

Topic 9 - Other related topics to Privacy

A Study of Civil Liability for Invasion of Privacy in Hong Kong - A Tort of Invasion of Privacy in Hong Kong? *

Right to privacy is widely recognized as a fundamental human right. The right is protected under the Basic Law and Hong Kong Bill of Rights. The paper argues that there is inadequate protection for this constitutional right for the recognition of a tort of invasion of privacy under the common law in Hong Kong.

I. Introduction

Privacy is defined in the *Shorter Oxford English Dictionary* as “the state or condition of being withdrawn from the society of others or from public attention; freedom from disturbance or intrusion; seclusion”. Justice Bokhary describes there is a need for privacy as “everyone values being left alone sometimes and in respect of some matters”¹. The protection of privacy benefits both the individual citizen and society. It is “in the public interest to protect the interests of individuals against injury to their emotions and mental suffering”².

Privacy issues exist in everyday life. A photo taken by the mobile phone, a conversation with a friend on the street and activities within one’s own home can all be said to involve at least some elements of privacy. The right to privacy is recognized as a fundamental human right in the Universal Declaration of Human Rights³, the International Covenant on Civil and Political Rights (“ICCPR”)⁴, and many other international and regional treaties⁵. In the

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¹ Bokhary, K. (2015). *Human rights: source, content and enforcement*. Hong Kong: Sweet & Maxwell., at §33.001

² The Law Reform Commission of Hong Kong (1999), *Consultation paper on civil liability for invasion of privacy*, at p.15

³ Article 12 of the Universal Declaration of Human Rights reads: -

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

⁴ Article 17(1) of the ICCPR reads: -

“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”

context of Hong Kong, the right to privacy is recognized in the Basic Law and in the Hong Kong Bill of Rights. Article 30⁶ of the Basic Law recognizes the freedom and privacy of communication. Article 17 of the ICCPR incorporated into Article 14⁷ of the Hong Kong Bill of Rights Ordinance (“**HKBORO**”) to protect citizens from arbitrary or unlawful interference with his privacy. The test for whether a right to privacy exists is whether the person in question has a reasonable expectation of privacy⁸.

With the above provisions in the Basic Law and the ICCPR, the government has a constitutional duty to ensure the domestic legal system provides adequate protection against interference with privacy. However, although the court may grant remedy or relief in an action for breach of the HKBORO⁹, such claims are only actionable against the government or public authorities¹⁰. The right to privacy under the HKBORO arguably creates only vertical effects - it cannot be enforced against private companies or private persons. Despite legislations have been enacted to protect the privacy of personal data¹¹ and against surveillance¹², the right to privacy guaranteed under the Basic Law and the ICCPR is not comprehensively covered and protected. Incidents where the right to privacy of celebrities and ordinary citizens are being infringed by the media¹³ or private individuals¹⁴ are not uncommon in Hong Kong. Yet, the common law of Hong Kong does not recognize an

⁵ For example, article 11 of *American Convention on Human Rights (1969)* and article 8 of *European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)*.

⁶ Article 30 of the Basic Law reads: -

“The freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences.”

⁷ Wordings in Article 14 of HKBORO is identical to that of Article 17 of ICCPR (note 4 above).

⁸ The test was adopted in the United Kingdom in *Campbell v MGN Ltd* [2004] 2 AC 457, in Canada in *R v Wong* (1990) 60 CCC (3d)

460 and in Hong Kong in *HKSAR v Chan Kau Tai* [2006] 1 HKLRD.

⁹ Section 6(1) of chapter 383 reads: -

“A court or tribunal...may grant such remedy or relief, or make such order, in respect of such a breach, violation or threatened violation as it has power to grant or make in those proceedings and as it considers appropriate and just in the circumstances.”

¹⁰ Section 7 of chapter 383 reads: -

“This Ordinance binds only—(a)the Government and all public authorities; and(b)any person acting on behalf of the Government or a public authority.”

¹¹ Chapter 486 Personal Data (Privacy) Ordinance

¹² Chapter 589 Interception of Communications and Surveillance Ordinance

¹³ For example, Next Magazine published photos of showing singer Gillian Chung changing clothes in 2006.

¹⁴ For example, a woman was convicted of “access to computer with dishonest intent” for installing video surveillance in her ex-boyfriend’s home in 2017.

enforceable right to personal privacy. Victims are left uncompensated and frustrated under the current legal framework.

The introduction of an enforceable right to personal privacy is highly controversial and remains unsettled in Hong Kong and most part of the world. The major problem lies in the difficulty in defining privacy. The Hong Kong Bar Association acknowledged that “it is difficult, if not impossible, to define the parameters of the right of privacy in precise terms”¹⁵. Another problem exists in striking the appropriate balance between the right to privacy and two other fundamental human rights - freedom of expression and freedom of the press. The Law Reform Commission of Hong Kong had produced a report on civil liability for invasion of privacy in 2004 (“**the 2004 Report**”). The report compared the law of privacy in other jurisdictions with Hong Kong and suggested that a statutory tort for invasion of privacy is preferable in Hong Kong. Yet, due to the sensitive and controversial nature of the right to privacy issue, the 2004 Report is yet to be implemented in Hong Kong. The response from the government in 2012 was that the report would be handled “in stages” and “in consultation with relevant parties”¹⁶.

The law of privacy is a developing and fast-moving area in the common law world. The Law Reform Commission had conducted a comprehensive comparative study in the 2004 Report. Yet, the current, as at 2018, laws of privacy in other jurisdictions have not been reflected accurately in the 2004 Report. There have been milestone developments in recent decisions in the UK, New Zealand, Canada and Australia. The House of Lords¹⁷ and the Supreme Court¹⁸ in the United Kingdom, the Court of Appeal in New Zealand¹⁹ and the Court of Appeal in Canada²⁰ have on different occasions expressed their willingness in recognizing forms of protection of personal privacy. A few turns have been made by the Australian Courts and the law in Australia remains uncertain. This article will look into the post-2004 international experience in the development of law of privacy by comparing the development in the United Kingdom, New Zealand, Canada and Australia. The author argues that, instead

¹⁵ Hong Kong Bar Association (2000), *Comments of the Hong Kong Bar on the Law Reform Commission Consultation Paper on "Civil Liability for Invasion of Privacy"*

¹⁶ Administration’s updated response (December 2012) by the Secretary for Constitutional and Mainland Affairs.

¹⁷ in *Campbell v MGN Limited* [2004] 2 AC 457

¹⁸ in *PJS v News Group Newspapers Limited* [2016] UKSC 26

¹⁹ in *Hosking v Runting* [2005] 1 NZLR 1

²⁰ in *Jones v Tsige* 2012 ONCA 32

of extending the action of breach of confidence to cover privacy issues, a separate tort of invasion of privacy should be recognized in Hong Kong. The author further argues that the tort should be recognized by the common law instead of by statute.

II. International Experience

England & Wales

The 2004 Report provided an outline of the legislative proposals in the United Kingdom from 1961 to 2003. Several bills were proposed and reports were published in the United Kingdom in the last few decades. Yet, none of the attempts to introduce statutory tort of privacy was successful. The only enacted legislation was the Human Rights Act 1998 which incorporates the European Convention on Human Rights (“**the Convention**”) into domestic law of the United Kingdom. Article 8 of the Convention provides a right to private life²¹. The 2004 Report concluded that “there is no common law remedy for breach of privacy as such in England and Wales, whether before or after the enactment of the Human Rights Act 1998. Actions for infringement of privacy have to be found on recognized heads of tortious liability”²². In reaching the conclusion, the 2004 Report relied heavily on *Douglas v Hello! Ltd (No 3)*²³, where Lindsay J held that “there was no effective law of privacy” and “there was nothing to fill such gaps as might exist when neither the law of confidence nor any other law protected a claimant”²⁴.

Despite the 2004 Report being entirely correct in concluding that there is no common law remedy for breach of privacy in the United Kingdom as at 2004, the position has arguably been changed upon several landmark decisions laid down by the House of Lords and the Supreme Court.

*Wainwright v Home Office*²⁵ and *Campbell v MGN Ltd*²⁶ are cases decided by the House of Lords in 2003 and 2004 respectively.

²¹ Article 8(1) of the Convention provides: -

“Everyone has the right to respect for his private and family life, his home and his correspondence.”

²² The Law Reform Commission of Hong Kong (2004), *Report on civil liability for invasion of privacy*, at §4.24

²³ *Douglas v Hello! Ltd (No 3)* [2003] 3 All ER 996

²⁴ *Douglas v Hello! Ltd (No 3)* [2003] 3 All ER 996, at §229

²⁵ *Wainwright and another v Home Office* [2004] 2 AC 406

²⁶ *Campbell v MGN Limited* [2004] 2 AC 457

In *Wainwright*, Mrs. Mary Wainwright and her son Alan were subjected to a strip-search when visiting her other son in prison. The search was not conducted in accordance with the rules and the Court held that the search amounted to an assault. The case went to the House of Lords and the claimants sought a declaration that “there is (and in theory always has been) a tort of invasion of privacy under which the searches of both Wainwrights were actionable and damages for emotional distress recoverable”²⁷. Lord Hoffmann refused to “declare that since at the latest 1950 there has been a previously unknown tort of invasion of privacy”²⁸ and confirmed that there is no “any general cause of action for invasion of privacy”²⁹.

After confirming in *Wainwright* that English law does not recognize a general tort for invasion of privacy, the House of Lords considered another privacy claim based on breach of confidence in *Campbell*. In *Campbell*, Naomi Campbell, a well-known celebrity model, claimed against the Daily Mirror newspaper for publishing an article headlined “Naomi: I am a drug addict”. The case was brought on the basis of breach of confidence. Lady Hale, after citing a number of English authorities³⁰, affirmed that “our law cannot, even if it wanted to, develop a general tort of invasion of privacy”. She added that where existing remedies are available, the court must balance the competing Convention rights of the parties³¹. Citing Lord Woolf CJ in *A v B plc*³², Lady Hale held that the Convention “has provided new parameters within which the court will decide, in an action for breach of confidence, whether a person is entitled to have his privacy protected by the court or whether the restriction of freedom of expression which such protection involves cannot be justified”³³. The action for breach of confidence was extended as a relevant vehicle for claims of right to privacy. The majority found in favour of Campbell and held that the relevant newspaper article constituted an infringement of Campbell’s right to privacy and that she is entitled to a remedy.

Campbell has led to the expansion of the tradition breach of confidence to be an adequate solution to invasion of privacy cases. Although the case was decided by a 3:2 majority, the split was based on the facts rather than the applicable law. The Law Lords were unanimous in

²⁷ *Wainwright and another v Home Office* [2004] 2 AC 406, at §14

²⁸ *Wainwright and another v Home Office* [2004] 2 AC 406, at §35

²⁹ *Wainwright and another v Home Office* [2004] 2 AC 406, at §23

³⁰ Including *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 and *Wainwright and another v Home Office* [2004] 2 AC 406

³¹ *Campbell v MGN Limited* [2004] 2 AC 457, at §133

³² *A v B plc* [2003] QB 195, 202, at §4

³³ *Campbell v MGN Limited* [2004] 2 AC 457 at §132 and §133

the use of the extended action for breach of confidence as the appropriate means of obtaining redress for invasion of privacy in the form of disclosure of private information³⁴.

In *Google Inc v Vidal-Hall and others*³⁵, there was a further attempt to recognize misuse of private information as a separate tort. The English Court of Appeal held that “misuse of private information is a civil wrong without any equitable characteristics” and “there is nothing in the nature of the claim itself to suggest that the more natural classification of it as a tort is wrong”³⁶. Accordingly, Lady Justice Sharp held that misuse of private information should now be recognized as a tort. She added that “this does not create a new cause of action” and simply “gives the correct legal label to one that already exists”³⁷. Google had applied for permission to appeal to the Supreme Court on several grounds. Although leave to appeal was granted, the ground concerning whether the claim is in tort were expressly refused because “this ground does not raise an arguable point of law”³⁸.

The Supreme Court handed down another landmark ruling on the protection of privacy in May 2016 in *PJS v News Group Newspaper Ltd*³⁹. Lord Mance, in delivering the leading judgment, held that despite the “existing invasions of privacy being perpetuated on the internet”⁴⁰, the injunction should still be granted to protect the rights of PJS, his partner and their children. Lord Mance and Lord Neuberger made it clear that the law draws a distinction between confidentiality and on an action for misuse of private information. In cases of misuse of private information, the availability of information will not prevent the courts from granting or upholding privacy injunctions depending on how much disclosure there has been and where⁴¹. Lord Neuberger further held that “claims based on respect for privacy and family life do not depend on confidentiality (or) secrecy alone”. He held that the two core components of the rights to privacy are “unwarranted access to private information and unwanted access to [or intrusion into] one’s personal space”⁴². Lord Mance found that there

³⁴ D. Bulter (2005), *A Tort of Invasion of Privacy in Australia?*, Melbourne University Law Review, at p.350

³⁵ *Google Inc v Vidal-Hall and others* [2016] QB 1003

³⁶ *Google Inc v Vidal-Hall and others* [2016] QB 1003, at §43

³⁷ *Google Inc v Vidal-Hall and others* [2016] QB 1003, at §51

³⁸ *Permission to appeal decisions by UK Supreme Court*, 28 July 2015

³⁹ *PJS v News Group Newspapers Limited* [2016] UKSC 26

⁴⁰ *PJS v News Group Newspapers Limited* [2016] UKSC 26, at §45

⁴¹ K. Yoshida (2016), *Privacy injunctions in the internet age: PJS v News Group Newspapers Ltd*, E.H.R.L.R. 2016, 4, 434-441

⁴² *PJS v News Group Newspapers Limited* [2016] UKSC 26, at §58

is no public interest in a legal sense in the disclosure or publication of “purely private sexual encounters, even though they involve adultery or more than one person at the same time”. He held that “any such disclosure or publication will on the face of it constitute the tort of invasion of privacy” and “repetition of such a disclosure or publication on further occasions is capable of constituting a further tort of invasion of privacy”⁴³.

The decision of the Supreme Court has illustrated a fundamental development in the law of privacy in the United Kingdom. A separate tort of invasion of privacy was recognized by the Supreme Court and remedy of injunction were accordingly allowed. *Clerk & Lindsell on Torts* describes the case as noting “the difference between protecting confidentiality/secretcy and protecting privacy, in particular highlighting the protection from intrusion that can be involved in privacy claims”⁴⁴. With these lines of authorities, a conclusion different from the 2004 Report can be drawn. It can be concluded that, under the current law in the United Kingdom, there is a separate tort of invasion of privacy and common law remedy is available for a breach of privacy.

New Zealand

The 2004 Report separated the law of privacy in New Zealand into common law and legislation. In common law, in *Hosking v Runting*⁴⁵, the New Zealand Court of Appeal held by a narrow 3:2 majority that the tort of invasion of privacy should be recognized as forming part of the law of New Zealand⁴⁶. The case involved an attempt by Mr. and Mrs. Hosking to restrain a magazine from publishing photographs of their 18-month-old twins. Gault P and Blanchard J, in delivering the leading judgment, noted that the law “must move to accommodate developments in technology and changes in attitudes, practices and values in society”⁴⁷. Despite the absence of a broad right to privacy in the *New Zealand Bill of Rights Act 1990*, the Court laid down two fundamental requirements for a successful claim of interference with privacy - “the existence of facts in respect of which there is a reasonable expectation of privacy” and “publicity given to those private facts that would be considered

⁴³ *PJS v News Group Newspapers Limited* [2016] UKSC 26, at §32

⁴⁴ Chapter 27 - Breach of Confidence and Privacy Section 3. - The Action for Breach of Personal Confidence/Privacy, *Clerk & Lindsell on Torts 21st Ed.*, Main Volume, (2016). Sweet & Maxwell.

⁴⁵ *Hosking v Runting* [2005] 1 NZLR 1

⁴⁶ *Hosking v Runting* [2005] 1 NZLR 1, at §259

⁴⁷ *Hosking v Runting* [2005] 1 NZLR 1, at §3

highly offensive to an objective reasonable person”⁴⁸. In legislation, the Privacy Act 1993 provides that one may make a complaint to the Privacy Commissioner alleging that any action is or appears to be “an interference with the privacy of an individual”.

The common law of privacy has further developed after the 2004 Report. The inadequacy of the protection in *Hosking* was raised in *C v Holland*⁴⁹ that the privacy tort has no application in the absence of threatened publication⁵⁰. In *C v Holland*, the defendant, the plaintiff’s boyfriend, installed a video camera in his bathroom and made two short recordings that captured the the plaintiff nude. As the defendant did not show or threaten to show the recordings to anyone else, the requirements in *Hosking* cannot be satisfied. Whata J of the High Court of New Zealand went further to recognize an intrusion tort. He proposed a test of 4 elements for the intrusion tort - “an intentional and unauthorized intrusion”, “into seclusion (namely intimate personal activity, space or affairs)”, “involving infringement of a reasonable expectation of privacy” and “highly offensive to a reasonable person”⁵¹. He found that by recording the plaintiff in the bathroom without her knowledge the defendant had “intruded into intimate personal space and activity”⁵². Liability was established as the intrusion “infringed a reasonable expectation of privacy and was highly offensive to the reasonable person”⁵³.

Another point to note is that the New Zealand Law Commission “considered the development of a tort of privacy through legislation inappropriate and favoured the continuation of developments through the courts”⁵⁴. The Commission contemplated “the risk of unforeseen situations and the risk of the law extending to situations not within their initial contemplation” and suggested that “the common law and courts might be better placed to access these issues on a case-by-case basis”⁵⁵.

⁴⁸ *Hosking v Runtig* [2005] 1 NZLR 1, at §117

⁴⁹ *C v Holland* [2013] 3 LRC

⁵⁰ *C v Holland* [2013] 3 LRC, at §89

⁵¹ *C v Holland* [2013] 3 LRC, at §94

⁵² *C v Holland* [2013] 3 LRC, at §99

⁵³ *C v Holland* [2013] 3 LRC, at §99

⁵⁴ Y. C. J. Mo and A. K. C. Koo (2014), *A Bolder Step towards Privacy Protection in Hong Kong*, *Asian Journal of Comparative Law* 2014; 9(1): 345-380, at p.354

⁵⁵ New Zealand Law Commission, *A Conceptual Approach to Privacy*, Miscellaneous Paper No 19 (2008), at §13.

It can be concluded that the common law in New Zealand has further developed after the 2004 Report and the law of privacy now covers both disclosure based privacy tort in *Hosking* and a tort of bare intrusion into privacy in *Holland*. It is unlikely that the tort of privacy will be developed through legislation as the Law Reform Commission is of the view that the common law is a more appropriate way to resolve the privacy issues.

Canada

The 2004 Report provided that “invasion of privacy per se is not a tort recognized by the courts in Canada”. The law in Canada before 2004 required the plaintiff to show that the defendant has committed some well-established tort such as trespass, nuisance or defamation to maintain an action for acts which constitute an invasion of privacy. The court in Canada had also recognized a tort of “appropriation of personality” in common law. The tort is actionable “where the defendant has appropriated some feature of the plaintiff’s life or personality without permission for economic gain”⁵⁶. Five provinces in Canada have legislated to create a tort of invasion of privacy.

The law of privacy in Canada has also developed rapidly after 2004. In 2006, in *Somwar v McDonald’s Restaurant of Canada Ltd*⁵⁷, Mr. Somwar accused his employer, McDonald’s, for unlawfully invading his privacy by condition a credit bureau check on him without his consent. He claimed damages for invasion of privacy. McDonald’s sought to strike the claim out on the basis that the cause of action was not recognized in Canada. Justice Stinson reviewed the Ontario case law and observed that the old cases were not entirely consistent. In refusing to strike the claim out, he found that “the time has come to recognize invasion of privacy as a tort in its own right”⁵⁸.

The decision in *Somwar* was followed in a number of subsequent first instance decisions⁵⁹. The cause of action for an invasion of privacy was eventually discussed and recognized in the Court of Appeal for Ontario in *Jones v Tsige*⁶⁰. In *Jones v Tsige*, the plaintiff and the

⁵⁶ The Law Reform Commission of Hong Kong (2004), *Report on civil liability for invasion of privacy*, at §4.11-14

⁵⁷ *Somwar v McDonald’s Restaurant of Canada Ltd* (2006) 79 O.R. (3d) 172

⁵⁸ *Somwar v McDonald’s Restaurant of Canada Ltd* (2006) 79 O.R. (3d) 172, at §31

⁵⁹ For example, in *Nitsopoulos v Wong*, [2008] O.J. No. 3498, 298 D.L.R. (4th) 265 (S.C.J.)

⁶⁰ *Jones v Tsige* 2012 ONCA 32

defendant were co-workers in different branches of the same bank. The defendant had used her workplace computer to access the plaintiff's personal bank accounts at least 174 times in four years. The trial judge dismissed the claim and found that the tort of invasion of privacy does not exist at common law in Ontario. On appeal, Justice Sharpe found that the common law in Ontario has at least remained open to the possibility that a tort action exists for intrusion upon seclusion⁶¹. He then found it appropriate “to confirm the existence of a right of action for intrusion upon seclusion”⁶². He explained that “technological change has motivated the legal protection of the individual's right to privacy”⁶³ and it is “within the capacity of the common law to evolve to respond to the problem”⁶⁴.

Another point to note is the right to privacy is, unlike in the UK or in New Zealand, not expressly affirmed in the Canadian Charter of Rights and Freedoms 1982. The tort is not derived from constitutional right, but entirely from the common law.

It can therefore be concluded that, after the 2004 Report, the common law in Canada has also developed to recognize invasion of privacy as a tort in its own right. The tort is derived solely from the common law without any constitutional backup.

Australia

The 2004 Report found that there is no clear authority for common law right to privacy in Australia. The tradition proposition was laid down in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* in 1937 that there is no common law right to privacy in Australia which could be enforced by the courts “however desirable some limitation upon invasions of privacy might be”. The High Court in Australia, in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*⁶⁵ in 2001, stated that “the law should be be astute than in the past to identify and protect interests of a kind which fall within the concept of privacy”⁶⁶. The District Court of Queensland in *Grosse v Purvis*⁶⁷ held that there could be a right of action for

⁶¹ *Jones v Tsige* 2012 ONCA 32, at §24

⁶² *Jones v Tsige* 2012 ONCA 32, at §65

⁶³ *Jones v Tsige* 2012 ONCA 32, at §67

⁶⁴ *Jones v Tsige* 2012 ONCA 32, at §68

⁶⁵ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* 208 CLR 199

⁶⁶ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* 208 CLR 199, at §40-41

⁶⁷ *Grosse v Purvis* [2003] QDC 151

damages based on an individual's right to privacy⁶⁸. Yet, up to 2004, there was no decisions at the appellate level confirming the existence of the tort of invasion of privacy.

There are a number of cases involving the right to privacy and the tort of intrusion of privacy in Australia after 2004. The tort was recognized again by the County Court in Doe v Australian Broadcasting Corporation⁶⁹. Both appeals of Grosse and Doe were not heard as the cases were subsequently settled before appeal. There are no authorities at the appellate level confirming the existence of this tort.

The recognition of the tort in Grosse v Purvis in 2003 was expressly rejected in the Federal Court in Kalaba v Commonwealth of Australia⁷⁰ in 2004 and in the Victorian Supreme Court in Giller v Procopets⁷¹ in 2008. Justice Gillard, in Giller, found that “the law had not developed to the point where an action for breach of privacy was recognised in Australia” and “the weight of authority at the moment is against that proposition [recognizing an action for breach of privacy]”⁷².

Subsequently, in Dye v Commonwealth Securities Ltd⁷³ in 2010, Justice Katzmann held “that it would be inappropriate to deny someone the opportunity to sue for breach of privacy on the basis of the current state of the common law”⁷⁴. In Doe v Yahoo!7 Pty Ltd⁷⁵ in 2013, Justice Smith found an arguable case of invasion of privacy and he would be “very hesitant to strike out a cause of action where the law is developing and is unclear”⁷⁶.

From the development of the cases in Australia, a conclusion can be drawn that there are still no clear authorities for the recognition of the tort of privacy in Australia. The view within the Australian judiciary is split. Quoting from the Australian Law Reform Commission, “the

⁶⁸ Grosse v Purvis [2003] QDC 151, at §442

⁶⁹ Doe v Australian Broadcasting Corporation & Ors [2007] VCC 281

⁷⁰ Kalaba v Commonwealth of Australia [2004] FCAFC 326

⁷¹ Giller v Procopets (2008) 24 VR 1

⁷² At Giller v Procopets (2008) 24 VR 1, §187-189, cited with approval in Kalaba v Commonwealth of Australia [2004] FCAFC 326 at §6.

⁷³ Dye v Commonwealth Securities Limited [2012] FCA 242

⁷⁴ Dye v Commonwealth Securities Limited [2012] FCA 242, at §290

⁷⁵ Doe v Yahoo!7 Pty Ltd [2013] QDC 181

⁷⁶ Doe v Yahoo!7 Pty Ltd [2013] QDC 181, at §310-311

general consensus then is that the likely direction of the future development of the common law is uncertain⁷⁷.

⁷⁷ The Australian Law Reform Commission (2014), *Serious Invasion of Privacy in the Digital Era*, Discussion Paper 80, at §3.60

III. Development of the right to privacy and tort of invasion of privacy in Hong Kong

Right to privacy enjoys a constitutional status in Hong Kong by virtue of “privacy of communication”⁷⁸ and protection from “arbitrary or unlawful interference with privacy”⁷⁹. The right has long been recognized in the courts of Hong Kong as a fundamental human right and is not to be intruded unless there are exceptions prescribed by law⁸⁰. Hartmann J in *Leung TC William Roy v Secretary for Justice*⁸¹ has described the right to privacy as the “right to get on with your life, express your personality and make fundamental decisions about your intimate, relationships without penalisation”. He observed the role of the state “to promote conditions in which personal self-realization can take place”⁸².

However, regrettably, the protection of privacy in Hong Kong remains in a constitutional level and provides only vertical effect. Existing legislations do not provide adequate protection over personal privacy. The frustration of victims was demonstrated in *Eastweek Publisher Ltd v Privacy Commissioner for Personal Data*⁸³. Eastweek magazine was complained for taking photograph of a woman on a public street without her consent and publishing it in the magazine with unflattering and unwelcome comments like “mushroom hairstyle” and “irregularly-edged skirt”⁸⁴. Eastweek magazine was accordingly convicted by the Privacy Commissioner under *Personal Data (Privacy) Ordinance* for “collecting personal data concerning the complainant using unfair means”. However, on appeal, Ribeiro JA, as he then was, despite “regarding the article and the photograph as an unfair and impertinent intrusion into her sphere of personal privacy”, held that the Ordinance “does not purport to protect personal privacy as opposed to information privacy”⁸⁵. Godfrey VP, in his concurring

⁷⁸ In article 30 of the Basic Law

⁷⁹ In article 14 of HKBORO

⁸⁰ For example, covert surveillance for prevention of crime.

⁸¹ *Leung TC William Roy v Secretary for Justice* [2005] 3 HKLRD 657

⁸² *Leung TC William Roy v Secretary for Justice* [2005] 3 HKLRD 657, at §116

⁸³ *Eastweek Publisher Ltd v Privacy Commissioner for Personal Data* [2000] 2 HKLRD 83

⁸⁴ The commentary was translated in p.3 of the judgment and reads: -

“*Japanese Mushroom Head. One can easily tell that this lady has a very sharp sense of what fashion is about. You only need to look at her mushroom hairstyle and irregular-edged skirt! However, her accessories including the black overcoat and black leather shoes look very incompatible to her style. The biggest failure is her handbag. So awkward that 'little reporter' thought that she had mistakenly taken her mom's handbag. Although there is no fixed and fast rules for fashion, a perfect 'Mix and Mismatch' requires in-depth knowledge and skill and is not as easy as it may look. Let all ladies be aware of this.*”

⁸⁵ *Eastweek Publisher Ltd v Privacy Commissioner for Personal Data* [2000] 2 HKLRD 83, at p.19-

judgment, held that the legislature was “never intended to apply to the sort of factual situation” of the case⁸⁶. The conviction was quashed. It is therefore clear that the the *Personal Data (Privacy) Ordinance* is limited to information privacy and does not provide protection over general privacy issues Hence, compensation under section 66 of the Ordinance does not create a cause of action for invasion of privacy.

Breach of right to privacy is raised frequently in criminal cases as a ground to challenge the admissibility of prosecution evidence. While the context of the application of the right is different in those criminal cases, they provide a useful reference as to how appellate courts in Hong Kong recognize and define the right. In *HKSAR v Chan Kau Tai*⁸⁷, Ma CJHC, as he then was, found the protection under ICCPR to have a broader application than article 30 of the Basic Law, which simply refers to privacy of communication. He adopted the test in the United Kingdom⁸⁸ and Canada⁸⁹ that “a right to privacy will generally exist where the person in question has a reasonable expectation of privacy”⁹⁰. In *HKSAR v Lam Hon Kwok Popy and others*⁹¹, Cheung JA defined the ambit of reasonable expectation and described “the most basic reasonable expectation” as an expectation that “the content of their private conversation with others on the telephone or in meetings which is intended to be heard only by the listener is private communication and consists of privacy rights and that it would not be secretly recorded by the government”⁹². Conversations “conducted in the public area where the noise level of the conversation could only be heard by the listener and the conversation is only intended to be heard by the listener and not by parties other than those engaged in the conversation”⁹³ are also included. The application of this standard of reasonable expectation of privacy arguably does not limit to the criminal context to exclude evidence, but apply also to the civil cases of invasion of privacy.

It appears that the courts in Hong Kong are willing to expand of the traditional action of breach of confidence action. In *Koo Chih Ling v Lam Tai Hing*⁹⁴, Bokhary J “was ready to

⁸⁶ *Eastweek Publisher Ltd v Privacy Commissioner for Personal Data* [2000] 2 HKLRD 83, at p.28-29

⁸⁷ *HKSAR v Chan Kau Tai* [2006] 1 HKLRD 400

⁸⁸ in *Campbell v MGN Limited* [2004] 2 AC 457

⁸⁹ in *R v Wong* (1990) 60 CCC (3d)

⁹⁰ *HKSAR v Chan Kau Tai* [2006] 1 HKLRD 400, at §102

⁹¹ *HKSAR v Lam Hon Kwok Popy and others*, unreported, CACC 528/2004

⁹² *HKSAR v Lam Hon Kwok Popy and others*, unreported, CACC 528/2004, at §14

⁹³ *HKSAR v Lam Hon Kwok Popy and others*, unreported, CACC 528/2004, at §14

⁹⁴ *Koo Chih Ling v Lam Tai Hing* [1992] 2 HKLR 314

dispense with the need of establishing a pre-existing relationship”⁹⁵. On appeal, Penlington JA acknowledged that Bokhary J was “satisfied that no matter how the appellant obtained he must have realized it was not available for him to use”⁹⁶.

The principle to extend the action of breach of confidence to cover privacy issues have been raised before courts in Hong Kong for a couple of times. In 2006, local artist Gillian Chung, relying on the House of Lords decision in *Campbell*, commenced civil action for breach of confidence against the magazine which took pictures of her by covert surveillance when she was changing clothes in Malaysia. This is the first time the principle in *Campbell* has been invoked in Hong Kong but, unfortunately, the case was settled and did not proceed to trial⁹⁷. In *Sim Kon Fah v JBPB and Co (a Firm)*⁹⁸, the Campbell principle was raised by counsel to support a claim for breach of confidence and right to privacy⁹⁹. Despite acknowledging that “a tort of misuse of private information” was “shoehorned into the law of confidence” in the law of the United Kingdom, Recorder Chow SC, as he then was, found it unnecessary to consider how such development may impact upon Hong Kong law¹⁰⁰. Still, the court expressly endorsed the test of reasonable expectation of privacy, derived from the *Campbell* case, in a claim for confidence¹⁰¹.

In the recent and ongoing case *Wong Wing Yue Rosaline v Next Media Interactive Ltd and other*¹⁰², the plaintiff, Rosaline Wong, sued the Next Media for publishing photos of her and her two children. She claims under breach of confidence in that she has a reasonable expectation of privacy of the photos. She demanded for an injunction to ban the publishing of the photo and claimed for the proceeds obtained for copying the photos as compensation¹⁰³. The judgment of the substantial trial is yet to be released so it is still unknown whether the claim for infringement of privacy under breach of confidence will be recognized in Hong Kong. From the interlocutory judgment, it appears that the court is prepared to such a claim

⁹⁵ Y. C. J. Mo and A. K. C. Koo (2014), *A Bolder Step towards Privacy Protection in Hong Kong*, Asian Journal of Comparative Law 2014; 9(1): 345-380, at p.356

⁹⁶ *Lam Tai Hing v Koo Chih Ling* [1994] 1 HKLRD 329, at p.348

⁹⁷ J. Chan SC (2007), *Freedom of the Press: The First Ten Years in the Hong Kong Special Administrative Region*, at p.177 and 180.

⁹⁸ *Sim Kon Fah v JBPB and Co (a Firm)* [2011] 4 HKLRD 45

⁹⁹ *Sim Kon Fah v JBPB and Co (a Firm)* [2011] 4 HKLRD 45, at §35

¹⁰⁰ *Sim Kon Fah v JBPB and Co (a Firm)* [2011] 4 HKLRD 45, at §42

¹⁰¹ *Sim Kon Fah v JBPB and Co (a Firm)* [2011] 4 HKLRD 45, at §44

¹⁰² *Wong Wing Yue Rosaline v Next Media Interactive Ltd and other* HCA 2701/2016 (21 February 2017)

¹⁰³ The Standards (2016), *Barrister sues Next over photos of her and kids*.

as Deputy High Court Judge Kent Yee found that the plaintiff “has an arguable case of breach of confidence in that she has a reasonable expectation of privacy in respect of the Original Photos”. Interlocutory injunction regarding the photos was granted.

IV. Protection of privacy in Hong Kong in the future

The approach to address privacy challenge in the common law jurisdictions can be conveniently classified into a few models - the old UK *Campbell* model which expands the action of breach of confidence, the Canadian and the new UK *PJS* model which recognizes a separate tort of invasion of privacy, the New Zealand *Hosking* model which recognizes both disclosure-based privacy tort and intrusion-based privacy tort, and the problematic unsettled Australian model. While expecting there will be continuous progression of the civil liability for invasion of privacy in the world, the development of the law in Hong Kong is far from satisfactory. As illustrated from the case of *Eastweek Publisher*, the law is certainly inadequate in protecting citizens against intrusion of personal privacy. There is a genuine need to modernize the privacy law in Hong Kong.

On how the law should develop in Hong Kong, it is submitted that there is no real conflict between freedom of expression, freedom of the press and the right to privacy. It is further submitted that, instead of extending the breach of confidence, a separate tort of invasion of privacy should be recognized. The tort should be recognized by common law instead of statute.

No real conflict between right to privacy, freedom of expression and freedom of the press

Freedom of expression and freedom of the press are major arguments advanced, especially by the press, against imposing civil liabilities when right to privacy is infringed. It is submitted that, in balancing the possible conflicts, if any, between the fundamental rights, the “ultimate balance test” suggested by the House of Lords is a good starting point. Lord Steyn stated:

“First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each.”¹⁰⁴

¹⁰⁴ In *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 at §17. The approach was cited with approval by the Supreme Court in *PJS v News Group Newspapers Limited*

Taking the ultimate balance test as a starting point, there is no question of automatic priority between the rights. The issue is whether it is justifiable to interfere with the right to privacy by the freedom of expression and the press, and to restrict the freedom by the right. A distinction should be drawn between “reporting facts - even if controversial - capable of contributing to a debate in a democratic society” and “making tawdry allegations about an individual’s private life”¹⁰⁵. The later one aimed only at satisfying curiosity of readers “regarding aspects of a person’s strictly private life”¹⁰⁶. This type of expression weighted “at the bottom end of the spectrum of importance”¹⁰⁷ when compared with, for example, freedom of a political speech. Wong JA, in his dissenting judgment in *Eastweek Publisher Ltd v Privacy Commissioner for Personal Data*, also observed that “there is no such a thing as unqualified freedom of the press or absolute right of the individual”. He stated that “a free press is, after all, a responsible press” and “freedom, in whatever form, will only thrive under law”¹⁰⁸.

It is submitted that freedom of expression and of the press, especially in cases aiming only to satisfy curiosity, are by no means sufficient justification for interference of the right to privacy. Civil and political values which underlie press freedom do not make it necessary to deny the citizen’s right to private life¹⁰⁹. There is no real conflict between the freedoms and the right. Indeed, the recognition of the right may eventually benefit the protection of the freedom of expression and of the press. As suggested by Professor Johannes Chan SC, the continuing negative impression of the press will “easily influence public views on the importance of freedom of the press”. The public will “easily be persuaded to give up freedom of the press when a balancing act against other legitimate interest is engaged”¹¹⁰. Therefore, not only there is no real conflict between the right and the freedoms, there will be positive impact of the freedoms in recognizing the right to privacy.

A separate tort of invasion of privacy should be recognized

[2016] UKSC 26 at §20 and by the Court of Appeal in *HK SAR v Wu Wing Kit* (No. 1) [2016] 3 HKLRD 386 at §49 and §65.

¹⁰⁵ *Armoniene v Lithuania* [2009] EMLR, at §39

¹⁰⁶ *Mosley v United Kingdom* [2012] EMLR 1, para 114

¹⁰⁷ *PJS v News Group Newspapers Limited* [2016] UKSC 26, at §24

¹⁰⁸ *Eastweek Publisher Ltd v Privacy Commissioner for Personal Data* [2000] 2 HKLRD 83, at p.26

¹⁰⁹ *Campbell v MGN Limited* [2004] 2 AC 457, at §56

¹¹⁰ J. Chan SC (2007), *Freedom of the Press: The First Ten Years in the Hong Kong Special Administrative Region*, at p.176

With the conclusion that there is no real conflict between the fundamental human rights and the right to privacy should be protected in Hong Kong, the next issue is whether the law should extend the traditional action of breach of confidence to include privacy issues, recognize a tort of misuse of private information, or recognize a tort of invasion of privacy.

For over 15 years since the enactment of the Human Rights Act 1998, the courts in the United Kingdom have demonstrated reluctance in creating a new tort of invasion of privacy. Lord Hoffmann observed that creating “a general wrong of infringement of privacy” would give rise to “an unacceptable degree of uncertainty”¹¹¹. He found that there is “no more than the need for a system of control of the use of film from CCTV cameras which shows greater sensitivity to the feelings of people who happen to have been caught by the lens”¹¹². Lady Hale observed that “the action for breach of confidence is not the only relevant cause of action”¹¹³. She further observed that “the sort of intrusion into what ought to be private” is clearly outside the scope of action under breach of confidence¹¹⁴.

With respect, it is submitted that the observations made by Lord Hoffmann and Lady Hale have to be viewed carefully with the fact that the technology allowing infringement of privacy back in 2003 was not as advanced as today. In 2003, there was no smartphone and the covert surveillance technology was not as mature as it is nowadays. It may well be the case that the action of breach of confidence, which arguably protects privacy only against disclosure of confidential documents, would be sufficient for victims to claim against the media, which was probably one of the very few entities that were capable of infringing privacy in the old days. Yet, with the advancement in technology, one can now easily take photos and videos and record conversations with their smartphones. Broadcasting a live video online is no longer the privilege of the media. Unwanted intrusion of one’s private life has been much easier. There is good reason for the law to recognize civil liability over not only unwarranted disclosure of information, but also intrusion upon seclusion of another. The recognition of such a liability would effectively achieve the deterrence purpose and reflect the constitutional right to privacy life guaranteed in the Basic Law and the ICCPR.

¹¹¹ *Wainwright and another v Home Office* [2004] 2 AC 406, at §27

¹¹² *Wainwright and another v Home Office* [2004] 2 AC 406, at §33

¹¹³ *Campbell v MGN Limited* [2004] 2 AC 457, at §133

¹¹⁴ *Campbell v MGN Limited* [2004] 2 AC 457, at §134

Furthermore, as recognized by Professor Johannes Chan SC, it is “awkward and uncomfortable to call the cause of action as breach of confidence” when the scope of the traditional tort of breach of confidence is extended to such an extent¹¹⁵. Lord Nicholls, in his dissenting judgment in *Campbell*, despite recognizing the expansion of the tort of breach of confidence, observed that it has changed the nature of the tort. He further observed that “information about an individual’s private life would not, in ordinary usage, be called confidential”¹¹⁶. Lord Mance observed that “modern law of privacy is not concerned solely with information or secrets” but also “importantly with intrusion”¹¹⁷. Lord Neuberger observed that “claims based on respect for privacy and family life do not depend on confidentiality (or secrecy) alone”. He cited Dr. Moreham and summarized the two core components of the rights to privacy as “unwanted access to private information and unwanted access to [or intrusion into] one’s ... personal space”. He further observed that “the internet and other electronic developments are likely to change our perceptions of privacy” and the court must be “ready to consider changing their approach when it is clear that that approach has become unrealistic in practical terms or out of touch with the standards of contemporary society”¹¹⁸.

Indeed, the need for a comprehensive recognition is evident in the way English courts framed the cause of action. The cause of action was labelled as “breach of confidence” in *Campbell*, as “misuse of private information” in *Google v Vidal*, and eventually as “a tort of invasion of privacy” in *PJS*. The change of label reflects the gradual acceptance and willingness to recognize a tort of invasion of privacy in the law. The recognition of the intrusion tort in *Holland* in New Zealand supports the general tendency in recognizing a more comprehensive civil liability for invasion of privacy in the common law jurisdictions. There is no reason for Hong Kong to go backwards to recognize only a disclosure-based tort under the vehicle of breach of confidence. The high density of the Hong Kong population makes intrusion further easier. There is a cogent need to recognize also the intrusive-based tort in Hong Kong. Further, recognizing a tort in its own right allows claimants to claim tortious damages, as

¹¹⁵ J. Chan SC (2007), *Freedom of the Press: The First Ten Years in the Hong Kong Special Administrative Region*, at p.178

¹¹⁶ *Campbell v MGN Limited* [2004] 2 AC 457, at §14

¹¹⁷ *PJS v News Group Newspapers Limited* [2016] UKSC 26, at §29

¹¹⁸ *PJS v News Group Newspapers Limited* [2016] UKSC 26, at §58 and §70

opposed to damages being an equitable remedy in the discretion of the judge in the case in actions for breach of confidence¹¹⁹.

Therefore, it is submitted that a separate tort of invasion of privacy should be recognized in Hong Kong. Both intrusion upon seclusion of another and unwarranted publicity given to an individual's private life should be covered by this tort.

Common law tort instead of statutory tort

The orthodox proposition is, of course, it is for the parliament, not the judiciary to effect legislation following extensive enquiry and consultation. This proposition receives support from Lady Hale, who observed that “our law cannot, even if it wanted to , develop a general tort of invasion of privacy”¹²⁰. Lord Hoffmann also stated that “that is how the way the common law works”¹²¹. He is of the view that the area requires “a detailed approach which can be achieved only by legislation rather than the broad brush of common law principle”¹²².

However, it is submitted that, for the present context, there are good reasons to recognize the tort of invasion of privacy by the common law instead of by statute.

The first reason is the nature of the right to privacy and the proposed tort. As recognized by the New Zealand Law Commission and adopted by Whata J in *Holland*, privacy concerns are “undoubtedly increasing with technological advances”. The courts are in a much better position “in dealing with individual facts and changing circumstances that a statutory regulation does not, in terms of both definition and remedy”¹²³. The nature of the proposed tort “has clear similarities to traditional torts based on protection of property and the person, involving unwanted acts that cause harm or damage to a person's possessions or to the person”¹²⁴. In view of the rapid development of technology which allows inexhaustible ways of infringement of privacy, the common law is in a better position to respond instantly and decide cases in the most justiciable way taking into account backgrounds and circumstances.

¹¹⁹ Allen & Overy (2014), *Misuse of Private Information is a Tort Distinct from Breach of Confidence*

¹²⁰ *Campbell v MGN Limited* [2004] 2 AC 457, at §33

¹²¹ *Wainwright and another v Home Office* [2004] 2 AC 406, at §31

¹²² *Wainwright and another v Home Office* [2004] 2 AC 406, at §33

¹²³ *C v Holland* [2013] 3 LRC, at §83

¹²⁴ *C v Holland* [2013] 3 LRC, at §75

The second reason is the duty to comply with international treaties to which Hong Kong is a party to. Maintaining a tort of invasion of privacy is consistent with the trends in the common law jurisdiction, especially in the United Kingdom, Canada and New Zealand. Hong Kong is under a positive duty to develop the law consistently with the ICCPR, in particular the protection of privacy. Yet, it appears that the Government was not committed to it. The proposal to introduce a statutory tort of invasion of privacy and the 2004 Report was shelved by the government in 2006¹²⁵. It is unforeseeable that a statutory tort will be proposed by the government to the legislature. This will result in a legal vacuum in respect of privacy law and render Hong Kong substantially falling behind the international standard in protection of privacy.

It is foreseeable that there will be counter arguments suggesting that, with the low volume of cases in Hong Kong, it will take even longer time for the common law to develop a comprehensive tort. These arguments can be rebutted if one takes into account the massiveness of the privacy infringement incidents nowadays. Illustrated by the example in the recent months, there are reported incidents of a taxi driver allegedly taking videos of a female passenger who was breast-feeding, paparazzi allegedly entering and videotaping students' hall without consent in the Chinese University of Hong Kong, and doctor convicted of taking voyeuristic pictures under the nurse's skirt. Victims of these incidents are all, prima facie, entitled to claim under the intrusion tort and/or the disclosure tort. There will be no short of opportunities for the court to lay down landmark cases on invasion of privacy.

With the general trend in the common law jurisdiction to recognize civil liability for invasion of tort, it is possible for the common law in Hong Kong to develop its case law on the tort of invasion of privacy. It is expected that the case laws will receive severe discontentment from the media. Nonetheless, as illustrated above, there is indeed no real conflict between right to privacy, freedom of expression and freedom of the press. Quoting from Lord Neuberger, "the courts exist to protect legal rights, even when their protection is difficult or unpopular". And if the legislature takes the views that "the courts have not adapted the law to fit current realities, then, of course, it can change the law"¹²⁶. It is therefore submitted that, taking into

¹²⁵ J. Chan SC (2007), *Freedom of the Press: The First Ten Years in the Hong Kong Special Administrative Region*, at p.176

¹²⁶ *PJS v News Group Newspapers Limited* [2016] UKSC 26, at §71

account the nature of the right to privacy and the duty to comply with ICCPR, it is more appropriate to recognize the tort of invasion of privacy in the common law.

V. Conclusion

As exemplified in the above analysis, the privacy protection in Hong Kong is inadequate. Constitutional right to privacy is not comprehensively protected under the existing legal system. This paper draws a conclusion, after examining the laws in several common law jurisdictions, that there is a general trend in the common law world to recognize a tort of invasion of privacy including both intrusion and disclosure tort. The development of Hong Kong in this context is far from satisfactory and falling substantially behind the rest of the world.

Advancement in technology facilitates informational and other forms of surveillance and, unfortunately facilitates intrusive practices into one's private life. This paper therefore suggests that a tort of invasion of privacy should be introduced in Hong Kong. The tort should be developed in common law so as to allow a better response to the rapidly changing circumstances. The legislature is, of course, at liberty to change the law if it is of the view that the common law does not fit the realities.

The development of the law of privacy is one of the most concerned and contentious issues over the world. Ongoing cases are anticipated to bring huge impact over this area of law, in particular the judgment of the substantial trial of *PJS v News Group Newspapers Limited* in the Supreme Court. In the local context, *Wong Wing Yue Rosaline v Next Media Interactive Ltd and other* will give the High Court an opportunity to decide whether Hong Kong recognizes a privacy claim under the action of breach of confidence, or a separate tort of invasion of privacy, or, most unfortunately, neither. It is expected that there will be no short of civil privacy claims, be it under the vehicle of breach of confidence or a separate tort, or whatsoever. The recognition of a tort of invasion of privacy by the court will be highly welcomed.