PRIVACY AND THE PRESS (1)

R. G. Hammond

If an English lawyer were to be asked whether there is a "right of privacy" as such in English law, he would probably answer "no" After a little more thought he might say, "there is no right of privacy as such, but the law does take account of some infringements of privacy, in the shape of trespass, nuisance, copyright and breach of confidence, and, moreover, the law will take account of invasions of privacy when awarding damages incidental to the invasion of these more tangible interests."

The purpose of this paper is to inquire whether it is necessary to call upon the law to do more in an attempt to secure the interest in privacy, than merely take account of incidental infringements of it, especially in regard to the Press. It would appear that the present Minister of Justice may be thinking along the same lines, for in a recent paper he states : "... I have in mind a number of subjects that I believe may be ripe for examination now or in the measurable future. Among these are - the introduction of a remedy for unwarranted invasion of privacy." (2)

In recent years, especially in the United States, there has been voluminous juristic writing on "privacy", but mainly insofar as a general right of privacy is concerned (3). We would strongly urge that the time has come for a more thorough-going analysis of the many "privacy" situations possible. These situations vary from police powers of search and entry to "spite-fences", and each situation calls for a separate analysis, and possibly, a different measure of protection.

This paper is restricted entirely to an examination of privacy and the press,

(1) This paper is an amended version of a paper presented to an LL. B (Hons) Seminar at Auckland University Law School in 1966. The writer does not claim originality of subject matter - far more experienced and able writers have explored the subject, and to these persons the writer acknowledges his indebtedness. The aim was, and is, simply to interest other persons in what the writer considers to be a deficiency in the law.

(2) The Law in a Changing Society pp 27-29, Hon. J.R. Hanan, Wellington, 1965.

(3) The following articles form an excellent starting point for research on this topic : Warren & Brandeis, Privacy (1890) 4 Harv. L.R. 193; Prosser, Privacy (1960) 48 Calif. L.R. 383; Blounstein, Privacy as an aspect of Human Dignity an answer to Dean Prosser (1964) 39 N.Y.U.L.R. 962; Feinberg, Recent developments in the Law of Privacy (1947) 48 Col. L.R. 713; Nimmer, The Right of Publicity (1954) 19 Law and Contemporary Problems 203; Brittan, The Right of Privacy in England and the United States (1963) 37 Tulane L.R. 235; T.L. Yang, Privacy: A Comparative Study of English and American Law (1966) 15 I.& C.L.Q. 175-198; Winfield, Privacy (1931) 47 L.Q.R. 23; Neil, The Protection of Privacy (1962) 25 Mod. L.R. 393; Mathieson, An Equitable Right of Privacy (1961) 39 Can. Bar. Rev. 409; Eldredge, Modern Tort Problem (1941) 77.

and the following approach is adopted :

(1) An examination of the present law on the subject,

   (a) in the Commonwealth;
   (b) in the United States;
   (c) on the Continent.

(2) An examination of some of the policy factors involved in a right of privacy.

(3) A survey of the extent of press intrusion into private lives in England, the U.S.A. and New Zealand.

(4) Suggestions for reform of the law.

I The present law relating to privacy

A. In the Commonwealth (4)

It has been said that the traditional approach of English tort law has been to express duties rather than rights. Thus the question may be posed : "what wrongs may be laid to the account of the intruding newspaper reporter or photographer ?" rather than, "what rights to privacy does the Englishman have ?"

Privacy of land would appear to be relatively well-protected by trespass, nuisance and contract (5). However privacy of "personality" is almost devoid of legal protection. Unwelcome publicity as such would not appear to be actionable in that it is damnum sine injuria. For instance in the case of Prince Albert v. Strange (6) it was held that when such respected personages as Queen Victoria and Prince Albert had cause to complain against unwanted publicity, and sought in Court (with the Prince as Litigant, because the Queen could not appear in front of her own Judges) an injunction to prevent a printer from the further printing of etchings done by the royal couple, they could secure protection only on the principle of a common law copyright.

In Pollard v. Photographic Co. (7) the principle of an implied contract was invoked. In this case a photographer who had taken a negative likeness of a lady to supply her with copies for money, was restrained from selling or exhibiting copies, both on the ground that there was an implied contract not to use the negative for such purposes, and also on the ground that such sale or exhibition was a breach of

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(4) Most of these cases were originally "discovered" by Professor Winfield and cited in the article referred to in note 3, supra.

(5) Quaere as to the application of such cases as Harrison v. Rutland, [1893] 1 Q. B. 142 and Hickman v. Maisey, [1900] 1 Q. B. 752 in New Zealand. "In New Zealand the soil of the highway is vested in the local authority in the case of highways in boroughs (Sec. 170 Municipal Corporations Act 1954), in other cases it is vested in the Crown (Sec. 111 Public Works Act 1928.)" Davis, The Law of Torts (2nd ed. 1959, 58)

(6) 2 De. G. and Sm. 652.

(7) (1899) 40 Ch. D. 345.

confidence.

Monson v. Tussauds Ltd. (8) provides some interesting dicta. Here the plaintiff had been charged in Scotland with murder and found 'not guilty'. Later Tussauds exhibited a waxen figure of this man in the entrance to its "Chamber of Horrors" - an exhibition of notorious criminals. The plaintiff sued for libel and succeeded. However the invasion of personal privacy clearly lay behind the decision (9), and on appeal Lord Halsbury wondered, "whether everything which has once been known may be reproduced with impunity ?" (10).

In Corelli v. Wall (11) the defendants published and sold, without the consent of the plaintiff, postcards on which were coloured representations of the plaintiff, depicting imaginary incidents in her life, and upon the plaintiffs objecting they did not withdraw them. The portraits of the plaintiff were stated to be unlike her. She brought an action to restrain publication on the grounds :

(1) that they were a libel;
(2) that she was entitled to restrain the publication of a portrait of herself published without her authority.

The Judge held that, "setting aside the question of taste", the difficulty he felt, "was whether there was any legal right to restrain such matters." (12).

In Dunlop Rubber Co. v. Dunlop (13), Dunlop managed to obtain an injunction from an Irish Court for libel in using his name for advertising purposes without his consent, where such advertising was calculated to expose him to public ridicule by misrepresenting his appearance or costume.

Palmer v. National Sporting Club Ltd. (14) is authority for a finding that, "annoyance and injury to the feelings are not grounds upon which the Court, apart from property or contract, will interfere."

In 1916 it was held that an exclusive right to take photos does not exist in law, as property (15). Horridge J. stated (16) : "in my judgment no one possesses

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(8) [1894] 1 Q. B. 671
(9) Mathew J. at first instance commented, (at p. 678) "suppose that for the purposes of a newspaper mainly chronicling criminal cases it was found worth-while to shadow a man who had been acquitted of a crime, to take portraits of a man who had been tried and acquitted in such and such a case, would that be actionable ? Is it possible to doubt that such a newspaper would be a sharp instrument of torture, and an outrage on the man's comfort and peace ?"
(10) Ibid., 687.
(11) (1906) 22 T. L. R. 532.
(12) Ibid., 532. For a contary view see Winfield, Privacy (1931) 47 L.Q.R. 23, 32. See also Winfield, The Foundation of Liability in Tort (1927) 27 Col. L.R. 1.
(13) [1921] A.C. 367.
(14) See Macgillivray Copyright Cases (1905-10) 5. Cited in Winfield, supra 33.
(15) Sports etc. Agency Ltd. v. "Our Dogs" Publishing Corp. Ltd. [1916] 2 K.B. 880.
(16) Ibid., 884.

a right of preventing another person photographing him, providing the description was not libellous, or otherwise wrongful." (17)

During the course of his judgment in the well known case of Tolley v. Fry, Lord Justice Greer commented, "I have no hesitation in saying that in my judgment the defendants in publishing the advertisement in question, without first obtaining Mr Tolley's consent, acted in a manner inconsistent with the decencies of life, and in so doing they were guilty of an act for which there ought to be a legal remedy." (18) (my emphasis).

The most definite pronouncement against a general "right of privacy" has come from the High Court of Australia in Victoria Park Raceway Ltd. v. Taylor, in which case Evatt J. said, "... there is no general right of privacy recognised by the common law." (19)

These cases and dicta would appear to be authorities for the following propositions :

There is no general right of privacy as such recognised by the common law, neither is unwelcome publicity as such actionable. Annoyance and injury to the feelings are not grounds upon which the Court, apart from property or contract will interfere. An action may lie for a breach of a common law copyright, a breach of confidence, or for a breach of an implied contract, but unscrupulous exploitation of the truth would appear not to be actionable. However if an action under one of the heads mentioned above is successful, then the invasion of personal privacy becomes relevant in considering the quantum of damages (20.

It is respectfully submitted that these propositions show that a grave deficiency exists in English law in respect of personal privacy (21)..

This deficiency has nowhere been more clearly demonstrated than in the

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(17) The use of the words 'or otherwise wrongful' is interesting. Perhaps Horridge J. had privacy in mind.

(18) [1930] 1 K.B. 478 per Greer L.J. at p. 478.

(19) (1937), 58 C.L.R. 479, 521. See also (1938) 54 L.Q.R. 319.

(20) As to the question of damages see :
1. Halsbury, Laws of England, (3rd ed. 1963) vol. 30, p. 556, footnote (a) English law does not restrain invasions of privacy unless some other right is infringed - then parasitic damages are obtainable."
2. Stone, The Province and Function of Law, 514. "The claim in respect of emotional disturbance has been recognized indirectly by the common law to the point of allowing it to be assessed as an element of damage parasitic to an independent cause of action, as where a theatre-goer claiming for ejectment in breach of licence is allowed an amount for the humiliation involved.: Hurst v. Picture Theatres Ltd., [1915] 1 K.B. 1, esp. 4."

(21) In addition to the authorities cited in Note 3 supra, the following have argued for a right of privacy in English law : Glanville Williams, The Reform of the Law (1950) p. 76; Salmond on Torts, (13th ed. 1961) p. 21; Fleming, Torts, (3rd ed. 1965) p. 568.

recent case of Williams v. Settle, 1960 1 W.L.R. 1072. Following a murder a professional photographer supplied press reporters with photographs of the murdered man among a wedding group which the photographer had taken at the wedding of the murdered man's daughter. The copyright was in the son-in-law. The publication of the photographs in two daily newspapers, which the photographer knew was intended, caused distress to the murdered man's daughter and son-in-law. The son-in-law succeeded in an action for breach of copyright, and gained heavy exemplary damages.

However the judgments, both at first instance and in the Court of Appeal, show that the real villains in the case were the newspapers concerned rather than the defendant. Lord Justice Sellers commented (at page 808), "the defendant was approached - I might say he was beseiged - by press reporters in order to get a photograph of Mr Baker." The heavy exemplary damages awarded at first instance, were, he considered, quite justified, in view of the fact that the whole matter was "scandalous ... and in total disregard .... of the plaintiffs feelings and his sense of family dignity and pride." (page 812).

It is to be regretted that in these circumstances an action for unwarranted invasion of privacy was not at least canvassed. In effect the perpetrators of the injury escaped liability entirely.

B. The Right of Privacy in the United States.

In 1890 Warren and Brandeis wrote an article containing a scathing indictment of press intrusion into private lives (22). This article sparked off the growth of a general right of privacy, which is today affirmatively rejected only in Rhode Island, Texas and Wisconsin. Indeed, so wide had this right become by 1960 that Dean Prosser queried whether the law on privacy would not eventually swallow up the entire law of public libel (23). The Restatement as early as 1939 was able to define "interference with privacy" in very wide terms - "a person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other." (24)

The main features of this right in the United States would appear to be as follows : (25)

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(22) (1890) 4 Harv. L.R. 193. In this article it was argued that the common law had been groping towards a right of privacy and needed to be pushed just a little further.

(23) Prosser, Privacy (1960) 48 Calif. L.R. 383, 401.

(24) (1939) Vol 4. para. 867. The features of the action may differ from state to state.

(25) Many of the leading U.S. cases on this topic have not been available to the writer. Consequently we have had to lean heavily on the American writers cited in Note 3 supra, in particular Yang, Brittan and Prosser. The leading U.S. cases on "privacy" would appear to be : Barber v. Time Inc., (1948) 159 S.W. 2d. 291 (picture taken of the plaintiff in her sickbed hospital despite her objections); Bazemore v. Savannah Hospital (1930) 155 S.E. 194 (publication of a picture of the plaintiff's deformed child); Melvin v. Read (1931) 122 Cal. App. 285; Sidis v. F.R. Publishing Co. (1940) 113 F.2d. 806; Stryker v. Republic Pictures (1951) 238 P 2d, 670; Pavesich v. New England Life Insurance Co. (1904) 122 G.A. 190, 50 S.E. 68.

(1) The tort must be committed against something which is entitled to be kept private (26).

(2) The tortious Act must be in the nature of offensive or objectionable prying or intrusion (27).

(3) The test is that the public disclosure of private facts must be offensive to a man of ordinary sensibilities.

"Bad taste and vulgarity by themselves do not suffice, nor is the actual mental distress of the plaintiff the deciding factor. In applying the test (of the man of ordinary sensibilities) the Court takes into consideration the status of the plaintiff in society, the prevailing customs, tastes and moral standards of society, the public benefit to be gained by the invasion of privacy complained of, the interest shown by the public, the lapse of time between the incident publicised and the publication and the ordinary notions of decency." (28)

(4) Publication must be by printing or pictures - not by word of mouth.

The defences available would appear to be :

(a) that the act was not objectionable to a man of ordinary sensibilities;

(b) consent to publication (29);

(c) that the printed material was of legitimate public interest concerning a public figure (30).

In effect the U.S. Courts exercise a power akin to a power of censorship over what the public may be allowed to know, but they appear to have exercised this power responsibly and have been slow to hold a newspaper item objectionable (31). Moreover through the cases they have evolved a set of principles acceptable to

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(26) Thus the unauthorised taking of a photograph in a public place was held to be nothing more than the making of a record - Chaplin v. National Broadcasting Co. (1953) 15 F.R.D. 134 (S.D.N.Y.).

(27) Thus the unauthorised prying into another's bank account was held to be actionable. Brex v. Smith (1929) 104 N.J. Eq. 386.

(28) The commentary to the Restatements principle cited note 24 supra states, "the protection is relative to the customs of the time and place and to the habits and occupation of the plaintiff. One who is not a recluse must expect the ordinary incidents of the Community life of which he is part."

(29) "in the Pavesich case it was held that one who seeks public office, or any person who claims from the public approval or patronage, waives his right of privacy to such an extent that he cannot restrain or impede the public in any proper investigation into the conduct of his private life which may throw light upon the question as to whether the public should bestow on him the approval or patronage that he seeks." Brittan, The Right of Privacy in England and the U.S. (1963) 37 Tulane L.R. 235.

(30) Sidis v. F.R.Publishing Co. (1940) 113 F. 2d. 806, 809 (2d Cir.) also Brittan, The Right of Privacy in England and the United States (1963) 37 Tulane L.R. 235.

(31) Some would say the U.S. Courts have been too reluctant to find against newspapers : Phillip Wittenberg has commented, "the dangers which were forseen by Brandeis and Warren have never been met by the law. The gossip columnists still continue to violate the privacy of the individual and the home." The Law of Literary Property 239. Cited in Brittan, supra.

press and private citizen alike.

C. The Law of Privacy on the Continent.

In Switzerland ample protection is given under the Swiss Civil Code and Code of Obligations. (32) In Germany protection is not so ample as in Switzerland, but greater than in the U. S. or Britain. "Protection would appear to centre around the so-called "law of personality". According to this theory the law must be such as to protect the individual to the fullest extent in the exercise of his faculties in every conceivable direction ... any wilful and unauthorised incursion by others into the private life of an individual is prima facie to be regarded as an actionable wrong" (33).

Again, it has been said of French law that, "it (is) pretty safe to say that in French law such a right is recognized, though no name for it has become generally accepted and though it is not easy to define the limits of the right." (34) The different treatment accorded "privacy" in various legal systems may seem surprising but it is suggested that the following factors may have given rise to the divergencies. In the first place on the Continent and in the United States academic writers exert far more influence than in the Commonwealth, and to a large extent "rights of privacy" have been created by academic urgings, especially in the United States. Moreover in the British Common Law systems cases are decided by a narrow circle of men - judges and counsel - who seldom if ever, look beyond the decided cases for guidance. (35).

Another factor would seem to be the strength of precedent in the various legal systems. It is generally recognised that precedent is less rigourously followed on the Continent and in the United States than in Commonwealth legal systems. (36) By and large Commonwealth judges seem to have been loath to strike out boldly in the field of tortious causes of action.

II The Policy Factors Involved in a Right of Privacy

Three major factors are involved in the problem of privacy and the press : the interests of the press; the interests of the private citizen; and the constitutional issue of the freedom of the press. It is proposed to examine each of these separately,

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(32) See H.C. Gutteridge, The Comparative Law of the Right to Privacy (1931) 47 L.Q.R. 203.

(33) Ibid., 203.

(34) F.P. Walton, The Comparative Law of the Right to Privacy (1931) 47 L.Q.R. 220 Apparently in South Africa the shadowing of another by a private detective in in such a manner as to attract attention has been held to be inuria : Epstein v. Epstein (1906), T.H. 87. Presumably the Roman-Dutch Civil Code of South Africa is somewhat similar to those operating on the Continent.

(35) Street, Freedom, the Individual and the Law, 245.

(36) Lord Denning, during the debate on Lord Mancroft's Bill 1961 stated : "there is nothing in any decision of this house, judicially, which prevents it". See British Parliamentary Debates, Vol. 229 Cols 607 - 662 (1961).

although in some cases overlapping will be unavoidable. (37)

A newspaper has to make a profit to remain in existence. This has led those newspapers without a fixed, stable group of subscribers, to bid for subscribers by printing "popular" articles. This has been the tendency of many Sunday newspapers, and regrettable or not, this factor must be born in mind. Moreover, newspapermen have an interest in obtaining quick, accurate information.

The interest of the individual is not so clear-cut. In the infancy of the law, the first thing to be protected was a person's physical well-being. Then property interests were deemed worthy of legal protection. Now that society has attained a more highly sophisticated level, demands are being made for the recognition of less tangible injuries. The focal point of the Warren Brandeis thesis was that the right to life has come to mean the right to enjoy life. It is to be noted that Western Society generally postulates that every individual is worth something, and has something to contribute to the human race. Again, in contrast to the nineteenth century, which preferred the general security, the twentieth century has tended towards preferring the individual moral and social life.

Privacy connotes personal modesty, dignity and independence. The use of the term "inviolate personality" by Warren and Brandeis in this context is particularly apt (38). But obviously liability cannot be extended to every trivial indignity - there can be liability only for conduct exceeding all bounds usually tolerated by society (39). Or to put the matter another way man lives in society and must expect the ordinary everyday incidents of living.

Again there is the constitutional issue of the freedom of the press. This extremely important freedom has sometimes been misunderstood. It is suggested that what the freedom of the press means is that the press has the fullest rights of publication allowable by law. In the Attorney-General v. Mulholland (40) it was argued that there is an overriding public policy which ought to entitle newspaper reporters to be privileged as to giving their sources of information - this was completely rejected by the Court. It would seem that the law has never accepted the notion that the freedom of the press is a supreme freedom which may override all the other freedoms of the community. It has insisted that the press too is under the rule of the law.

Taking all the above factors into account, it is submitted that the law could very well extend liability to outrageous invasions of privacy, consistently with maintaining the interests of the newspapers, the private citizen and the freedom of the press.

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(37) In the United States there has been controversy as to the classification of the various privacy situations. Warren and Brandeis argued for a general right of privacy, while Prosser in 1960 analysed four distinct torts. Blounstein wrote a reply to Prosser and recently Young has written in support of Prosser. See the articles cited in Note 3, supra.

(38) Warren and Brandeis. Note 3, supra. 205.

(39) A good example is being an unauthorised witness to a childbirth and publishing details of it - De May v. Roberts (1881), 46 Mich. 160, 9N.W. 146.

(40) [1963] 1 All E.R. 767.

III The Extent of Press Intrusion into private lives

In the United States the 'right to privacy' may have been spawned by the 'Yellow Press' of the 1890's (41). Banner headlines, lurid details, sensationalism, and plain lies did great harm to the tradition of the American Press. The development of a 'popular press' in England has led to similar manifestations. The failure of the law in respect of invasions of privacy was criticised by a select committee of the House of Lords as far back as the 1840's (42).

The P.E.P. (43) Report on the British Press of 1938 commented (44) :

> "Perhaps the most acute cause of trouble is the intrusion into private lives and personal affairs which has led to considerable public indignation against sections of the Press. Questions in Parliament and letters in 'The Times' and elsewhere, have repeatedly given examples showing how victims of misfortunes and their friends, relatives and servants have been persecuted by being rung up in the middle of the night by reporters, by importunate attempts to secure interviews or pictures, by trespassing in grounds and gardens, and by the use of all sorts of inconsiderate and objectionable methods for securing information, much of it on private matters which are of no public interest, however interesting they may be to members of the public who may find in them a substitute for, or an addition to personal gossip."

The 1949 Royal Commission on the Press was also thoroughly critical : "an aspect of this form of sensationalism which has attracted much attention is the intrusion on the privacy of individuals necessary to satisfy the appetite for intimate personal detail about the lives and affairs of people who are, perhaps quite accidentally in the news. "After stating that this had been made clear by questions in the House of Commons and letters to 'The Times' the report went on : "the pain given to individuals is, however, only part of the evil of this practice. The greater evil lies in the degradation of public taste which results from the gratification of morbid curiosity, and in the debasement of the professional standards of journalists who, whether willingly or otherwise, minister to it." (45)

The problem would appear to be not so acute in New Zealand as in England (46). Recently the N.Z. Consumer Council carried out a survey of the N.Z. Press (47). This report emphasised that : "the main good quality of the (New Zealand) press is in its sense of responsibility" (48). However, "sensational aspects of the

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(41) Swindler, Problems of Law in Journalism (1955) 245.
(42) Gerald Abrahams, The Law for Journalists and Writers 31.
(43) Policy and Economic Planning.
(44) At p. 282.
(45) Royal Commission on the Press 1947-49. Cmd. 7700 p. 132. For a journalist's reply see Sir Linton Andrews, Problems of an Editor (1962), 151-2.
(46) But as the Hon. J.R. Hanan has said : "A situation where every reform demands at least one victim is much to be deprecated. The proverb about prevention being better than cure is as valid in lawmaking as in other spheres." Paper cited supra Note 2 at p. 21.
(47) Consumer Council Survey of the Press 1965.
(48) See the Waikato Times, Sat. 19 March 1966, Col. 7 p. 4 (this paper reproduced the report in full).

news were considered to be over-emphasised, especially the results of stupidity, or irresponsibility such as any act which gave a poor level or norm to public behaviour" (49). Morevoer in recent years both New Zealand and Australia have experienced the nucleus of a "popular press" and, as has been shown, it is with the "popular press" that these invasions of privacy are experienced (50).

IV The Reform of the Law

Section I of this paper demonstrated the inadequacy of English law in respect of privacy. Section II, supra showed that it is possible to reconcile the various interests involved in the privacy situation. Section III showed that such is the extent of press intrusion upon private lives, the law should afford legal protection. This section is concerned to discuss possible forms of legal protection.

In 1961 Lord Mancroft introduced a "right of privacy" bill into the House of Lords. This bill obtained a majority on the second reading and was considered in Committee. The object of the bill was stated as being : "to give every individual such further protection against invasion of his privacy as may be desirable for the maintenance of human dignity while protecting the right of the public to be kept informed in all matters in which the public may reasonably be concerned" (51).

A right of action was to have been given : "against any other person who without his consent publishes of or concerning him in any newspaper or by means of any cinematograph exhibition or any television or sound broadcast any words relating to his personal affairs or conduct if such publication is calculated to cause him distress or embarassment."

The defences were to be :

(1) Unintentional reference to the plaintiff.
(2) Publication on an occasion of absolute or unqualified privilege, for example, fair and accurate reports of Court proceedings.
(3) Publications relating to public figures, and
(4) Publications relating to persons temporarily in the public eye, for example, criminals or persons involved in some general or personal calamity, or persons who had deliberately courted publicity which made them, for the time being, the subject of reasonable public interest.

The chief objection to the bill seems to have centred on the test of "reasonable public interest". The Lord Chancellor thought this was unworkable in practice, while Lords Goddard and Denning thought it applicable, Lord Goddard commenting, "in libel actions at the present time judges have to rule over and over again what is a matter of public interest" (52).

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(49) Ibid., Col. 8.
(50) By the "popular-press" we mean the Sunday pictorials, the weekly pictorials, and those papers which specialise in reports of crimes, sex deviation, etc.
(51) The terms of the bill are set out in The Law Times Vol. 23, April 21, 1961, 234. As to the bill see the article by Neil, supra, note 3, to which the author is especially indebted.
(52) For these speeches refer to 232 H. L. Debates (5th ser. 1961), 294.

Newspaper opposition to the bill was predictably hostile, and seems to have centred around two main themes :

(1) A deluge of litigation. "The Times" commented, (53) "the prospect of the luxuriant litigation that the bill opens up would make a lawyer's mouth water and fill anyone else with dismay."

(2) The difficulties of the "public interest" test. "The Times" asked : "at what point do the personal affairs of parsons or film stars end, and, their pastoral work, or publicity, begin ?" (54)

In retrospect, a pure "public benefit" test would seem to be unsatisfactory. It may mean public benefit - in which case harmless gossip is forbidden, or it may mean public curiosity, in which case it is meaningless and everything may be published (55).

The alternative to legislation is a judicially-developed tortious remedy (56). Neil has suggested that the Courts should give a limited measure of protection by regarding severe mental distress as sufficient injury to found an action of the Wilkinson v. Downtown type (57). The new tort associated with Wilkinson v. Downtown was that of wilful conduct, by words or acts, calculated to inflict physical harm through mental illness. However it is extremely doubtful if Courts would allow the type of action Neil recommends, because of evidential difficulties and the danger of trivial actions (58). "The Courts' safeguard has always been that the plaintiffs emotional distress must have been accompanied by objective and substantially harmful physical or psycopathological consequences, such as actual illness" (59).

We would strongly urge that the Courts of the British Commonwealth are completely free to develop a tortious remedy of privacy in respect of press activities.

(1) There is no judicial authority to prevent this being done (60). The Victoria Park case (cited supra) can be distinguished. Although

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(53) Editorial, What is Reasonable ? The Times (London) March 13, 1961, p. 15. Col. 4. Cited in the article by Neil, Note 3, supra.
(54) Ibid.
(55) Yang, Privacy : A Comparative Study of English and American Law (1966) 15 I.& C.L.Q. 175, 183. This writer has formulated an alternative set of legislative proposals. See also The Right of Privacy, Normative - descriptive confusion in the defence of news worthiness (1963) 30 U. Chi. L.R. 722. Sir Valentine Holmes K.C. ,"Libel Law Reform"in The Kemsley Manual of Journalism 379 objects to legislation as an answer to intrusion upon privacy. So also does Mr Justice Spender in a speech cited in Andrews, Problems of an Editor (1962) 152.
(56) Refer to Note 36, supra.
(57) B. Neil, The Right of Privacy (1962) 25 Mod. L.R. 393.Wilkinson v. Downtown is reported [1897] 2 Q.B. 57.
(58) "There is no occasion to invervene with balm for wounded feelings where a flood of billingsgate is loosened in an argument over a back fence." Prosser, Torts, 46.
(59) Fleming, Torts (3rd ed. 1965) 38.
(60) See notes 12 and 36, supra.

Evatt J. stated : "there is no general right of privacy recognized by the common law", that case dealt only with privacy of land, not personal privacy.

(2) Lack of authority has never been a sufficient reason for denying a remedy in tort. As Paton has well said, "if decisions in tort had been arrived at only on the basis of remedies already provided by decided cases there would have been no development (61).

(3) Although legislation is the primary method of law reform today, there are areas of the law where a court, if inspired by sufficient boldness of vision may adapt the law to certain cases where for one reason or another the legislature has either been too timid to act or where legislation might do more harm than good (62). In this respect, the classic common law method of development has been by analogy, or by striking out into a field that seemed implicit in earlier decisions. The Classic case of this type is Donoghue v. Stevenson (63). Other comparatively recent decisions include Rylands v. Fletcher (64); the High Trees Case (65); and Hedley Byrne v. Heller (66). It is in this pragmatic type of development that the genius of the common law has lain; and the greatest English judges have been those who have appreciated this feature of the common law and taken advantage of it. In brief, the deficiency in respect of privacy has been primarily due to a lack of initiative on the part of both bar and bench (67).

(4) U.S. Courts took the bold step described above. They considered the cases described in section one supra as pointing the way to a right of privacy (68). Moreover should an English Court follow the

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(61) Note on the Victoria Park Case (1938) 54 L.Q.R. 319, 321. Also, "if men will multiply injuries actions must be multiplied too, for every man that is injured ought to have his recompense." Ashby v. White (1703) 1 Sm. L.C. 253 per Holt C. J.

(62) For an argument to the contrary see Devlin J. in 1956 Current Legal Problems 11-15.

(63) [1932] A.C. 562.

(64) (1866) L.R. 1 Ex. 265; affd. (1868) L.R. 3 H.L. 330.

(65) [1947] K.B. 130.

(66) [1964] A.C. 468.

(67) It is not our intention in this paper to examine the field of creative reasoning in the field of torts. The following authorities as to the liberal doctrine may be of interest - Pollock, Judicial Valour and Caution (1929) 45 L.Q.R. 294; Winfield, Foundations of Liability in Tort (1927) 27 Col. L.R. at 2; Williams, Foundations of Tortious Liability (1939) 7 Camb. L.J. at 131; Levi, Legal Reasoning (1949) Parts I and II; Lord Atkin in Donoghue v. Stevenson [1932] A.C. at 580; Blackburn J., in Fletcher v. Rylands (1866) L.R. 1 Exch. 265 at 280; Holt C.J. in Ashby v. White (1703) 2 Ld. Raym. at 957. For a more restrictive view see Lord Buckmaster in Donoghue v. Stevenson [1932] A.C. at 567; Devlin, J. (as he then was) in (1956) 9 Current Legal Problems pp. 11-15

(68) See Note 25, supra.

American lead, it could well adopt features of the U.S. action, especially the test of the man of ordinary sensibilities. (This is after all simply a variant of the 'reasonable man' test.)

(5) There would not appear to be as yet a pressing need for a right of privacy in respect of the press in New Zealand The basically conservative New Zealand press would appear not to overstep the bounds of propriety. However, in England and perhaps Australia, the need for such a right would appear to be urgent. Should an English Court allow the right, New Zealand would then be free to follow suit if and when the occasion arose (69).

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(69) Since this paper was written the writer's attention has been drawn to Earnst and Schwartz Privacy, The Right to be Let Alone, (1962). See in particular pp. 132-142.