have scrutinized cannot be captured in the hoary old language favoured by common law traditionalists. This leads us on to our next topic.

³³ n 10, above

³⁴ [2004] 2 AC 406

³⁵ P. O’Callaghan, n 20, above, section 6(ii): (‘Assessing Vulnerability’). This is an argument O’Callaghan also alludes to in P. O’Callaghan, ‘Privacy in Pursuit of a Purpose’, (2009) 17 *Tort Law Review* 100 at 113.

³⁶ n 10, above, [27]

³⁷ See *Re Montagu’s Settlements* [1987] Ch 264 at 278, per Megarry V-C: “...[T]here is something of a tendency in equity to put less emphasis on detailed rules that have emerged from the cases and more weight on the underlying principles that engendered those rules, treating the rules less as rules requiring complete compliance, and more as guidelines to assist the court in applying the principles.”

³⁸ It may be said that the disguising of a Strasbourg methodology within the ‘elements’ of the new cause of action is in reality an example of some fancy (a Strasbourg-enthusiast might prefer ‘ingenious’) judicial footwork.

2. Trying to understand the elements of the new action as if it were a tort in the traditional mould is problematic

The new cause of action is not a tort in the traditional common law mould. So much is obvious simply by its elements, even without recourse to a discussion of direct horizontality. For rather than being concerned primarily with providing a remedy, the main aim of the new action is to protect a substantive right. Eady J himself outlined the problems which academics have had trying to classify the new action, stating that:

The leading text book editors cannot agree about this. The new edition of *McGregor on Damages*, at para. 42.47, thinks it is a tort, whereas *Clerk & Lindsell on Tort*, at para. 28.03, thinks it is an extension from equity – but they cover it in their text book anyway, just in case.³⁹

English tort law has traditionally been based around remedies, rather than rights; “[e]very law student used to learn that English [tort] law was not about rights but about remedies.”⁴⁰ According to corrective justice theory, tort law aims to put right harm done to one person by another by way of compensation. The harm done in many torts is obvious on its face: in trespass or negligence it is the interference with the individual or the individual’s property. If damage is caused then, absent a valid defence, the tortfeasor must compensate the victim. Corrective justice theory ascribes intrinsic value to the individual.⁴¹ In pursuing a methodology that allows for the compensation of the victim to correct the harm done, the law recognises his or her intrinsic value.⁴² This sets corrective justice theory squarely apart from utilitarian theories of tort law.⁴³

‘Misuse of private information’, however, is neither a trespass nor a negligence-based action. Even assuming, *arguendo*, that it could be classified roughly as a tort at

³⁹ Eady J, n 4, above, p.8

⁴⁰ Eady J, n 4, above, p.6 For an alternative view, see A. Ripstein, ‘Tort Law in a Liberal State’ (2007) 1(2) *Journal of Tort Law* Art.3, (where it is argued that underlying the traditional view of ‘wrongs’ at the heart of tort law are identifiable, substantive rights).

⁴¹ See n 1, above, p.90. See also E. Weinrib, ‘Legal Formalism: On the Immanent Rationality of Law’, (1988) 97 *Yale Law Journal* 949, section V(D), (‘The Normative Force of the Forms of Justice’).

⁴² A.C. Hutchinson and D. Morgan, n 1, above, p.90

⁴³ It should be noted that this paper uses the term ‘utilitarian’ in much the same way as Kent Greenawalt in K. Greenawalt, *Conflicts of Law and Morality* (Oxford: OUP, 1987) at 98. Such use refers to any theory that makes the consequences of an act the determining factor of that act’s morality and disregards, for simplicity, the many variations between different discreet utilitarian and consequentialist theories.

all, it is one that is unique. Its elements are unlike those of any other cause of action. There must be information about which the claimant has a ‘reasonable expectation of privacy’; and some sort of ‘misuse’ of that information by the defendant must be proven (typically publication or dissemination). Once those elements are made out, then the only applicable defence is one of ‘public interest’ based on a test of proportionality. No moral culpability need be shown on the part of the defendant, nor need the tort be intentional.⁴⁴ In that sense, it is a ‘tort’ of strict liability. Whilst its closest relative in tort law is arguably defamation, there remains a fundamental difference between the two that again harks back to the traditional concern of tort law with remedies rather than rights.⁴⁵ Defamation law can be seen as a classic example of corrective justice in action. Rather than having a ‘right’ to one’s reputation, tort law ascribes intrinsic value to the individual and springs to his or her aid when reputational damage occurs. (The key assumption being made here is that reputation is a significant interest since it is part of the whole that makes an individual.⁴⁶) The ability of defamation law to vindicate reputation is a major part of its value as a tort.⁴⁷ Certainly, this is reflected in the ECtHR’s treatment of reputation as an aspect of the individual’s private life.⁴⁸ There have been signs in recent ECtHR decisions that the Strasbourg Court is inclined to locate a substantive right to reputation within the ambit of the Convention.⁴⁹ If that is so, however, then it exists as part of the right to private life under Article 8, and can be explained by reference to the ECtHR’s concern to

⁴⁴ This mirrors the approach taken in recent years in UK defamation cases involving publication of defamatory material on internet websites, particularly in regard to ‘user generated content’. The current position is that an internet service provider who fails to remove within a reasonable time defamatory material from a website that they host, after they have been informed of its presence, will be held liable as a publisher of the material, in spite of not having actually generated it, (see *Godfrey v Demon Internet Ltd* [2001] QB 201; *Bunt v Tilley & Ors* [2006] EWHC 407 (QB)).

⁴⁵ See D. Eady, n 30, above.

⁴⁶ See R. Post, ‘The Social Foundations of Defamation Law: Reputation and the Constitution’ (1986) 74 *California Law Review* 691. Also see the deontological impulses present in the work of Immanuel Kant, who uses the term *persönlichkeit* to identify the aspect of an individual in which his/her ‘dignity’ can be located (see n 59, below).

⁴⁷ J. Coad, ‘Reynolds and public interest - what about truth and human rights?’ (2007) 18(3) *Entertainment LR* 75

⁴⁸ See *Pfeifer v Austria* (2009) 48 EHRR 8 at [35]: ‘The Court considers that a person’s reputation, even if that person is criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity and therefore also falls within the scope of his or her “private life”.’

⁴⁹ See as other examples: *Cumpăna v Romania* (2005) 41 EHRR 14; *Radio France v France* (2005) 40 EHRR 29; *Chamy and Others v France* (2005) 41 EHRR 29. As yet, however, there has been no Grand Chamber ruling confirming that reputation comes under the ambit of Art.8.

protect ‘human dignity’ through Article 8, which has been the subject of extensive comment.⁵⁰

‘Misuse of private information’, then, is unique because there *is* now in English domestic law a substantive right to privacy.⁵¹ It comes from the Convention. As outlined above, some say it comes indirectly,⁵² whilst others (including this author) argue it comes directly.⁵³ However it has come, though, it is undeniably here. And as this process of development has unfolded the ECtHR has placed great emphasis on ‘dignity’.⁵⁴

This concept of ‘dignity’ contrasts with the altogether simpler American conception of privacy as ‘the right to be let alone’.⁵⁵ Moreover, it throws up questions of *what* is actually suffering the harm. Without care, the damage element in the new English tort could be construed overly circularly: ‘interference with the right not to be interfered with’ is about as unhelpfully as it could be put. Is the individual herself being damaged, or just her right? This is what Eady J was engaging with when he stated:

If you are ordered not to do something, or to pay compensation for having done it, because it is not regarded as necessary or proportionate, that is quite a different concept from the court ruling that a legal “wrong” or “tort” has been committed. At least until the judge has carried out the required balancing exercise, it may be said in a real sense that no “wrong” has been committed.⁵⁶

The various problems noted here are hardly surprising. Judges are now having to deal with, *inter alia*, the question of nomenclature (‘misuse of private information’), the relevance of and nature of ‘dignity’, the danger of circularity, and the precise focus of the law’s concern (the claimant or her right). These problems are the result

⁵⁰ See C. McCrudden, ‘Human dignity and judicial interpretation of human rights’, (2008) EJIL 655. For an alternative argument, that the ECtHR’s use of proportionality as a tool in order to conduct a balancing exercise does not adequately protect ‘human dignity’, see S. Tsakyrakis, ‘Proportionality: an assault on human rights?’ (2009) 7(3) *International Journal of Constitutional Law* 468.

⁵¹ n 4, above

⁵² See G. Phillipson, n 13, above.

⁵³ T. Bennett, n 14, above. See also K. Hughes, ‘Horizontal Privacy’, (2009) 125 *LQR* 244.

⁵⁴ For a useful discussion of dignity in, *inter alia*, the jurisprudence of the ECtHR, see D. Feldman, ‘Human Dignity as a Legal Value: Part 1’, (1999) *Public Law* 682; and D. Feldman, ‘Human Dignity as a Legal Value: Part 2’, (2000) *Public Law* 62.

⁵⁵ Warren and Brandeis, ‘The Right to Privacy’, (1890) 4 *Harvard Law Review* 193 at 205

⁵⁶ n 4, above, p.9

of English judges having studiously avoided dealing with these matters over the years.⁵⁷ Only when the HRA required the courts to protect private life was a cause of action capable of so doing fashioned. In essence, the HRA parachuted a new, substantive ‘right’ to privacy into the middle of the common law. Judges were left with the task of having to protect this ‘right’, using the common law, without having been given any clear indication of how it should be done. This led to the second of Eady J’s ‘uncertainties’ (discussed further below) – an uncertainty as to which principles and rules of law should be applied, how and when.⁵⁸

So, the courts are now faced with a conceptually tricky task. They must endeavour to fit into an area of the law long understood as giving remedies to individuals (for interferences with their persons or property) a cause of action protecting a ‘right’ to private life. It can be done, but it is not an easy undertaking. Moreover, it is this conceptual confusion that gives ‘misuse of private information’ its awkward and uncomfortable position within English tort law. It is perhaps more difficult to conceive of a person’s privacy as a measurable aspect of their *persönlichkeit* (personality/personhood) in the way suggested.⁵⁹ Impact upon reputation is more measurable. Judges can, in many cases, obtain evidence of actual financial loss resulting from reputational harm. Where this is not possible, a somewhat haphazard approach to the calculation of damages has to suffice. However, the presence in most cases of a jury (whose deliberations go unrecorded) typically obscures the inadequacies of this process/procedure. Interference with privacy is, however, far less easily given a value.⁶⁰ We might find some assistance in philosopher and novelist J.M. Coetzee’s *Diary of a Bad Year*. He describes the individual’s view of his/her own body in terms which initially echo Kant’s notion of *person* (the physical aspect of the individual, as distinct from *persönlichkeit*). However, it becomes clear that for Coetzee, the manner in which we talk about aspects of ‘our’ *person* leads to a uniquely human splitting up of our various constituent parts (“my leg”, “my eye”,

⁵⁷ See D. Eady, n 30, above, (at 248), where Eady advocates the introduction of a statutory privacy tort “... to fill most of the gaps left by the present law, such as the lack of a duty or relationship recognised by equity, or the lack of the necessary ‘quality of confidence’...”.

⁵⁸ See section 3 of this essay, below.

⁵⁹ See I. Kant, *Critique of Practical Reason* (Cambridge: Cambridge University Press, 1997). Kant’s use of the word *persönlichkeit*, whilst literally translatable into English as ‘personality’ is perhaps better reflected by the English word ‘personhood’ when used in this context. Kant draws a distinction between the purely physical aspect of the individual, *person*, and the personhood of the individual, *persönlichkeit*, which is the aspect of the individual in which his/her ‘dignity’ is located.

⁶⁰ In *Applause Store*, n 27, above, the claimant was awarded £15,000 in damages for libel, but only £2,000 for ‘misuse of private information’, seemingly as the result of some overlap between the harm suffered to his/her reputational and privacy-related interests. Similarly, in *Mosley*, n 11, above, the claimant was awarded £50,000 for ‘misuse of private information’, well below the notional ‘cap’ on defamation damages of £200,000.

“my brain” as opposed to simply “me”). Coetzee suggests that the individual “... believe[s] there is some non-material, perhaps fictive, entity that stands in relation of possessor to possessed to the body’s “parts” and even to the whole body.”⁶¹ Otherwise, he suggests, the existence of such locutions as “my leg”, “my eye”, “my brain” show us “... that language cannot get purchase, cannot get going, until it has split up the unity of experience.”⁶² We can perhaps use this to help us understand why it is difficult to separate out constituent aspects of the individual’s *persönlichkeit* (“my privacy”, as opposed to “my reputation”). The difficulty in separating out these aspects leads to a related difficulty in ascribing them a ‘value’ for the purpose of calculating an appropriate amount of compensation in monetary terms. Judges are also not aided by the relative scarcity of ‘misuse of private information’ cases to date, which provides a very limited range of guiding examples of damages awards.

So far, then, we have seen how ‘misuse of private information’ should be thought of as a *sui generis* constitutional tort – albeit one in disguise – rather than a tort in the traditional mould because of its roots in the HRA’s direct horizontality. We have also seen that analysing its elements in the manner of a traditional tort leads to conceptual confusion; attempting to squeeze it into this body of private law encourages this confusion. Notwithstanding these issues, however, which set the new action apart from traditional torts, the essay now demonstrates that principles of corrective justice are nevertheless located within ‘misuse of private information’.

3. ‘Misuse of private information’ may not be a tort, but it is nevertheless informed by principles of corrective justice

Given the substantial differences between traditional torts such as negligence and trespass and the new privacy action, a new methodology is clearly needed if principles of corrective justice are to find expression in privacy cases. That there is both a need for and an existence of a new methodology has been recognised judicially in recent years. For example, Eady J used what he called ‘The New Methodology’ as a subheading to structure his judgment in *Mosley* (and, in so doing, advanced the cause of corrective justice).⁶³ This new methodology, as outlined above, consists of flexible elements which, although ostensibly narrow in focus, are capable of mirroring the Strasbourg approach and, in particular, placing new focus on the Strasbourg principle of proportionality.⁶⁴

⁶¹ J.M. Coetzee, *Diary of a Bad Year*, (London: Harvill Secker, 2007) Pt. 1: (‘Strong Opinions’), Ch.13: (‘On the body’).

⁶² *Ibid*

⁶³ n 11, above, [7]

⁶⁴ See *Von Hannover v Germany* (2005) 40 EHRR 1 at [60]

The methodology associated with ‘misuse of private information’ typically involves conducting a balancing exercise between competing interests. Unlike torts in the traditional mould, in this cause of action the courts are dealing with competing substantive rights, rather than negative freedoms. This is a demanding task for the judges who undertake it, for two weighty interests are in play.

In ‘misuse of private information’, then, there is a particular problem presented for the judiciary in that the competing interests in play are (typically) the human right to privacy and the public interest in publication of the information.⁶⁵ In England, privacy is recognised as a fundamental right under Article 8 ECHR and has been ‘brought home’ by the HRA. When we ponder how this fundamental right can be linked to corrective justice, Eady J’s methodology is worthy of consideration. For it sheds light on how principles of corrective justice might be translated from traditional torts to the new privacy action.

Eady J has talked, extra-judicially, of the uncertainties that such a balancing act produces.⁶⁶ He locates two uncertainties in this process, the first of which is inherent and which “[w]e can do nothing about”⁶⁷ Eady J’s first uncertainty comes from his recognition “... that individual judges are required to carry out a balancing exercise between competing Convention rights;” this being a feature of the ‘new methodology’.⁶⁸ Moreover, Eady J states that “different persons may come up with different answers on the same set of facts.”⁶⁹ The only principled way to deal with uncertainty, Eady J insists, is “by applying an ‘intense focus’ to the facts of the particular case.”⁷⁰ This does not remove the uncertainty as to outcome, but does help to solve the second of his uncertainties: “uncertainty as to principles or rules of law.”⁷¹

The ‘intense focus’ on the facts of the particular case is a key theme in the judgments of Eady J. It appears that for Eady J, ‘applying an intense focus’ means, quite simply, taking into account the widest possible range of relevant facts and factors when conducting a balancing act between the rights of the claimant and

⁶⁵ The impact upon the methodology of competing Article 8 and 10 interests is another issue – one which there is insufficient space in this essay to explore – but which does result in a different structure to the methodology. The requirement on judges to apply an ‘intense focus’ to the facts of the particular case, however, remains the same.

⁶⁶ Eady J, n 4, above, p.5

⁶⁷ *Ibid*

⁶⁸ *Ibid*

⁶⁹ *Ibid*, p.6

⁷⁰ *Ibid*

⁷¹ *Ibid* p.5

countervailing public interest in revealing the information.⁷² It is key to solving the second of Eady J's uncertainties that judges consistently engage in this 'intense focus'. Litigants have the assurance that judges will apply this fine-grained, situation-sensitive approach to the disputes that come before them.

It is clear that the judiciary, including Eady J, have some very strong views about which kinds of information can attract legitimate public interest, and which cannot. In *Mosley*, the sexual nature of the information (detailing the claimant's consensual sado-masochistic sexual activities with multiple partners) was held by Eady J to be incapable of being in the public interest. Eady J explains quite clearly how the new methodology is to be applied:

In deciding whether a right has been infringed, and in assessing the relative worth of competing rights, it is not for judges to make individual moral judgments or to be swayed by personal distaste. It is not simply a matter of personal privacy versus the public interest. The modern perception is that there is a public interest in respecting personal privacy. It is thus a question of taking account of conflicting public interest considerations and evaluating them according to increasingly well recognised criteria.⁷³

Eady J identifies only one way in which an infringement of a claimant's reasonable expectation of privacy may be legitimised: if the information is in the public interest. There are, he explains, two ways in which this might be the case:

[Where it was] necessary and proportionate for the intrusion to take place, for example, in order to expose illegal activity or to prevent the public from being significantly misled by public claims hitherto made by the individual concerned ... [or where it was] necessary because the information, in the words of the Strasbourg court in *Von Hannover* at [60]

⁷² The 'new methodology' in 'misuse of private information' bears considerable resemblance to the Australian High Court's 'salient features' test for establishing novel duties of care in negligence cases. This 'salient features' approach was developed as a tool to ensure incremental development of the Australian common law, and reflected a rejection of the tests in *Anns v Merton LBC* [1977] UKHL 4, and *Caparo Industries Ltd v Dickman* [1990] UKHL 2. The 'salient features' test is designed to be flexible, and involves the court undertaking "... a close analysis of the facts bearing on the relationship between the plaintiff and the ... tortfeasor", *Caltex Refineries (Qld) Pty Limited v Stavar* [2009] NSWCA 258, per Allsop P at [102]. The test has its roots in the case of *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54, and contains a non-exhaustive list of 'salient features' which the court may take into account. These factors are set out usefully in *Caltex* at [103].

⁷³ n 11, above, [130]

and [76], would make a contribution to “a debate of general interest” ... That is, of course, a very high test.⁷⁴

The defendant had argued that a legitimate public interest in the information could be found on several grounds; including the assertion that the claimant was a public figure (and should thus be subject to greater scrutiny than non-public figures), the assertion that there was a Nazi theme to the activities (of which Eady J found no evidence), the assertion that there was some criminality to the activities (some of the claimant’s partners apparently being prostitutes) and the assertion that the activities were ‘depraved and adulterous’. Eady J rejected each of these arguments in strong terms:

Obviously, titillation for its own sake could never be justified. Yet it is reasonable to suppose that it was this which led so many thousands of people to accept the *News of the World’s* invitation on 30 March to “See the shocking video at [their website] notw.co.uk”. It would be quite unrealistic to think that these visits [to the website] were prompted by a desire to participate in a “debate of general interest” of the kind contemplated in *Von Hannover*.⁷⁵

Extra-judicially, Eady J has repeated his assertion that information pertaining to an individual’s sexual activities cannot engage the public interest, remarking that “...most privacy cases concern sexual shenanigans of one sort or another where there is no public interest argument available.”⁷⁶

While Eady J has plainly done much to map the legal terrain we are surveying, on one subject much more needs to be said: *viz*, the ideal of justice at work in this branch of the law. Eady J has made a number of observations that suggest that corrective justice is highly relevant to the law’s operations. In *Mosley*, Eady J’s most telling remark, for the purposes of identifying a commitment to principles of corrective justice may be his assertion that:

⁷⁴ n 11, above, [131]

⁷⁵ n 11, above, [132]. Though, of course, ‘titillation for its own sake’ has been meat and drink to the media (and in particular the tabloid press) for decades. See R. Wacks, *Privacy and Press Freedom*, (London: Blackstone Press, 1995) ch.1. See also A. McLean and C. Mackey, ‘Mosley v News Group Newspapers Ltd: how sadomasochism changed the face of privacy law: a consideration of the Max Mosley case and other recent developments in privacy law in England and Wales’, (2010) 32(2) *European Intellectual Property Review* 77.

⁷⁶ n 12, above, p.11

When the courts identify an infringement of a person's Article 8 rights, and in particular in the context of his freedom to conduct his sex life and personal relationships as he wishes, it is right to afford a remedy and to vindicate that right.⁷⁷

This statement makes plain Eady J's belief that the courts should fashion a methodology that enables claimants who have had their privacy infringed to obtain a remedy. Eady J explains that the purpose of the law is now to afford protection for the privacy of individuals, and goes so far as to defend pre-emptively such a stance against potential criticism:

... [T]he law is concerned to prevent the violation of a citizen's autonomy, dignity and self-esteem. It is not simply a matter of "unaccountable" judges running amok. Parliament enacted the 1998 statute [the Human Rights Act] which *requires* these values to be acknowledged and enforced by the courts.⁷⁸

This remark also indicates Eady J's explicit acceptance of the fundamentally different type of 'damage' that the new privacy action is concerned to remedy: interferences with human dignity.⁷⁹

The decision in *Mosley* might be contrasted with the decision in the more recent case of *The Author of a Blog v Times Newspapers*.⁸⁰ Eady J was asked to consider whether the anonymous author of an internet 'blog' was entitled to an injunction to prevent exposure of his identity. The defendant had, through thorough investigation, discovered the identity of the claimant. Moreover, he wished to expose him, since the material that the claimant had written on his 'blog' concerned the practices of the police and the administration of justice. This material was highly critical both of the police and of incumbent politicians. The claimant was in fact, at the time, a serving police officer.

In his response to this claim, Eady J devoted great attention to the issue of proportionality. However, his discussion was essentially academic, since he had already ruled that the claimant had no reasonable expectation of privacy over his identity, as "... blogging is essentially a public activity."⁸¹ Presumably, if the

⁷⁷ n 11, above, [131]

⁷⁸ *Ibid*, [7]

⁷⁹ See P. O'Callaghan, n 35, above, for a discussion of the breadth of the *Von Hannover* ruling. See also D. Feldman, n 54, above.

⁸⁰ [2009] EWHC 1358 (QB)

⁸¹ *Ibid* [11]

information is ‘public’, talk of (privacy-invading) wrongdoing makes no sense.⁸² Nevertheless, the focus which Eady J again places on the nature of the information is key to understanding how the decision also fits into the framework of principles informed by corrective justice.

Eady J’s view was that the information – the identity of the claimant – contributed to a ‘debate of general public interest’, such as to render its publication necessary and proportionate. Having stated in *Mosley* that this was a ‘very high test’, Eady J was clearly of the view that, in this case, it was satisfied. Whilst the claimant argued that all that the public needed to know in order to engage in a debate of general public interest was that he was a police officer, and that his name was therefore irrelevant to such a debate, Eady J rejected this:

It is very often useful, in assessing the value of an opinion or argument, to know its source. As was pointed out, for example, by Lord Nicholls in *Reynolds v Times Newspapers Ltd* [2001] 2 A.C. 127 5 A–B, one may wish to apply greater caution or scepticism in the case of a person with “an axe to grind”. For so long as there is anonymity, it would obviously be difficult to make any such assessment.⁸³

It seems to me that the public is entitled to know how police officers behave and the newspaper’s readers would be entitled to come to their own conclusions about whether it is desirable for officers to communicate such matters publicly....⁸⁴

Here, we may contrast Eady J’s approach with that of a utilitarian. An approach of the latter sort would involve a balancing of socially desirable ends. In this case, a utilitarian approach would likely have seen the revelation of the claimant’s identity in order to contribute to a debate of general public interest given automatic precedence over the rights of the individual claimant. Eady J noticeably does not do that. By ‘intensely focusing’ on the facts of the particular case, he ensures that a flexible mechanism is in place whereby claimants can be protected against violations of their dignity and autonomy. Moreover, he engages predictably in the same exercise of focus as he did in *Mosley*. It appears that his expectation is that through the use of the new methodology, such protection will become commonplace. Only in certain instances, where the countervailing interest in

⁸² See generally B. Markesinis, n 2, above.

⁸³ *Ibid* [21]

⁸⁴ *Ibid* [29]

revealing the relevant information passes the ‘very high test’ of proportionality, will the claimant be unable to obtain redress.

This essay suggests that the ‘intense focus’ involved in weighing/balancing competing interests in the new privacy action might answer both O’Callaghan’s and Alder’s misgivings about using a balancing exercise to weigh ‘incommensurable interests’, which Alder argues (and O’Callaghan emphasises) is “inappropriate because there is no common scale against which the different components can be compared.”⁸⁵ O’Callaghan emphasises this as part of his argument that human rights language is incapable of providing ‘reasonable answers’ to private law disputes.⁸⁶

Whilst acknowledging that some uncertainty as to the outcome of any particular balancing act will always be inherent in the new methodology, uncertainty as to the types and number of factors that the courts will take into account when conducting the balancing exercise, and as to the structure that will be followed, ought to be removable.⁸⁷ Eady J’s pursuance of a consistent methodology has aided in this. Clearly, there is some way still to go – especially given the potential which this essay identified earlier for the new action to be used in circumstances beyond simply the publication of private information. However, the foundations are now in place. Moreover, these foundations, it is suggested, can help to provide the ‘reasonable answers’ that O’Callaghan seeks. This is plain on a close examination of the judgments on which we have dwelt.

It is not, then, the particular outcome of any given case that is key to the locating of principles of corrective justice within Eady J’s judgments (indeed, views on the particular outcomes of cases inevitably differ according to the commentator’s own moral standpoint). Rather, it is the existence and ready identification of a principled methodology, capable of reflecting the Strasbourg court’s commitment to taking individuals seriously, through according sufficient weight to the claimant’s dignity and autonomy, that demonstrates that the new privacy action is indeed informed by principles of corrective justice.

4. Causation has a central place in the new cause of action

⁸⁵ P. O’Callaghan, n 20, above, citing J. Alder, ‘Dissents in Courts of Last Resort: Tragic Choices?’, (2000) 20 *Oxford Journal of Legal Studies* 221 at 222.

⁸⁶ P. O’Callaghan, n 20, above, section 6: (‘The Strasbourg Enthusiasts - Monologism in Action?’)

⁸⁷ It is worth noting that in the eight years since the inception of the Australian ‘salient features’ test, the ‘uncertainty as to factors’ has arguably been largely removed from the equation (see *Caltex Refineries*, n 72, above).

In ‘The Canengusian Connection’, the element of causation plays a key role in Wright J’s methodology. As he states (when dealing with the negligence claim before him):

The focus is rightly placed upon the activity rather than the defendant’s conduct: the *what* happened is more important than the *how* or *why*. Within such a regime, causation becomes not *a* basis for liability but *the* basis. It is the fulcrum of liability.⁸⁸

It is out of this that Wright J later moves on to a “rather breathless argument”⁸⁹ that strict liability is to be seen as superior to a scheme of fault-based liability.

Writing in 1996, at the time that he was a member of the Calcutt Committee, David Eady QC (as he then was) advocated the introduction of a statutory tort protecting privacy interests.⁹⁰ That, of course, never came about. In 1996, however, he suggested how a statutory tort might be formulated and, particularly notably, he suggested that such a tort should have a public interest defence in the *Reynolds* mould.⁹¹ There should be a defence, he suggested, where the information complained of was published:

- (i) with the consent, general or specific, of the individual whose privacy was infringed; or
- (ii) in circumstances which would give rise to a defence of absolute or qualified privilege if the proceedings had been founded on the tort of defamation; or
- (iii) in circumstances in which the defendant, having exercised all reasonable care, did not know that his act would or might constitute an infringement of the plaintiff’s privacy; or
- (iv) at a time when the personal information in question had already come into the public domain through no act or fault of the defendant; or
- (v) under lawful authority.⁹²

⁸⁸ A.C. Hutchinson and D. Morgan, n 1, above, p.91

⁸⁹ R. Mullender, ‘The Scampering Discourse of Negligence Law’ (2010) 7 *J. Juris.* 575 (‘Hutchinson and Morgan on Negligence Law’).

⁹⁰ See D. Eady, n 30, above.

⁹¹ See Lord Nicholls’ 10 ‘factors’ for the ‘responsible journalism’ test in defamation: *Reynolds v Times Newspapers* [2001] 2 AC 127 at 205.

⁹² D. Eady, n 30, above, p.251

It is parts (ii) and (iii) that are of particular note. For they indicate that, in 1996, David Eady would have sanctioned the use of fault-based liability in a privacy-protecting action. Subsequently, following the ‘elements’ of ‘misuse of private information’ formulated in *Campbell* and later cases, Eady J has been unable to locate space for fault-based liability, though he does still take the opportunity to discuss the possibility of it in *Mosley*. Addressing the question of whether a *Reynolds*-style test could be incorporated into the proportionality aspect of ‘misuse of private information’, Eady J stated that:

There may be a case for saying, when “public interest” has to be considered in the field of privacy, that a judge should enquire whether the relevant journalist’s decision prior to publication was reached as a result of carrying out enquiries and checks consistent with “responsible journalism”.⁹³

Recognising, however, that there is a fundamental difference between ‘misuse of private information’ and defamation, as explored earlier in the essay, Eady J cites Lord Phillips MR in *Campbell* and makes clear that “... the same test of public interest should *not* be applied in the ‘two very different torts’.”⁹⁴ Ultimately, Eady J satisfies himself that the relevant authorities show that the “... public interest is to be determined solely by the court *ex post facto*”, leaving no room for deference to the defendant’s judgment.⁹⁵ Clearly, then, no element of fault can be said to exist within ‘misuse of private information’. It may be that Eady J still harbours some misgivings about the new action being one of strict liability through his continued discussion of a *Reynolds*-style defence’s appropriateness. It is suggested, however, that such a defence would actually be inconsistent with his otherwise clear commitment to a methodology reliant on causation.

It can thus be said that for Eady J, emphasis in the new privacy action is rightly placed on the cause of the interference with the claimant’s right, not on the reasons for it. This restricts the opportunities for the defendant in any given case to avoid liability. Only if a public interest defence can be made-out can liability be avoided. This yields further evidence that corrective justice principles are at work within ‘misuse of private information’.

One final, brief point should be made. That is that Eady J does make room in his judgments for the claimant to be found to have contributed to his own harm; that

⁹³ n 11, above, [141]

⁹⁴ *Campbell*, n 3, above, [61], cited in *Mosley* (n 11, above) at [141]

⁹⁵ *Mosley*, n 13, above, [171]

is, for him to be contributorily negligent. In *Mosley*, Eady J points out that the conduct of the claimant may impact upon the remedy he can obtain.⁹⁶ Similarly, in *The Author of a Blog*, whilst ruling on the ‘reasonable expectation of privacy’ test, rather than on contribution to the level of damage *per se*, Eady J was also clearly of the opinion that the claimant was the author of his own misfortune.⁹⁷ Rejecting any possibility of contributory negligence, as Wright J does, may be seen to be at the extreme end of a deep commitment to strict principles of corrective justice. However, Eady J, like the House of Lords in *Campbell*, clearly takes the view that claimants can be at least partly responsible for their own difficulties. This (like a number of other issues examined in this essay) is a matter on which debate seems set to continue.

Some concluding remarks

This essay has had two broad aims: firstly, to explain how the approach to corrective justice adopted by Hutchinson & Morgan’s Wright J is relevant to debate in the UK on privacy; and, secondly, to stake out plausible positions in four areas of live controversy.

‘The Canengusian Connection’, upon which each of the pieces in this collection is based, gives us, through the judgment of Wright J, an indication of how negligence law can be said to be informed by corrective justice and an example of a methodology reflecting thus. It is hoped that this essay demonstrates how principles of corrective justice can also be said to inform ‘misuse of private information’, in spite of its awkward and uncomfortable position within English tort law.

It is also hoped that this essay can contribute to a reinvigorated debate on the horizontal effect of the Human Rights Act 1998. It has been ten years now since the HRA came into force. Speculative assertions about how it was *likely* to operate, and what horizontal effect it was *likely* to have, must now give way to detailed examinations of the *actual* results of its first decade in use. It is of vital importance that we find a way to understand the new privacy action properly, and that at some point its true boundaries become known. This essay has argued that the true potential breadth of ‘misuse of private information’ as a *sui generis* action is currently masked by its tort-like elements.

⁹⁶ *Ibid* [225]

⁹⁷ *The Author of a Blog*, n 80, above, [33]

The next stage in solving the second of Eady J's 'uncertainties' is to counter the confusion as to the scope of the new action. This, of course, will take time. It will require continued growth in the body of case law using the new action over the coming years, and it will require the judiciary to keep a sharp eye on developments in Strasbourg. Direct horizontality has come under constant attack since it was first mooted as a possibility for the HRA by the late Sir William Wade. In the context of the new privacy action, it has only existed in our legal system for six years. Rarely has anything so new been so vilified. The truth facing both Strasbourg-enthusiasts and common law traditionalists may be very simple indeed: that there is much about the potential reach of direct horizontality and the causes of action it results in that, as yet, we simply do not know.⁹⁸ We have not yet encountered its full

⁹⁸ As outlined in the introduction to this collection, and in the introduction to this essay, the argument advanced in this piece regarding the effect of the HRA on private law lends itself to a model whereby higher-order public law (in the form of the HRA) exerts a shaping force over lower-order private law and is, in that sense, directly effective (making lower-order private law 'subordinate' on O. Cherednychenko's model, see n 2, above). However, notwithstanding that the argument works on such a model, this author makes room for the possibility that the HRA might affect the traditional fields of public and private law still directly, but on a different model, which is now set out here by way of a very tentative analogy. The argument advanced in this essay may also be plausibly explained, it is equally tentatively suggested, by this new model.

This is the 'Operating System' model, and is based on trying to understand the use of legal tools by analogising them to a computer operating system (*viz* Windows). (The author has simplified some of the Windows terminology, for ease of reference.) It exists because of a concern that today, "public" and "private" law, as terms of art, are limiting. They do not lend themselves to helping to understand the impact that human rights principles have on the development of our common law.

Pre-HRA, the English legal system was running Windows XP. Private law actions are a particular file-type (".doc") which can be opened, created, modified and run by the Word2003 programme. Public law actions are the file-type (".xls"), which can be opened, created, modified and run by Excel2003. These 2003 programmes have certain rules, which make up the 'elements' of the actions. They also have certain features which are unique to each: .doc files have a wider range of fonts, while .xls files can be sorted more easily into a searchable format. Pre-HRA, the operating system only supported the opening and running of files of these types. .doc and .xls files were at that time the most advanced file-types available, and did everything that their users required.

When the HRA came into force, it forcibly upgraded the operating system to Windows Vista. New file-types were made available, because the new programme, Office2007, does not create .doc or .xls files. Instead, it creates ".docx" and ".xlsx" files. These resemble the older file types, but have a vastly enhanced range of (human rights) features. Windows Vista has opened up a range of new (human rights) features available to the courts. Not only *can* they be utilised, but they *must* be utilised, since the new features are built into the new programme, Office2007. Now, older file types can still be opened, run, and used by the new programme. In that sense, .doc and .xls files are obsolete, but far from useless. They are the remnants of an old system, but since they make up the majority of the files on the computer's hard disk, they cannot simply be erased. Nor can they be replaced one-by-one in a short space of time.

potential. And it may be that until we have, none of us is in a position either to glorify or to vilify it.

Any new files (causes of action) created, however, are in the new format. They are at least HRA-compatible. Some, where insufficient protection for human rights was in place, are designed specifically to take advantage of the new human rights features. ‘Misuse of private information.docx’ is one such new action. It could only have been created using Windows *Vista*’s Office2007 programme. In creating a new cause of action that features human rights methodology in the Strasbourg vein, enabling individuals to protect their human rights in a *sui generis* fashion, the HRA’s impact can still properly be described as ‘direct horizontal effect’.

So, with the new operating system in place, there is much more scope for new causes of action. Some of the ‘new features’ of .docx and .xlsx files are common to both. Describing the newly created causes of action in the old terms “public” and “private” law is both unhelpful and misleading; they are neither, because they are created by a different system where .doc and .xls files are *no longer the only available option*. Insofar as the old files can still be used, they rightfully retain their old classifications. New actions, however, must be called something new.

Now, whether we try to draw a distinction between .docx and .xlsx files is another question. Arguably, they now have such similar features, and are created by the homogenous Office2007 programme, and so should be thought of in the same bracket (“.newx”). On the other hand, since they resemble some of the old-style files, perhaps we can continue to think of them as “private law plus” and “public law plus” (in the sense that they are ‘plus’ some human rights features).

Appendix A: Features of ‘misuse of private information’

Figure 1: Original breadth⁹⁹

This figure shows the breadth of the action for ‘misuse of private information’ as it was when it first appeared in the common law in *Campbell v MGN Ltd* [2004] 2 AC 457.

Elements:

1) Reasonable expectation of privacy:

- Details of treatment, pictures of claimant leaving Narcotics Anonymous.
- No reasonable expectation of privacy regarding the fact of C’s addiction.

2) Misuse:

- Publication in the defendant newspaper.

3) Public interest defence:

- No public interest in information outside of issues about which the claimant had previously made inaccurate statements.

⁹⁹ It may be said that the tripartite structure in this Figure maps neatly onto the schematic account of ‘incrementalism’ in R. Mullender, ‘Negligence Law as a Human Practice’, (2003) *Law and Literature* 21(3) 321.

Figure 2: Subsequently evidenced breadth

This figure shows the breadth of ‘misuse of private information’ as demonstrated by some of the cases in which it has been used since *Campbell*.

Elements:

1) Reasonable expectation of privacy:

- Photographs of child in public with parents (*Murray v Big Pictures* [2008] EWCA Civ 446);
- Various details as to personal relationships of Canadian folk singer (*McKennitt v Ash* [2006] EWCA Civ 1714);
- Details, pictures and video footage of sexual acts (*Mosley v NGN* [2008] EWHC 1777 (QB));
- Information as to date of birth and religious views (*Applause Store Productions v Raphael* [2008] EWHC 1781 (QB)).

2) Misuse:

- Publication in national newspapers (*Mosley*);
- Publication in book (*McKennitt*);
- Retention by photographer/holding company (*Murray*);
- Publication on social networking website with limited access to page containing material (*Applause Store*).

3) Public interest defence:

- No public interest in sexual matters (*Mosley*);
- No public interest in date of birth/religious views of claimant (*Applause Store*);
- Some public interest in identity of claimant if information contributes to a debate of general public interest (*The Author of a Blog v Times Newspapers* [2009] EWHC 1358 (QB)).

Figure 3: Potential breadth

This figure demonstrates the potential breadth of ‘misuse of private information’ if, as argued in the essay, the labels attached to its ‘elements’ are mere disguises. It should be noted that, as demonstrated by a number of ECtHR decisions, there may not always be a clear-cut distinction between the ‘engagement’ and ‘interference’ elements, *i.e.* the interference may itself engage Article 8 (thus appearing to ‘skip over’ the ‘engagement’ element – highlighting the inadequacy of analysing the new privacy action by reference to traditional ‘elements’).

Elements:

1) Reasonable expectation of privacy (re-labelled ‘engagement of Article 8 rights’)

The following may engage Article 8 (non-exhaustive list):

- Private information, including: sexual information, date of birth, religious views (as in Figure 2), pictures of the individual (*Reklos and Davourlis v Greece* [2009] EMLR 16);
- Reputational interests (*Pfeifer v Austria* (2009) 48 EHRR 8);
- Non-defamatory, false information (currently actionable under ‘malicious falsehood’);
- Emotional distress (identified in *R (on the application of Watkins-Singh) v Aberdare Girls' High School Governors* [2008] EWHC 1865 (Admin) at [137] (an application for judicial review) as potentially lying within the ambit of Article 8);
- Bodily integrity (*Wainwright v UK* [2004] 2 AC 406).

2) Misuse (re-labelled ‘interference’)

- Publication of information;
- Covert obtaining of information;
- Physical interferences with the individual (*Wainwright v UK*);
- Physical intrusions into the private sphere of the individual, *i.e.* into the home, or the personal space of the individual when outside the home;
- Retention of information (*S and Marper v UK* (2009) 48 EHRR 50; *Murray*);
- Coercing the individual into revealing private information;
- Coercing the individual into doing (or not doing) anything* (*Wainwright v UK*);
- Harming the individual’s reputation;
- Causing emotional distress.

3) Public interest defence/defence of proportionality**

- Any interference must be justified either proportionately in the public interest or, if the defendant’s own Convention rights are in play, as part of a balancing exercise using the proportionality doctrine

* It may be said that the mere act of coercing a person into doing or not doing something that he/she would normally do/not do may constitute an interference. However, in many of these instances, the interference is likely to be proportionate and thus not unlawful.

** There will be instances where certain of the ‘interferences’ involve the defendant exercising his/her own Convention right, since publication is (on this model) not the only type of possible ‘interference’. In such instances, the proportionality defence becomes a balancing exercise between the competing rights which, at that point, are