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PRIVACY IN PUBLIC PLACES

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ONE of the most difficult questions facing English courts as they develop the common law right to privacy recognised by the House of Lords in *Campbell* v. *MGN Ltd.*[1] is whether and, if so, when a person might have a reasonable expectation of privacy in a public place. Should an individual have a cause of action if she is photographed as she leaves her mother's funeral or as he receives medical attention after an accident? Or should there be an absolute rule which says that there is no privacy in a public space? Recent decisions in England and the European Court of Human Rights (ECtHR) suggest that it is no longer an answer (if it ever was) simply to say that the disclosure concerned something which took place in public. A more difficult question therefore remains: if the existence of a privacy interest does not depend on the nature of the space in which claimants find themselves, how do we determine whether a person does have a legitimate privacy interest?

This article looks at how the courts should answer this question when the claimant is in a public place (*i.e.*, places such as parks, beaches, restaurants, bars and sports facilities to which members of the public have access, either freely or on payment of a fee).[2] It begins (in Parts I and II) by examining the ECtHR and the English jurisprudence, looking at the extent to which privacy is currently protected in public spaces. Part III then looks at whether the notion of "public privacy" is theoretically sound and Part IV identifies factors which should bear on the existence of a legal right to "public privacy", particularly the nature of the claimant's location, the nature of his or her activity, the way in which the information was obtained and the extent to which the information focuses on the claimant. The article rests on the premise that by carefully examining *dicta* in existing case law and by identifying underlying principles, one can begin to identify a coherent

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[1] *Campbell* v. *MGN Ltd.* [2004] UKHL 22; [2004] 2 A.C. 457.

[2] For further discussion of the meaning of "public" and "private" see E. Paton-Simpson, "Private Circles and Public Squares: Invasion of Privacy by the Publication of 'Private Facts'" (1998) 61 M.L.R. 318.

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framework for the protection of privacy in public places in English law.

I. *von Hannover* v. *Germany*

Questions about whether and when a person can have privacy in public places have taken on new significance in light of the ECtHR decision of *von Hannover* v. *Germany*.[3] *von Hannover* was the climax of a 10 year campaign by Princess Caroline of Monaco to prevent publication of photographs taken without her consent as she went about her daily life. The photographs which were the subject of the princess's ECtHR claim depicted her riding on horseback, shopping (either on her own or with a bodyguard), riding a bicycle, eating in a restaurant with a companion, skiing in Austria, leaving her Parisian residence (either alone or with her husband), playing tennis with her husband (and arriving by bicycle beforehand), and tripping over an obstacle at a beach club. All of the photographs in question therefore depicted the princess going about her daily life either in public or semi-public places.

The German Federal Constitutional Court (the *Bundesverfassungsgericht*) refused to grant protection of the images because the claimant was a "figure of contemporary society *par excellence*" and as such, could only expect privacy outside her home if she was away from the public eye and in a secluded place to which she had retired with the objectively recognisable aim of being alone.[4] The Court stressed that even purely entertaining stories contribute to the development of public opinion and held that even though they were purely entertaining the photographs therefore enjoyed the protection of section 23 of the German Copyright (Arts Domain) Act. This meant that, because they related to images of contemporary society, they were exempt from the usual rule (contained in section 22 of that Act) that one cannot publish a photograph of a person without his or her consent.[5]

The ECtHR unanimously held that this protection was inadequate and that Germany had breached its positive obligation under article 8 of the European Convention for the Protection of Human Rights 1950 to respect the princess's private life.[6] In the

[3] App. No. 59320/00, 24 June 2004.

[4] See Bundesverfassungsgerichts (First Division) 1BvR 653/96, 15 December 1999. However the Court held that the publication of three photographs showing the claimant with her children might be actionable and directed the lower court to re-consider them. By the time that the ECtHR action was heard, the publishers had undertaken not to re-publish them.

[5] *Ibid.*

[6] Article 8(1) provides that "Everyone has the right to respect for his private and family life, his home and his correspondence", subject to certain exceptions set out in article 8(2). As well as having negative obligations not to breach the Convention themselves, Member states have positive obligations to protect citizens against interferences with Convention rights by others.

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leading judgment, six of a panel of eight judges said that the decisive factor in balancing privacy and freedom of expression interests, was the fact that the photographs made no contribution to a debate of general interest.[7] They said:

> [A] fundamental distinction needs to be made between reporting facts—even controversial ones—capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of "watchdog" in a democracy by contributing to "impart[ing] information and ideas on matters of public interest ... it does not do so in the latter case.[8]

Although the judges accepted that the public's right to be informed could "in certain special circumstances" extend to aspects of the private life of public figures (particularly the private lives of politicians) they held that that was not the case where the sole purpose of the publications was to satisfy the curiosity of a particular readership regarding the details of the applicant's private life:[9] "in these conditions", they said, "freedom of expression calls for a narrower interpretation".[10] They therefore concluded that:

> [T]he public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life *even if she appears in places that cannot always be described as secluded* and despite the fact that she is well known to the public. Even if such a public interest exists ... in the instant case those interests must, in the Court's view, yield to the applicant's right to the effective protection of her private life.[11]

As far as the privacy interest itself was concerned, the Court observed that "[t]here is ... a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life.'"[12] It said that the domestic courts were wrong to classify the applicant as a "public figure *par excellence*" with all the privacy restrictions which that implied; if Germany was to comply with its positive obligations under article 8, the "contemporary society" exception had to be interpreted narrowly. Thus, although

[7] *von Hannover*, at para. [76]. Judges Barreto and Zupancic wrote concurring judgments.
[8] *Ibid.*, at para. [63].
[9] *Ibid.*, at paras. [64]–[65].
[10] *Ibid.*, at para. [66].
[11] *Ibid.*, at para. [77] (emphasis added).
[12] *Ibid.*, at para. [50]. They also observed that the advent of ever more sophisticated communication technologies called for "increased vigilance" on the part of those protecting privacy interests (para. [70]) and that the Convention is "intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective" (para. [71]).

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the Court said that it could conceivably be appropriate to use the label "public figure *par excellence*" for politicians exercising official functions, it was not appropriate where a "private" individual such as the applicant was concerned, interest in whom was based solely on her membership of a reigning family for which she performed no official functions.[13]

Finally, the ECtHR held that the distinctions the domestic courts drew between different types of public figure and different types of places were in practice too vague for an individual to know in advance what kind of public figure he or she was and, more importantly, whether he or she was in a protected sphere at any given time. All this added up to inadequate protection of the applicant's private life. The judges said:

> As a figure of contemporary society "*par excellence*" [the applicant] cannot—in the name of freedom of the press and the public interest—rely on protection of her private life unless she is in a secluded place out of the public eye and, moreover, succeeds in proving it (which can be difficult). Where that is not the case, she has to accept that she might be photographed at almost any time, systematically, and that the photos are then very widely disseminated even if, as was the case here, the photos and accompanying articles relate exclusively to details of her private life. In the Court's view, the criterion of spatial isolation, although apposite in theory, is in reality too vague and difficult for the person concerned to determine in advance. In the present case merely classifying the applicant as a figure of contemporary society "*par excellence*" does not suffice to justify such an intrusion into her private life.[14]

von Hannover is not the first ECtHR decision to extend the protection of privacy beyond private spaces: as will be discussed below, similar conclusions were reached in *Peck* v. *United Kingdom* and *PG and JH* v. *United Kingdom*.[15] However, it is the first case in which members of the press have been held—albeit indirectly—to have breached a person's privacy by photographing her going about her daily business. The scope of *von Hannover* is therefore far-reaching: it makes it clear people are not automatically free to publish images of others simply because they were in a public place at the time that the images were obtained and that freedom of expression and public interests will be weak when information or images are published solely to satisfy readers' curiosity. Thus, as Eady J. said in the recent case of *McKennitt* v. *Ash*:

[13] *von Hannover*, at para. [72].
[14] *Ibid.*, at paras. [74] and [75].
[15] See (2003) 36 E.H.R.R. 41 and App. No. 44787/98, 25 September 2001, respectively.

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> In the light of [*von Hannover*, *Peck* and *PG and JH*], a trend has emerged towards acknowledging a "legitimate expectation" of protection and respect for private life, on some occasions, in relatively public circumstances. It is no longer possible to draw a rigid distinction between that which takes place in private and that which is capable of being witnessed in a public place by other persons.[16]

In short, a decision excluding privacy protection simply because the claimant was in public could now be subject to challenge in Strasbourg.

II. The Protection of "Public Privacy" in English Common Law

So what effect does the ECtHR's unwillingness to draw rigid distinctions between public and private spaces have on the common law right to privacy in England? In order to answer this question, one needs to look at the extent to which the breach of confidence and privacy actions already protect "public privacy" interests.

The leading case on the English common law protection of privacy is the House of Lords decision in *Campbell* v. *MGN Ltd*.[17] In that case, a well-known fashion model, Naomi Campbell, sought damages for the publication of an article outlining the time, place and frequency of treatment she was receiving for drug addiction and of a photograph showing her outside one of her therapy meetings. (The claimant conceded that the defendants were entitled to correct false public statements she had made about managing to stay away from drugs but claimed that publication of the additional details interfered with her privacy). Although only a majority held that publication of the details was a breach of privacy, all five judges held that English law does recognise a right to protection of private information.

As Lord Hoffmann acknowledged, although on the face of it the judges took different approaches to some of the issues involved in the case, there were in fact "no significant differences" on points of principle.[18] Thus, although most of the judges continued to label the action "breach of confidence", they all accepted that the gravamen of the action was in fact the protection of personal information. A clear test also emerged from the judgments: Lord Nicholls said that whether or not something is "private" depends on "whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy",[19] and Baroness Hale said

[16] *McKennitt* v. *Ash* [2005] EWHC 3003 (Q.B.), at para. [50].
[17] *Campbell* v. *MGN Ltd.* [2004] UKHL 22; [2004] 2 A.C. 457.
[18] *Ibid.*, at para. [36].
[19] *Ibid.*, at para. [21].

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that article 8 rights to privacy will come into play if "the person publishing the information knows or ought to know that there is a reasonable expectation that the information in question will be kept confidential".[20]

The ensuing discussion of the English common law will therefore proceed on the basis that the courts will protect personal information about individuals if they can show that they had a reasonable expectation of privacy in respect of it. The first question we need to ask is therefore to what extent have English courts recognised that an individual can have a reasonable expectation of privacy in a public place?

A. The Traditional Breach of Confidence Cases

Although the courts have not expressly considered the question of whether a person can have a reasonable expectation in public, the early breach of confidence cases made it clear that confidentiality could not attach to information which had reached the public domain. As Megarry V.C. (as he then was) said in *Coco* v. *Clark*:

> something which is public property and public knowledge cannot *per se* provide any foundation for proceedings for breach of confidence. However confidential the circumstances of communication, there can be no breach of confidence in revealing to others something which is already common knowledge.[21]

Lord Goff elaborated this in *Attorney-General and Observer Ltd.* v. *Times Newspapers Ltd.* ("*Spycatcher*"). He said:

> [T]he principle of confidentiality only applies to information to the extent that it is confidential. In particular, once it has entered what is usually called the public domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential) then, as a general rule, the principle of confidentiality can have no application to it.[22]

[20] *Ibid.*, at para. [134]. Lord Hope also said (citing *A* v. *B plc* [2003] Q.B. 195) that "a duty of confidence will arise whenever the party subject to the duty is in a situation where he knows or ought to know that the other person can reasonably expect his privacy to be protected" (para. [85]) (although he also said that said that in cases where it is not "obvious" whether the information is private, the courts should ask "whether disclosure of the information about the individual ("A") would give substantial offence to A, assuming that A was placed in similar circumstances and was a person of ordinary sensibilities" (para. [92])). Lord Carswell adopted Lord Hope and Baroness Hale's reasons for concluding that the information was private (para. [165]). The reasonable expectation of privacy test has also been endorsed by the Court of Appeal (see *A* v. *B plc* [2003] Q.B. 195, at para. [11(vii)–(ix)]) and *Douglas (No.3)* [2005] EWCA Civ 595; [2005] 3 W.L.R. 881, at para. [100]).

[21] *Coco* v. *Clark* [1969] R.P.C. 41, 47.

[22] *Attorney-General and Observer Ltd.* v. *Times Newspapers Ltd.* [1990] 1 A.C. 109, 282.

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This argument is a straightforward one—information cannot be confidential if everyone knows it. The difficult question is when information will be said to be in the "public domain".

On the one hand, the courts limited the scope of the public domain concept by saying that information will only be in the public domain if it is known to a substantial number of people. Thus, in *Spycatcher*, Lord Keith said that publication abroad will not necessarily preclude the confidentiality of personal information in England[23] and in *Stephens* v. *Avery*, Sir Nicolas Browne-Wilkinson V.C. rejected the contention that details of a sexual relationship between two parties cannot be confidential because the other party to the relationship will always know of it.[24]

However, on the other hand there were a number of cases in which the courts interpreted the notion of the public domain broadly. First, some judges held that personal information would be in the public domain if the claimant had discussed the general matter to which it related (such as his or her sex life or a particular relationship) in public. Thus, in *Lennon* v. *News Group Ltd. and Twist*, Lord Denning M.R. held that former Beatle, John Lennon could not restrain the publication of marital confidences by his former wife because both parties had previously discussed intimate details of the relationship in the media and thereby put the relationship itself in the public domain.[25] Likewise, in the more recent case of *Theakston* v. *MGN Ltd.*, Ouseley J. held that the claimant's previous disclosures about his relationships and sex life (made in an effort to foster an image "as a man physically and sexually attractive to women") meant that he could not complain when the press published an article describing his visit to a London brothel.[26]

The courts also held that information could be in the public domain even if it had not been previously disclosed, if it related to an *event* which took place in public. Thus, in *Woodward* v. *Hutchins*, Lord Denning M.R. held that disclosures about a group of pop stars "getting high" and "behaving outrageously" on a jumbo jet (made in breach of confidence by a former publicity manager) could not be confidential because the band were in a publicly accessible place when the events took place. Dismissing the claimant's application for an interim injunction, Lord Denning M.R. said:

[23] *Ibid.* at p. 260.
[24] *Stephens* v. *Avery* [1988] 1 Ch. 449.
[25] *Lennon* v. *News Group Ltd. and Twist* [1978] F.S.R. 573, 574–575.
[26] *Theakston* v. *MGN Ltd.* [2002] EWHC 137 (Q.B.); [2002] E.M.L.R. 22, at para. [68].

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> Mr. Hutchins, as a press agent, might attend a dance which many others attended. Any incident which took place at the dance would be known to all present. The information would be in the public domain. There could be no objection to the incidents being made known generally. It would not be confidential information. So in this case the incident on this Jumbo Jet was in the public domain. It was known to all the passengers on the flight. Likewise with several other incidents in the series.[27]

Ouseley J. made a similar point in *Theakston*. In reaching his conclusion that publication of articles detailing the claimant's activities in the brothel should not be restrained, he said:

> The Claimant went to what from the evidence was obviously a brothel. Anyone passing by could have seen him going in and coming out and have made simply enquiry as to what the place was. His face is apparently well known and could attract that degree of interest…. It is likely that other customers and a number of prostitutes and staff will see who comes and goes.[28]

So, on the face of it, these *dicta* establish that information cannot be confidential if, either the matter to which it relates has previously been widely disclosed, or if the disclosure relates to an event which took place in public. However, as will be discussed below, these decisions are open to criticism. It is also clear that their reasoning has not been applied in cases involving photographs.

B. Photographs and the Modern Privacy Cases

The courts have held on a number of occasions that photographs should be distinguished from other forms of information and that publication of them can intrude into private life "in a peculiarly humiliating and damaging way".[29] Thus, in *Douglas* v. *Hello!*, Keene LJ. said, "[t]he photographs conveyed to the public information not otherwise truly obtainable, that is to say, what the event and its participants looked like";[30] in *D* v. *L* (an interlocutory application by an unnamed musician to prevent publication of a conversation which his former partner had surreptitiously recorded), Waller LJ. said that "a photograph is more than the

[27] *Woodward* v. *Hutchins* [1977] 1 W.L.R. 760, 764. See also *Hosking* v. *Runting* [2004] NZCA 34; [2005] 1 N.Z.L.R. 1 (a New Zealand case concerning a photograph of two young children being wheeled down a busy shopping street by their mother, discussed further below) in which Gault P. and Blanchard J. stressed in that "[t]he photographs taken by the first respondent do disclose anything more than could have been observed by any member of the public in Newmarket on that particular day" (para. [164]).

[28] *Theakston*, at para. [62].

[29] *Ibid.*, at para. [78].

[30] *Douglas* v. *Hello!* [2001] Q.B. 967 (*Douglas (No.1)*), at para. [165].

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information you get from it";[31] and in *Douglas* v. *Hello! (No. 3)*, Lord Phillips M.R. said:

> Nor is it right to treat a photograph simply as a means of conveying factual information. A photograph can certainly capture every detail of a momentary event in a way which words cannot, but a photograph can do more than that. A personal photograph can portray, not necessarily accurately, the personality and the mood of the subject of the photograph.[32]

This is surely right. Unlike a sketch or description, a photograph (or other recording) enables the observer to see the subject for him or herself: if X posts on the internet a photograph of Y bathing topless on a remote beach then anybody who looks at the image will be able to see what Y looks like topless, to observe her body language, her demeanour, her location and countless other things about her.[33] Likewise, if Z publishes detailed video footage of X having an intimate dinner with Z, those who see the film will be able to see for themselves what X and Y looked like on that occasion, how they interacted with one another, what kind of conversation they were having and so on. By contrast, in a sketch or description, X and Y could only ever be seen through the "filter" of someone else's impressions and even then, only as accurately as the artist or narrator's talents allowed.

The courts have also made it clear on several occasions that this distinction between photographs and descriptions means that the publication of a photograph can be actionable even though the publication of a description is not. Thus, in *Theakston*, Ouseley J. restrained publication of photographs of the claimant engaging in sexual activity inside a Soho brothel even though he had allowed publication of a detailed description of the same event,[34] and in *Campbell* Lord Hoffmann said that "[t]he publication of a photograph cannot necessarily be justified by saying that one would be entitled to publish a verbal description of the scene".[35] Similarly, in *D* v. *L*, Waller L.J., said that:

> A court may restrain the publication of an improperly obtained photograph even if the taker is free to describe the information which the photograph provides or even if the information revealed by the photograph is in the public domain. It is no answer to the claim to restrain the publication

[31] *D* v. *L* [2004] E.M.L.R. 1, at para. [23].
[32] *Douglas* v. *Hello! (No. 3)* [2005] EWCA Civ 595; [2005] 3 W.L.R. 881, at [106].
[33] For a useful discussion of these issues see A. McClurg, "Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places" (1995) 73 North Carolina L. Rev. 989.
[34] See *Theakston*, (at note 26 above).
[35] *Campbell*, at para. [72]. See also Lord Nicholls, at para. [31].

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> of an improperly obtained photograph that the information portrayed by the photograph is already available in the public domain.[36]

Lord Phillips M.R. took this one step further in *Douglas (No. 3)* and said that unlike other types of information, the fact that a photograph has been previously published does not mean that it cannot be a breach of privacy to publish it again. He said:

> Once intimate personal information about a celebrity's private life has been widely published it may serve no useful purpose to prohibit further publication. The same will not necessarily be true of photographs. Insofar as a photograph does more than convey information and intrudes on privacy by enabling the viewer to focus on intimate personal detail, there will be a fresh intrusion of privacy when each additional viewer sees the photograph and even when one who has seen a previous publication of the photograph, is confronted by a fresh publication of it.[37]

It therefore seems clear that the *Lennon*/*Theakston* view that personal information cannot be confidential if any public disclosure had been made in respect of it, will not apply to photographs. This means either that different principles apply to photographs than to descriptions or that *Lennon* and *Theakston* are out of step with modern developments. The recent case of *McKennitt* v. *Ash* (in which a successful folk singer obtained an injunction restraining a former friend from publishing passages of a book revealing intimate details of her personal life) suggests the latter. Eady J. held in that case that the fact that the claimant had discussed her fiancé's death in the course of work promoting water safety, did not mean that the defendant was entitled to publish eight pages of intimate revelations about her reaction to it. He said that the all-or-nothing approach adopted to previous disclosures in the commercial context was not appropriate where personal information was concerned and that instead, "[t]here are grounds for supposing that the protection of the law will not be withdrawn unless and until it is clear that a stage has been reached where there is no longer anything left to be protected".[38] He said:

[36] *D* v. *L*, at para. [23]. He applied the same principles to audio recordings (see para. [24]).

[37] *Douglas (No. 3)*, at para. [105]. He said, for example, that "if a film star were photographed, with the aid of a telephoto lens, lying naked by her private swimming pool, we question whether widespread publication of the photograph by a popular newspaper would provide a defence to a legal challenge to repeated publication on the ground that the information was in the public domain" (para. [105]). Previous publication of commercial information (photographs of a film set and record shoot, respectively) also failed to prevent the claimants from obtaining interlocutory injunctions restraining further publication in *Shelley Films Ltd.* v. *Rex Features Ltd.* [1994] E.M.L.R. 134 and *Creation Records and others* v. *News Group Newspapers Ltd.* [1997] E.M.L.R. 444 (see p. 149 and p. 456, respectively).

[38] *McKennitt*, at para. [81].

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> It does not necessarily follow that because personal information has been revealed impermissibly to one set of newspapers, or to readers within one jurisdiction, that there can be no further intrusion upon a claimant's privacy by further revelations. Fresh revelations to different groups of people can still cause distress and damage to an individual's emotional or mental well-being.[39]

Eady J. therefore took the same approach to the re-publication of personal information that the courts in *D* v. *L* and *Douglas (No. 3)* took to the re-publication of photographs. This approach is to be supported. It is by no means clear that the fact that 1000 people heard a report that X had suffered sexual abuse as a child means that X would not suffer further humiliation and distress if the same information was subsequently disseminated to a further 1000 people. On the contrary, X is likely to feel fresh humiliation with each new disclosure. In my view, Eady J's suggestion that re-publication should only be justified if the claimant has no more privacy to lose therefore reflects the true nature of the privacy interest far more effectively that the approach in *Woodward* and *Lennon*.[40]

There are also indications that the suggestion in *Woodward* and *Theakston* that disclosures relating to events which take place in public cannot be confidential/private will not be followed where photographs are concerned. Thus, for example, in *Campbell*, Lord Hoffmann said that it does not follow from the fact that people cannot avoid being photographed in public places, "that anyone who takes or obtains such photographs can publish them to the world at large"[41] and that it could be a breach of privacy to publish a photograph of someone in a public place in "a situation of humiliation or severe distress".[42] Lord Hope also said that publication of a photograph of the claimant leaving a therapy meeting would be offensive to a reasonable person of ordinary sensibilities and that it tipped the balance in favour of privacy protection in that case.[43] Again, for reasons discussed in the next

[39] *Ibid.*, at para. [81]. A similar view has also been expressed in the two New Zealand cases, *Morgan* v. *Television New Zealand Ltd.* HC, 1 March 1990, 4 and *TV3 Network Services Ltd.* v. *Broadcasting Standards Authority* [1995] 2 N.Z.L.R. 720, 730 and in *WB* v. *Bauer Publishing Ltd.* [2002] E.M.L.R. 8, 26 (which Eady J. cited with approval in *McKennitt*). See also, E. Paton-Simpson, "Privacy and The Reasonable Paranoid: The Protection of Privacy in Public Spaces" (2000) 50 U. Toronto L.J. 305, especially pp. 320–326.

[40] It is also important to note that *Woodward* has been widely criticised. See, for example, *Douglas (No.1)*, at para. [96]; *Campbell* v. *Frisbee* [2002] EWCA Civ 1374, at para. [34]; M. Tugendhat and I. Christie (eds.), *The Law of Privacy and the Media* (Oxford 2002) (see paras. [6.95] and [7.48], for example); and R. Toulson and C. Phipps, *Confidentiality* (London 1996) (see paras. [3–10]–[3–12]).

[41] *Campbell*, at para. [74].

[42] *Ibid.*, at para. [75]. See further below.

[43] *Ibid.*, at paras. [121]–[124]. Baroness Hale made similar observations, at paras. [155]–[156].

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two sections, this approach seems to recognise the nature of the privacy interest more effectively than that taken in *Woodward* and *Theakston*.

So although the question is far from settled, English courts do seem to countenance the possibility of extending privacy protection to public places and *von Hannover* has made it clear that such protection will have to be developed in the future. The challenge now facing the courts is therefore to determine *when* a person will have a right to privacy in a public place. That question will be discussed below, but first it is useful to consider whether the notion of privacy protection in public spaces is theoretically sound.

III. Is the Recognition of a Right to Privacy in Public Spaces Theoretically Sound?

I have argued elsewhere that privacy should be defined as the state of desired inaccess or as freedom from unwanted access, with "access" meaning perceiving a person with one's senses (*i.e.* seeing, hearing or touching him or her), obtaining physical proximity to him or her and/or obtaining information about him or her.[44] One can therefore breach another's privacy by obtaining unwanted access to him or her or by enabling someone else to obtain such access.[45] However, because a legal interest based entirely on a claimant's subjective desires would be unacceptably far-reaching, I also argue that an objective requirement of reasonableness should be added to any *legal* right. The courts should therefore recognise an individual's right to privacy if he or she has a reasonable desire not to be accessed in the circumstances.[46]

On either the legal or theoretical version of this definition, it is possible to have an expectation of privacy in public places. This is, first, because although people cannot avoid being observed in public places, they can choose how much or how little of themselves they reveal to others when they go into public. For

[44] See N. Moreham "Privacy in the Common Law" (2005) 121 L.Q.R. 628. For similar definitions see R. Gavison "Privacy and the Limits of the Law" (1979) 89 Yale L.J. 421; T. Gerety "Redefining Privacy" (1977) 12 Harv. C.R.-C.L. Law Rev. 233; J. Rachels "Why Privacy is Important" (1975) 4 Phil. & Publ. Aff. 323; and J. Wagner DeCew, "The Scope of Privacy in Law and Ethics" (1986) 5 L. & Phil. 145.

[45] In my view, it is important to include a "desire" element as well as an "inaccessibility" element in the definition of privacy because there will be many situations where, despite being inaccessible to others, a person could not be said to be in a state of privacy. As Charles Fried says, to refer to the privacy of a lonely man on a desert island would be to "engage in irony" (see "Privacy" (1968) 77 Yale L.J. 475, 482). See also M. Weinstein, "The Uses of Privacy in the Good Life", in J. Pennock and J. Chapman (eds.), *Privacy* (NOMOS vol. XIII, New York 1971), 88; and E. Schils "Privacy: Its Constitution and Vicissitudes" (1966) 31 Law & Contemp. Prob. 281.

[46] Although, for the sake of simplicity, the English courts' reasonable *expectation* of privacy test will be adopted in the discussion here.

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example, X can wear clothes to cover the intimate parts of his body, avoid discussing personal matters when others can hear him, and reserve intimate experiences—such as receiving medical treatment, undressing, viewing the bodies of deceased loved ones—for situations where he cannot be observed by others. Thus, as section 652B the US Restatement acknowledges, "[e]ven in a public place … there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to the public gaze; and there may still be invasion of privacy when there is intrusion upon these matters".[47] A person who used a technological device to break through these self-protection barriers in a public place—to see through X's clothes or to listen in on his conversations, for example—would therefore obtain unwanted access to X and, on the definitions outlined above, breach his privacy.

The second reason that it is possible to breach the privacy of individuals in public places is that those who observe them there are able to disseminate images of or information about them to a broader and differently constituted audience to the one to which those individuals were originally exposed. For example, if X were to post on the internet a video of Y bathing topless on the beach, he would expose her to a different and infinitely larger audience that the one she was exposed to on the beach that day: rather than being seen by a small group of other beach goers who observe her only incidentally, Y can now be seen by colleagues, relatives and countless strangers surfing the internet for any kind of nefarious purpose.[48] It makes no difference that both the observers on the beach and the internet were a random collection of strangers: Y chose to sunbathe in front of one group of strangers in one context and, as a result of X's actions, was exposed to a different group of strangers in a different context. This continues to hold true, albeit in a weaker form, even if the number of people who had access to Y is very large. If Y is perfectly happy to be observed incidentally by countless other shoppers as she walks down Oxford Street, but not by a general television audience, then X would breach her privacy if he broadcast footage of her walking there on television. As in the beach example, by broadcasting Y's image on television, X facilitated unwanted access by a much larger and differently constituted group of people than the one Y chose when she went

[47] Restatement of the Law Second, Torts 2d (vol. 3).
[48] See A. Jay McClurg (note 33 above); L. Barnett Lidsky, "Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It" (1998) 73 Tul. L.Rev. 173 (especially p. 237); and E. Paton-Simpson (note 39 above), 327–329.

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out shopping.[49] X would therefore breach Y's privacy in both examples.

The principal objection to this second argument is that, because people who go into public places know that they *could* be accessed by *anyone*—anyone could walk past, swim on the same beach, drink at the same bar—then they should not be able to complain if their image *is* disseminated to *every*one. If anyone who saw Y's picture on the internet could have been on the beach at the time it was taken, then why should Y be able to complain about it being posted there?[50] The main weakness of this argument lies in its failure to distinguish between access and accessibility. Although Y might theoretically be accessible to all the world as she lies topless on the beach—anyone who saw her on the internet would have been entitled to be on the beach if they had wanted to be—in reality she was only accessed by the handful of people who happened to be there that day. This is important because Y will have tailored her behaviour according to an assessment of who could see her as she lay on the beach, not an assessment of who could theoretically have been there had they wanted to be.[51] Had all those who ultimately saw her on the internet been on the beach looking at Y, she might well have conducted herself differently; in particular, she might have decided to cover herself up or move to some other location. By posting the image on the internet and exposing Y to a wider audience than the one she had selected, X

[49] A number of commentators have recognised the importance of respecting individuals' choices about access. See, for example, S. Benn, "Privacy, Freedom and Respect for Persons" in J. Pennock and J. Chapman (eds.), *Privacy* (NOMOS vol. XIII, New York 1971), 1; and J. Reiman, "Privacy, Intimacy and Personhood" (1977) 6 Phil. & Publ. Aff. 26.

[50] This argument seems to underpin William Prosser's view that "[o]n the public street, or in any other public place, the plaintiff has no right to be alone, and it is no invasion of his privacy to do no more than follow him about [or] ... take his photograph is such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which any one present would be free to see" (W. Prosser, "Privacy" (1960) 48 Cal. L.R 383, 391–392). This view is also reflected in a number of American cases such as *Jackson* v. *Playboy Enterprises Inc*. 574 F.Supp. 10 (1983) (defendants were held not to be not liable for publishing a photograph of the claimants speaking to a police officer on a public street alongside a nude picture of the police officer because the claimants and the officer were in "plain view of the public eye" when the photograph was taken (p. 13)); *Figured* v. *Paralegal Technical Services, Inc*. 555 A.2d 663 (N.J.Super.A.D. 1989) (private detectives were held not to be liable for shadowing the claimant because all their activities "took place in the open, either on public thoroughfares or in areas where members of the public had the right to be" (p. 667)); *US* v. *Varquez* 31 F.Supp.2d 85 (D.Conn. 1998) (anti-abortion protester did not intrude upon the claimants when he videotaped them on a public street as they arrived at and left an abortion clinic (p. 90–91); and *Schulman* v. *Group W. Productions Ltd*. 955 P. 2d 469 (Cal. 1998) (no intrusion when the defendants filmed the claimant being extricated from a car wreck on a public highway).

[51] As Paton-Simpson says (presumably speaking of "everyday" individuals and not "celebrities"), "[r]easonable people assess roughly just how 'public' a situation is and adjust their behaviour accordingly. Only the paranoid confuse remote risks with likelihoods and behave in all public places as if the eyes of the world were upon them" ("Privacy and the Reasonable Paranoid", note 39 above, 322). See also H. Gross "Privacy and Autonomy" in J. Pennock and J. Chapman (eds.), *Privacy* (NOMOS vol. XIII, New York 1971), 169, especially at p. 173.

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therefore prevented Y from choosing to whom and in what circumstances she revealed herself to others and thereby interfered with her privacy.[52]

So, I would argue, it is theoretically sound to say that people can have a reasonable expectation of privacy in a public place: first, because people can choose how much or how little of themselves they reveal in public and secondly, because it is always possible to disseminate an image of a person to a much wider audience than the one to which he or she was originally exposed. In other words, it does not follow from the fact that an individual is happy for some aspects of him- or herself to be observed by some members of the public in some contexts, that he or she must be prepared to have all aspects of him- or herself observed by the public at large in any context.

IV. When Should an Individual have a Legally Actionable Expectation of Privacy in a Public Place?

This theoretical conclusion suggests that English courts are right to say that a claimant can have a reasonable expectation of privacy in public in some circumstances. The challenge, however, is to identify when such an expectation will arise and, in particular, to develop this aspect of the privacy interest in a principled, coherent way. This section will identify some of the factors which should point towards the existence of a reasonable expectation of privacy in a particular public place, examining the relevance of the claimant's location, his or her activity, the way in which the information was obtained, and the extent to which the disclosure in question focused on the claimant. It should be noted at the outset that, although there will be cases where just one of these factors can give rise to a presumption of a reasonable expectation of privacy, in most cases a reasonable expectation will only be established if more than one factor is at play. Thus, for example, while it might not be actionable to publish a photograph of Y wearing shorts and a T-shirt at the local swimming pool, it might be actionable to publish (as part of a general paparazzi campaign of harassment) a photograph of her in a see-through swimming costume at a pool to

[52] It is also possible to see Y's loss of privacy in this example as stemming from a loss of control over who can access her body. A number of commentators define privacy as control over access: see for example, Fried (note 45 above), 482–483; Gross, note 51 above, 169–170; and D. Feldman, "Privacy-related Rights and their Social Value" in P. Birks (ed.), *Privacy and Loyalty* (Oxford 1997), 24–26. See also Lord Hoffmann in *Campbell* (note 17 above), para. [51]. I have argued elsewhere that it is problematic to define privacy as control over access (see Moreham, note 44 above, 637–639), but the analysis is none the less helpful in this instance.

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which she paid a substantial entry fee. For the sake of simplicity, however, each of the four factors will be discussed separately.

It should also be added that it is difficult to discuss whether and when a person should have a reasonable expectation of privacy without also considering the particular form which any intrusion is likely take. For example, although Y might breach X's privacy by broadcasting an image of him lying injured after a car accident, she might not breach his privacy is she recounted the incident to his friends. Likewise, Y's privacy interests might prevent X from publishing a photograph of her lying topless on a quiet beach but not from publishing a description of what she looked like there. In order to avoid obfuscating the public places issue with questions of how courts might treat these different types of disclosure, it will be assumed for the purposes of this section that the intrusion is the dissemination of an image to the public at large.

So, what factors should the courts take into account when deciding whether a person has a reasonable expectation not to have an image of him or her in public disseminated to the public at large?

A. Location

The first factor which should be considered when deciding whether a person has a reasonable expectation of privacy in a public place is the nature of the claimant's location. The courts have already suggested that a person's privacy is more likely to be breached if the number of people who saw the broadcast or photograph in question was significantly larger than the number who saw the original scene. Thus, for example, one of the factors influencing the ECtHR in *Peck* was the fact that:

> the relevant moment was viewed to an extent which far exceeded any exposure to a passer-by or to security observation and to a degree surpassing that which the applicant could possibly have foreseen when he walked in Brentwood on August 20, 1995.[53]

Likewise, in the course of (interlocutorily) restraining the defendant from broadcasting CCTV footage of the claimant engaging in sexual activity in the doorway of a London club in *Jagger* v. *Darling*, Bell J. took account of the fact that the claimant had been in a place where she was unlikely to be seen by other club-goers

[53] *Peck*, at para. [62]. The German courts have also held that a person can expect privacy outside his home if he was away from the public eye and in a secluded place to which he had retired with the objectively recognisable aim of being alone (see Bundesverfassungsgerichts (First Division) 1BvR 653/96, 15 December 1999).

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and that she did not realise that she could be observed clearly nor that she was being recorded.[54]

The courts are surely right to suggest that people should have a greater expectation of privacy in places where only a few people can see or hear them. As discussed above, people quite reasonably adapt their self-presentation efforts according to their assessment of who can observe them and will usually have fewer inhibitions and make fewer self-presentation efforts when fewer people are around.[55] So, for example, even though Y does not like to reveal her body to strangers, she might be happy to sunbathe topless on a secluded beach if she believes that no-one except her boyfriend can see her. Likewise, X and Y might be happy to discuss their intimate affairs on a park bench out of the (unenhanced) earshot of those around them even though they would not discuss them if they thought that they could be overheard. It therefore seems right that the smaller the number present when the information or image was obtained, the more likely the claimant should be to have a reasonable expectation of privacy in respect of it. Indeed, we might argue that courts should go one step further and presume a reasonable expectation of privacy if an individual is in a place which, although theoretically public, is sufficiently remote that no-one can see and/or hear him or her there without the aid of technological devices.[56] It would then be up to the defendant to show either that the claimant could not reasonably expect that an image of him or her would not be disseminated in the circumstances or that there was a public interest in the disclosure.[57] As a general matter however, there would seem to be no reason why the public interest in unimpeded access to public spaces should outweigh a reasonable expectation of privacy in remote places: the everyday use of public space does not depend on the ability to

[54] *Jagger* v. *Darling* [2005] EWHC 683 (Ch.D.), at para. [7].

[55] A number of theorists have also stressed the importance of having moments "off stage" when one can be "oneself". See, for example, A.Westin, *Privacy and Freedom* (New York 1970), especially at p. 35; S. Warren and L. Brandeis, "The Right to Privacy" (1890) 4 Harvard Law Rev. 193, especially at p. 196; T. Nagel, "Concealment and Exposure" (1998) 30 Phil. & Publ. Aff. 3, especially at pp. 17–18. The German Federal Constitutional Court has also said that it is important to provide an individual with "a sphere outside, including outside the home, in which he does not feel himself to be the subject of permanent public attention—and relieves him of the obligation of behaving accordingly—and in which he can relax and enjoy some peace and quiet" (Bundesverfassungsgerichts (First Division) 1BvR 653/96, 15 December 1999, B(II)(1)(bb)).

[56] Observation in these circumstances will also, of course, be surreptitious. As will be discussed below, this again makes it particularly intrusive.

[57] Whether such a presumption would be a legal or evidential one would depend on whether the existence of a reasonable expectation is a question of law or of fact. The courts have not yet addressed this question but in my view whether a claimant has a reasonable expectation of privacy is a question of law which should be decided once the facts have been determined. On this view, the presumption that the claimant had a reasonable expectation of privacy would be a legal one.

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eavesdrop on the inaudible conversations of others or to use telephoto lenses to video people who think they are alone, and the work of serious investigative journalists can be protected by a public interest defence for those who honestly believe that their spying would expose serious wrongdoing (such as the commission or planning of a serious crime).

Finally, although the courts have not considered the matter directly, individuals should also be more likely to have a reasonable expectation of privacy if they go to a place where they expect to find like-minded, supportive individuals, especially if they also expect that everyone present will also be engaged in a potentially embarrassing, intimate or exposing activity.[58] Thus, X should have a greater expectation of privacy when dressed in woman's clothes at a cross-dressing bar or in an inelegant position at a yoga class than when he simply walks down a busy street: there is a certain reciprocity in only being observed in a potentially compromising position by people who are also in a compromised position and it should not be exploited by people wanting to obtain embarrassing photographs of others. As well as considering the number of people who observed the activity photographed, therefore the courts should consider who those people were.[59]

B. The Nature of the Claimant's Activity

The second factor which the courts should consider when deciding whether a claimant has a reasonable expectation of privacy in a public place is the nature of the claimant's activity.

1. Intimate, embarrassing or traumatic events

The nature of the claimant's activity should be relevant, first, where the defendant has disclosed something which depicts or describes the claimant at a particularly intimate, traumatic or humiliating time. This has been widely recognised in the cases. Thus, in *Peck*, the ECtHR emphasised the claimant's vulnerability when concluding that a local council interfered with his private life by disseminating CCTV footage of him walking through the streets

[58] There is some support for this in the Strasbourg cases. As will be discussed below, the Commission in *X* v. *United Kingdom* (1974) 45 CD 90 (App No 5877/72, 12 October 1973) and *Friedl* v. *Austria* (1995) 21 E.H.R.R. 83 said that the courts should take account of the degree and type of attention the applicants should have expected when undertaking the activity when deciding whether there has been a breach of article 8.

[59] It is worth noting that both of these factors—a small numbers of observers and observers who are engaged in similar activities to the claimant—are likely to be at play in places to which access is restricted to those who pay a fee, pay for a meal, belong to a particular group or the like. Individuals should therefore be more likely to have a reasonable expectation of privacy in such places.

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holding a large knife both before and immediately after trying to commit suicide. The Court said:

> The present applicant was in a public street but he was not there for the purposes of participating in any public event and he was not a public figure. It was late at night, he was deeply perturbed and in a state of some distress. While he was walking in public wielding a knife, he was not later charged with any offence.[60]

This decision has been widely approved, and in *Campbell* Lord Hoffmann acknowledged that it might establish a special category of privacy protection in English law. Having cited the case with approval, he therefore continued:

> In my opinion, therefore, the widespread publication of a photograph of someone which reveals him to be in a situation of humiliation or severe embarrassment, even if taken in a public place, may be an infringement of the privacy of his personal information.[61]

A similar suggestion was made in the New Zealand case of *Hosking* v. *Runting*.[62] All five of the Court of Appeal judges declined to restrain publication of a photograph of two young children being wheeled down a busy Auckland shopping street because they were in a public place at the time that the photograph was taken. However, Gault P. and Blanchard J. acknowledged that:

> Cases such as *Peck* and perhaps *Campbell* qualify [the rule that generally there is no right of privacy when a person is photographed on a public street] to some extent, so that in exceptional cases a person might be entitled to restrain additional publicity being given to the fact that they were present on the street in particular circumstances. That is not, however, this case.[63]

Anderson J. also said that the claimants' situation was "quite unlike the situation of Mr. Peck in that there was nothing in the least personally embarrassing or distressing about the material which might be published".[64]

[60] *Peck*, at para. [62]. The Court also held that although the disclosures served the legitimate aims of promoting public safety, preventing disorder and crime and protecting the rights of others (see para. [67]), they were a disproportionate response to those aims because they could have been pursued in less intrusive ways (by seeking the applicant's consent or ensuring that his identity was adequately masked, for example) (see paras. [80]–[83]).

[61] *Campbell*, at para. [75].

[62] *Hosking* (note 27 above). The Court of Appeal was divided on whether a tort of invasion of privacy should be recognised in New Zealand. Gault P., Blanchard and Tipping JJ. held that there was such a tort while Keith and Anderson JJ. held that there was not.

[63] *Hosking*, at para. [164]. See also the recent case of *Andrews* v. *Television New Zealand Ltd.* HC Ak Civ. 2004–404–3536, 15 March 2005 in which Cooper J. declined to strike out an application by a man who was the subject of a television broadcast showing him immediately after being injured in a car accident.

[64] *Hosking*, at para. [271].

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The courts are right to suggest that people in humiliating or traumatic situations should be given special treatment. However, it is important to distinguish between humiliating and embarrassing situations which the claimant has created him or herself and those which have been forced upon him or her against his or her wishes. There is a difference between X's embarrassment at being filmed receiving medical treatment after a heart attack on a public street and his embarrassment at being filmed yelling at his girlfriend or streaking naked across a cricket ground.

This distinction between voluntary and involuntary events has been recognised in the well-known US case of *Daily Times Democrat* v. *Graham*, in which a newspaper was held to be liable for publishing a photograph of the claimant in a public "funhouse" with her skirts blown up. The court drew a distinction between "ordinary" public events and intimate or embarrassing events which occur for reasons beyond the claimant's control and said that although a person can be photographed as part of a public scene "in his ordinary status":

> Where the status he expects to occupy is changed *without his volition* to a status embarrassing to an ordinary person of reasonable sensitivity, then he should not be deemed to have forfeited his right to be protected from an indecent and vulgar intrusion of his right of privacy merely because misfortune overtakes him in a public place.[65]

In my view, the English courts should also recognise this distinction, and indeed, taking it one step further, presume that a person has a reasonable expectation of privacy in any situation where he or she had no choice but to experience an intimate, humiliating or traumatic event in public.[66] As argued above, although people have to accept that they will be observed by others when they use public spaces, they can make that observation tolerable by limiting how much of themselves they reveal to others through their dress, behaviour and the like. If because of some unexpected event, the protection conferred by these self-presentation efforts is taken away, these people will be forced to reveal themselves in public, either emotionally or physically or both. For example, if Y who wears purdah in public suddenly went into labour or was stripped half naked by ambulance officers after an accident, then the privacy which her clothes had afforded her moments before would be lost and parts of her body which she

[65] *Daily Times Democrat* v. *Graham* 162 So. 2d 474 (1964), at p. 478, emphasis added.
[66] As said above, this presumption should be a legal one (see note 57 above).

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wished to keep private would be exposed to anyone present.[67] Likewise, if X, who normally reserves intimate experiences for private places, was attacked by muggers or witnessed his child being killed by a dangerous driver, then the protection which his reserve usually accords him would disappear and he would be forced to experience an emotional traumatic event in public. Anyone who saw X and Y at these times would therefore obtain unwanted access to them and to publish a photograph taken at that time would be a serious affront to both their dignity and privacy.[68] In my view, people should therefore be presumed to have a reasonable expectation of privacy if they become physically exposed in a public place against their wishes (if, for example, Y's skirt is suddenly blown up, her clothes are removed by medical officers or she is involved in an accident) or if they have to go into public spaces in order attend a traumatic event (such as a funeral of a loved one or the identification of a body) or to undertake some intimate procedure (such as giving birth or having an abortion).[69]

However, it is important that recognition of a presumption in "involuntary" humiliating or traumatic situations should not be taken to imply that that people cannot also have a reasonable expectation of privacy if they are voluntarily engaged in intimate activities. As the facts of *Peck* itself show, people acting voluntarily can also be vulnerable and require the protection of the law.[70] The courts have also suggested that physical exposure in a public place will point towards the existence of a reasonable expectation of privacy, even if it is undertaken voluntarily. They have generally been reluctant to allow publication of photographs of people engaging in sexual activity[71] and it seems likely that a similar approach would be taken to someone photographed on a nudist beach, in a swimming costume, or going to the toilet in the bushes.

However, it is important to note that because experiences which are traumatic and humiliating for those involved are often of interest to the public, any reasonable expectation that an intimate

[67] However, ambulance officials and concerned members of the public would not breach Y's privacy if they came to her aid. It is unlikely that Y would have any desire—let alone a reasonable one—to be left alone by such people.

[68] The question of whether a defendant can also be liable simply for taking a photograph in these circumstances will be discussed below.

[69] Although the experiences in this second category are not involuntary in the sense that individuals cannot choose whether to *have* them, they are involuntary in the sense that the claimant has no choice about where to have them and is therefore forced to reveal him or herself emotionally in public.

[70] Although the extent to which a suicide attempt can be described as a "voluntary" act might be open to debate.

[71] See, for example, *Jagger* (note 54 above) and *Theakston* (note 26 above).

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or traumatic event will remain private would have to be subject to a public interest defence. That said, only a strong public interest should outweigh a claimant's interest in privacy at intimate or humiliating times, especially if the experience was involuntary. In particular, the fact that the image or disclosure in question added colour or human interest to a story on a matter of general public interest should not be enough to outweigh the privacy interest: as the ECtHR said in *Peck*, a general public interest in the operation of CCTV should not justify dissemination of footage of an identifiable individual immediately after he had tried to commit suicide.[72] Defendants should instead be required to show that there was sufficient a public interest in *this* footage of *this* claimant to outweigh the claimant's interest in being left alone at a traumatic time.[73] Further, even where people are caught up in events of national or international significance (such as a terrorist bombing or a devastating hurricane), it would not be unduly restrictive to insist that the media refrain from publishing images of individuals whose intimate body parts are exposed, who are being being treated for serious injuries, or who are plainly trying to avoid the gaze of the camera.

2. Drawing attention to oneself

Also falling under the "nature of the claimant's activity" heading, are situations where people are drawing attention to themselves. There are conflicting authorities on these cases. On the one hand, the European Commission of Human Rights have held that a person is less likely to have an enforceable right to respect for private life if he or she deliberately takes part in public incidents which are likely to attract attention, such as an anti-apartheid protest or a much-publicised sit-in.[74] On the other hand, there are

[72] See *Peck*, at paras. [79]–[80]. However, compare *Schulman* (note 50 above) in which the Supreme Court of California held that a general public interest in the operation of ambulance services did justify the dissemination of detailed footage of a person being extricated, severely injured, from a car wreck (see paras. [14]–[18]).

[73] This would not prevent the media adding "human interest" to its stories. Reconstructions, footage which does not focus on identifiable individuals, and real-life footage broadcast with the subject's consent could all be used to similar effect.

[74] See *X* (note 58 above) and *Friedl* (note 58 above) respectively. The ECtHR cited *Friedl* with approval in *PG and JH* v. *United Kingdom* (note 15 above) (see para. [58]). It also said that "[s]ince there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, though not necessarily conclusive factor" (para. [57]). Cases such as *Theakston*, *Woodward* and *A* v. *B Ltd.* (in which the Court of Appeal held that a premiership footballer could not reasonably expect an affair with a lapdancer to remain private/confidential) also suggest a general unwillingness on the part of the courts to protect claimants against the exposure of what would generally be regarded as "bad behaviour". As Bridge L.J. (as he then was) said in *Woodward*, "those who seek and welcome publicity of every kind bearing upon their private lives so long as it shows them in a favourable light are in no position to complain of an invasion of their privacy by publicity which shows them in an unfavourable light (p. 765).

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suggestions in the common law that one's normality can count against one. For example, in *Campbell*, Baroness Hale said that the claimant could not have complained about a photograph of her "going about her business in a public street" because "[r]eaders will obviously be interested to see how she looks if and when she pops out to the shops for a bottle of milk" and "there is nothing essentially private about that information".[75] Claimants therefore seem to face a double bind—if both drawing attention to oneself and doing nothing out of the ordinary militate against the existence of a reasonable expectation of privacy then would seem to be difficult to establish one.

To the extent that there is a conflict between these two approaches, I would argue that the Strasbourg approach should prevail: it seems perfectly reasonable that a person should have a greater claim to privacy when sitting quietly in a restaurant or popping out for a pint of milk than when streaking across a rugby pitch or starting a fight with a bouncer. However, in reality Baroness Hale's *dicta* seem merely to be distinguishing between photographs of people in "ordinary" situations and those taken in intimate or traumatic situations. It does not follow from the fact that people have a greater claim to privacy protection in intimate situations, that disclosures relating to people going about their day to day business cannot also be intrusive.

C. The Way in which the Image was Obtained

The next factor to consider in determining whether a claimant can have a reasonable expectation of privacy in public is how the image of the claimant was obtained. Three matters will be examined in this section: the surreptitious acquisition of material, the use of technological devices to break through self-presentation barriers and harassing conduct.

1. Surreptitious acquisition

English courts have made their disapproval of surreptitious recording clear on a number of occasions. Thus, in the course of upholding a Broadcasting Standards Commission decision that it was a breach of the broadcasting code surreptitiously to film the public area of an electronic goods store, Lord Woolf C.J. said that the clandestine nature of the filming could add an additional ingredient to a claim because it "prevents those who are being

[75] *Campbell*, at para. [154]. However, Baroness Hale did ultimately conclude that the photographs of the claimant leaving her therapy meeting contributed to the harm she suffered as a result of the intrusion (see paras. [154]–[156]). The New Zealand Court of Appeal also stressed the "normality" of the scene photographed in *Hosking* (note 27 above).

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filmed from taking any action to prevent what they are doing being filmed''.[76] Similarly, in the course of declining an application for permission to review a Press Complaints Commission decision that it was not a breach of the Code to photograph the claimant on a beach in Majorca in *Ford*, Silber J. accepted that he should attach great importance to the fact that the photographs were surreptitiously taken and stressed that the couple were:

> deprived of not only the opportunity of refusing to consent to be photographed but also of the opportunity of moving out of sight of the camera or of taking steps to ensure that no newsworthy photographs were taken of them.[77]

The fact that the photographs were covertly taken also bore heavily on Lord Hope's conclusion that publication of the photographs in *Campbell* would be offensive to a reasonable person of ordinary sensibilities[78] and, in the criminal case of *R* v. *Loveridge, Lee and Loveridge*, Lord Woolf C.J. (speaking for the Court of Appeal) said that ''secret filming in a place to which the public has free access can amount to an infringement even where there is no private element to the events filmed''.[79] Thus, even though, as Baroness Hale said in *Campbell*, the courts ''have not so far held that the mere fact of covert photography is sufficient to make the information contained in the photograph confidential'',[80] they seem likely to accept that a person can have a reasonable expectation of not being surreptitiously recorded in public places or, at least, of not having any recordings taken disseminated.

Surreptitious observation is particularly invasive because, as Lord Woolf C.J. and Silber J. said, it prevents people from responding to observation with their usual self-presentation

[76] *R* v. *Broadcasting Standards Commission, ex parte British Broadcasting Corporation* [2001] Q.B. 885, at para. [37]. See also para. [44] (*per* Hale LJ, as she then was).

[77] *Ford R (on the application of Anna Ford)* v. *Press Complaints Commission* [2001] EWHC Admin 683; [2002] E.M.L.R. 41, at para. [30].

[78] *Campbell*, at para. [121]–[123], and see above at p. 616.

[79] *R* v. *Loveridge, Lee and Loveridge* [2001] EWCA Crim 973; [2001] 2 Cr. App. R. 591, para. [30]. The defendants in that case (unsuccessfully) sought leave to appeal on the grounds that the police had surreptitiously filmed them in the magistrates' court and during their trial compared the film with CCTV footage obtained at the scene of the crime. See also *Theakston*, where Ouseley J. said that that breach of confidence protection extends to ''photographs taken in public or from a public place of what could be seen if not with a naked eye, then at least with the aid of powerful binoculars'' (para. [78]); *Hellewell* v. *Chief Constable of Derbyshire* [1995] 4 All E.R. 473, where Laws J., (as he then was), said that ''[i]f someone with a telephoto lens were to taken from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted and proceed to publish it'' (p. 476); and *Earl and Countess Spencer* v. *UK* (1998) 25 E.H.R.R. CD105, where the European Commission accepted the government's submission that the claimant would have had a breach of confidence action against a newspaper which published surreptitiously taken photographs of her in the grounds of a bulimia treatment clinic (CD111–118).

[80] *Campbell*, at para. [154].

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methods. Thus, for example, if Z used a telescope to spy on Y as she bathed topless, Y would not know to cover herself up as she normally would if she could see someone watching; and if Z used a shotgun microphone to record X and Y's conversation, then they would not know to restrict their conversation to anodyne matters as they usually would if they thought that somebody might be listening. Z's spying is therefore objectionable not only because it enables him to obtain significant unwanted access to X and Y, but also because he deliberately deceives X and Y about the nature of their environment—as Stanley Benn has said, they might be in a "fool's paradise or a fool's hell" but either way, Z is "making a fool of [them]".[81]

For the reasons discussed above, this kind of observation is particularly problematic when individuals think that they are out of sight and/or earshot. Claimants should be presumed to have a reasonable expectation of privacy in these circumstances.[82] However, even if a claimant is in a more widely accessible place such as a street, restaurant or shopping centre at the time of the filming, a reasonable expectation of privacy can still arise. If Y disseminates a surreptitiously obtained video of X drinking in a bar, then she would not only expose him to a wider and differently constituted audience to the one he had chosen, but would also prevent him from tailoring his behaviour to that wider audience, by wearing different clothes, behaving less raucously or doing whatever else he thought appropriate. Anyone who sees the footage will therefore see a much less censored X than they would have seen if the filming had been open. This should make it more likely that Y has breached X's reasonable expectation of privacy.

2. Using technological devices to force through self-presentation barriers

Closely related to surreptitious observation situations are those where a defendant uses technological devices to force his or her way through the claimant's self-presentation barriers. Few would dispute, for example, that Y, who wears clothes to avoid revealing her body in public, would have a reasonable expectation that Z would not use an x-ray device to see through her clothing or, as has already been argued, that X and Y would have a reasonable expectation that Z would not record their conversations with a shotgun microphone. English courts have not yet dealt with this

[81] S. Benn, "Privacy, Freedom and Respect for Persons" in J. Pennock and J. Chapman (eds.), *Privacy* (NOMOS vol. XIII, New York 1971), 1, 11.

[82] As argued above, people who believe that nobody can see and/or hear them will usually deem self-censorship efforts unnecessary, meaning that those who do spy on them intrude upon them in particularly serious way. (See p. 622 above).

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issue expressly, but it is implicit that the "humiliating or embarrassing situations" exception, which Lord Hoffmann has suggested might flow from *Peck*, would extend to defendants who deliberately cause a person embarrassment by looking through their clothes or listening in on their conversations.[83] Indeed, in my view, the existence of a reasonable expectation should again be presumed where such devices are used.

3. Harassment

The third matter which falls under the heading "the way in which the information was obtained" is whether the image or information in question was obtained as part of a campaign of harassment against the claimant. This was expressly considered in *von Hannover*. Having acknowledged that "photos appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution",[84] the ECtHR said that:

> even though, strictly speaking, the present application concerns only the publication of the photos and articles by various German magazines, the context in which these photos were taken—without the applicant's knowledge or consent—and the harassment endured by many public figures in their daily lives cannot be fully disregarded.[85]

This seems fair. Although a harassed person suffers no more unwanted access in a particular instance than a non-harassed person, the fact that he or she deals with constant intrusions into his or her daily life should be considered as part of the context in which any particular intrusion is considered and in my view, make it more likely to be actionable.

[83] See *Campbell*, at para. [75]. Also, despite their conclusion that the claimant could not have a reasonable expectation not to be videoed as she was attended by paramedics on the roadside, the Supreme Court of California in *Schulman* held that "by placing a microphone on [the paramedic's] person, amplifying and recording what she said and heard, defendants may have listened in on conversations the parties could reasonably have expected to be private" (p. 491). See also *Bennett* v. *Norban* 151 A.2d 476 (1959) in which the court said that there would undoubtedly be a breach of privacy if a group of people forced a girl to take off her clothes and then to "flee naked through the streets" (p. 479).

[84] *von Hannover*, at para. [59].

[85] *Ibid.*, at para. [68]. American courts have held that it is a breach of privacy to take and/or publish photographs of people in public spaces if that activity is part of an "over zealous" surveillance campaign. See, for example, *Nader* v. *General Motors Corporation* 255 N.E.2d 765 (1970); *Galella* v. *Onassis* 353 F.Supp. 96 (1972); *Summers* v. *Bailey* 55 F.3d 1564 (11th Cir. 1995) and *Pinkerton National Detective Agency Inc.* v. *Stevens* 132 S.E.2d 119. However, contrast *Dempsey* v. *National Enquirer* 702 F.Supp. 927 (D.Me. 1988), 931; *International Union* v. *Garner* 601 F.Supp. 187 (1985); and *Figured* v. *Paralegal Technical Services, Inc.* 555 A.2d 663 (N.J.Super.A.D. 1989) 555 A.2d 663 (N.J.Super.A.D. 1999), 667.

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D. The Extent to which the Publication Focused on the Claimant

The final factor bearing on the existence of a reasonable expectation of privacy is the extent to which the disclosure in question focused on the claimant. This was central to the Supreme Court of Canada's decision in *Aubry* v. *Editions Vice-Versa Inc.* in which a photographer was held to have breached a young woman's right to respect for private life under section 5 of the Quebec Charter of Human Rights and Freedoms by publishing a photograph of her sitting on a step in front of a public building in Montreal. Although the majority held that section 5 established a "protected right to [a person's] image [which] arises when the subject is recognizable",[86] it said that neither a photographer nor a publisher would be liable for breaching this right if the claimant was not "the principal subject" of the photograph; if for example, the claimant "appear[ed] in an incidental manner in a photograph of a public place" or "in a group photographed in a public place", as long as the place was not simply being used "as background for one or more persons who constitute the true subject of the photograph".[87] Lord Hope adopted these *dicta* in *Campbell*[88] and they provide useful guidance for the English courts: X should be more likely to recover for publication of a photograph of *him* attending a football match than for a photograph of a football crowd in which he incidentally appears. However, the guidance they give is essentially negative: although the rule helps us to exclude from the action cases where the claimant is *not* the focus of the photograph, it does not tell us when a reasonable expectation of privacy *will* arise. There is no suggestion that English courts would adopt the Quebec position and allow claimants to recover simply because they were the principal subject of a photograph taken in a public place.

V. One Final Issue: Liability for Taking a Photograph

So far this discussion has focused on when a person might have a reasonable expectation not to have an image of him- or herself disseminated to the world at large. Before leaving this discussion of public places, it is necessary briefly to examine whether a person

[86] *Aubry* v. *Editions Vice-Versa Inc.* (1998) 157 DLR (4th) 577, at para. [53].
[87] *Ibid.*, at para. [59].
[88] *Campbell*, at para. [122]. He said that: "A person who just happens to be in the street when the photograph was taken and appears in it only incidentally cannot as a general rule object to the publication of the photograph … But the situation is different if the public nature of the place where a photograph is taken was simply used as background for one or more persons who constitute the true subject of the photograph. The question then arises, balancing the rights at issue, where the public's right to information can justify dissemination of a photograph taken without authorisation".

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should ever be liable simply for taking a photograph or making a record of a person in a public place. *Dicta* in *Campbell* suggests not: Lord Hope said that "[t]he taking of photographs in a public street must ... be taken to be one of the ordinary incidents of living in a free community";[89] and Lord Hoffmann said, "[t]he famous and even the not so famous who go out in public must accept that they may be photographed without their consent, just as they may be observed by others without their consent".[90] They would therefore seem to agree with William Prosser's famous statement (echoed in Section 652B of the US Restatement) that taking a photograph "amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which any one present would be free to see".[91]

However, there is some suggestion that unwanted photography without more can be actionable in some circumstances. Thus, in *Campbell* Lord Hope cited with approval a passage from *PG and JH* in which the ECtHR said that:

> [although] a person who walks down a public street will inevitably be visible to any member of the public who is also present and, in the same way, to a security guard viewing the scene through closed circuit television ... private life considerations may arise *once any systematic or permanent record comes into existence* of such material from the public domain.[92]

Clause 3(ii) of the Press Complaints Commission Code also provides that "[i]t is unacceptable *to photograph* individuals in private places without their consent"; "private places" being "public or private property where there is a reasonable expectation of privacy" (emphasis added). A journalist would therefore be liable for photographing an individual in a public place if that individual could show that he or she had a reasonable expectation of privacy at the time.

Contrary to Prosser's contention that there is no difference between observing a person in a public place and taking a photograph of him or her there, it should therefore be possible to breach a person's privacy by taking a photograph of him or her in a public place. As said above, photographs enable those who look at them to see or hear the subject *for themselves*: if X looks at

[89] *Ibid.*, at para. [122].
[90] *Ibid.*, at para. [73].
[91] Prosser (note 50 above), 391–392. Section 652B of the Second Restatement of the Law of Torts provides that there will be no liability "for observing [a person] or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye". This reasoning applies not only to the *taking* of a photograph, but also to it publication. See note 50 above.
[92] *Campbell*, at para. [122], citing *PG and JH*, at para. [57], (emphasis added).

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photograph of Y bathing topless he will see exactly what Y looks like naked and be able to observe her body language, her demeanour and the like. Anyone who possesses a revealing image of another therefore obtains a large measure of control over that other: if X obtains the photograph of Y then he, and not just Y, will be able to determine who gets to see her naked body. Thus, as Andrew Jay McClurg says, photographs allow an observer "to, in effect, take a part of the subject with him. The victim loses control over an aspect of her self".[93]

This is problematic both for its own sake and because X can use that control to exacerbate the effects of the original observation, either by showing the photograph to someone else (to his friends, Y's work colleagues or innumerable people on the internet, for example) or by revisiting the original observation himself, for sexual gratification or for any other purpose.[94] The photograph therefore facilitates continued unwanted access in a way that merely observing Y on the beach or on the street or any other public place does not. The taking of a photograph can also contribute to the feelings of humiliation and objectification engendered by a breach of privacy. For example, whilst X is likely to find it humiliating and disrespectful to be watched by voyeurs as he is extricated, badly injured from a car wreck, it would add insult to injury if those observers were also to start videoing him with their mobile phones. Although in both situations, the voyeurs undermine X's dignity by treating his trauma as a spectacle, the suggestion in the latter that they wish to disseminate footage of the incident or to re-visit it for their own gratification makes that sense of indignity even worse.[95]

I would therefore argue that the taking of a photograph in a public place should be legally actionable if the person photographed is involuntarily having an intimate or traumatic experience, is in a place where he or she reasonably believes he or

[93] See A. McClurg (note 33 above), 1041 and generally. See also *Amati* v. *City of Woodstock, Illinois* 829 F.Supp. 998 (N.D.Ill 1993): "a sound recordation obtained by eavesdropping carries with it a *potential* projection of a private conversation and that such potential disclosure impairs the mental peace and comfort associated with an individual's expectation of privacy" (p. 1010) and L.L. Barnett Lidsky (note 48 above) especially 237.

[94] Indeed, he can probably look more closely and for longer at Y's body than was possible in the original observation particularly if he had been concerned about conventions against staring or about the subject's reaction. See further, A. McClurg (note 33 above), 1042.

[95] Numerous commentators have recognised the relationship between privacy and dignity. See for example, E. Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39 N.Y.U.L.R. 962, 1000–1007; J. Reiman, "Privacy, Intimacy and Personhood" (1977) 6 Phi.l & Publ. Aff. 26, 39; H. Kalven Jnr., "Privacy in Tort Law—were Warren and Brandeis Wrong?" (1966) 31 Law & Contemp. Prob. 326; D. Feldman, "Secrecy, Dignity or Autonomy? Views of Privacy as a Civil Liberty" (1994) 47 C.L.P. 4, 54–58; and Benn (note 49 above), 1–13. See also Lords Nicholls and Hoffmann in *Campbell*, at paras. [12] and [51], respectively.

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she is imperceptible by others, or if the defendant has used technological devices to break through his or her self-presentation barriers; in other words, when the presumptions advocated above apply. A rule of this nature need not interfere unduly with the use of public space: the everyday use of public space does not depend on being able to photograph people in humiliating situations or in remote, secluded places or to obtain images by looking through their clothing. However, any rule of this nature would have to be tightly drawn and be subject to a newsgathering defence for media defendants who can show that they honestly believed that any recording or images obtained would be in the public interest. A defence for people who (quite reasonably) failed to realise that Y was having an intimate or traumatic experience when the photograph was taken would also be necessary.

VI. Conclusion

So, far from there being no right to privacy in public spaces, there are a number of situations in which English courts have shown a willingness to protect it. The courts therefore seem well-equipped to deal with the challenge set down for them in *von Hannover*. This article has aimed to examine how this protection should be developed and in particular to identify four main factors which should be considered when deciding whether a reasonable expectation of privacy exists in any particular case: the claimant's location, the nature of his or her activity, the way in which the information or photograph was obtained, and the extent to which the disclosure focused on him or her. People should be presumed to have a reasonable expectation of privacy if they are involuntarily experiencing an intimate or traumatic experience in public, they are in a place in which they reasonably believe themselves to be imperceptible to others, or the defendant has used technological devices to penetrate his or her clothes or other self-protection barriers. Recognition of these aspects of the privacy interest is not only consistent with the requirements of article 8, it is also theoretically sound and essential if the courts are to protect privacy effectively, something which they are showing an increasing interest in doing.

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