Legal Comment

No tort of invasion of privacy

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There is no tort of invasion of privacy *Wainwright* v *Home Office* (2003) 3 WLR 1137, HL. Privacy may be invaded in so many ways, often but not necessarily always, morally and ethically and socially unacceptably:

Disclosure of private personal medical matters.
Disclosure of intimate personal and family matters.
Unjustified strip search.
Intrusion into hospital room.
Photograph of conjoined twins; or cancer patient.
Surveillance device stuck on to the wall of the house.
"Bugging". Hidden camera.
Insurers' investigators.
Photography with long lens into private garden, owner swimming naked in her private pool, or topless woman on private or secluded beach, causing embarrassment.
Publication of photograph (infra-red) of an unhappy man attempting suicide in a dark street corner.
Non-consensual video and audio recording.
"Gatecrashing" a private wedding reception, taking and selling secret photographs of the event.
Public disclosure of identity of adulterer by scorned and rejected mistress.
Public disclosure of fact that a particular identified person suffers from AIDS or is HIV positive, e.g. spouse, lover, doctor.
Disclosure of information revealing identity and location of released child killers, e.g. Mary Bell, and Thompson and Venables.

Reasons

The reasons given by the House of Lords for there being no tort are exactly what one would expect from traditional English Judges:

There has been no judicial authority, certainly no clear line of cases from the higher courts. Definition would present a real difficulty. A tort of privacy, however defined, would be vague and uncertain and broad and general, difficult or impossible to apply in any given case, unworkable, impracticable.

The need to protect freedom of expression and freedom of speech would mean that there would need to be too many counterbalancing defences and exemptions in the public interest.

Judges may properly extend and develop and refine common law principles, and discretely employ analogies, but they may not create entirely new laws. That is a legislative activity for the legislature.

Parliament has not created a statutory tort of invasion of privacy and must be presumed to be content that there is none.

In fact many specific statutory and common law remedies do exist to protect to some extent the citizen in many particular circumstances of invasion of privacy:

Battery
Trespass to the person, trespass to property
Protection from Harassment Act 1997
Nuisance
Police Act 1997 (re surveillance)
Interception of Communications Act 1985 (re telephone tapping)
Breach of copyright
Trade secrets
Breach of confidence
Data Protection Act 1998
Malicious falsehood
Defamation

Breach of privacy by a public authority entitles the citizen to go to the ECHR and obtain a remedy under Article 8, requiring the United Kingdom government to alter the domestic law if necessary in order to provide an effective remedy.

Unconvincing

It is submitted that these arguments are unconvincing in this century.
In an era of the recognition of human rights the autonomy and dignity of the citizen is rightly accorded a high priority in the law.

That the many intrusions and abuses of privacy should go without a remedy is unacceptable.

The existing statutory and common law remedies certainly cover some of the intrusions and abuses, but by no means all.

The judges have always applied underlying values, justice, common sense, and have always steadily developed remedies to meet developing needs. Basic principles have always been taken forward, the common law has never been static. Lord Atkin "created" the tort of negligence, by way of common law techniques, and a seemingly vague tort has served the social and legal purpose admirably. It has been successfully applied to new situations.

Negligence is a far bigger tort than privacy would ever be. The judges have always recognised that there must be limits to negligence, and that would apply also to a tort of privacy. All tort is a balancing exercise between competing interests. The need in the public interest to balance privacy and freedom of expression would always be recognised. Definition of a tort of privacy would not be easy, but the draftsmen of the European Convention on Human Rights (draftsmen who included Englishmen) managed to draft article 8 over fifty years ago and the draft has stood the test of time, is applied daily, and indeed is incorporated into English law.

Article 8 expressly creates the right of privacy, qualified of course, in European human rights law. Why should that remedy not be directly available in the United Kingdom instead of the citizen having to go to Strasbourg to obtain judgement to compel the government to provide an appropriate remedy?

The fact that Parliament has not created a statutory tort of invasion of privacy may just possibly be because Parliament does not want to see such a remedy. However the United Kingdom is a party to the European Convention on Human Rights, and has partially incorporated it into domestic legislation. The failure to legislate is probably, indeed very likely, because government has higher political priorities for legislation.

The House of Lords has missed a golden opportunity. Lord Atkin would not have missed such an opportunity.

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