THE LAW OF PRIVACY IN SOUTH AFRICA

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by

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AN ANALYSIS OF THE LAW OF PRIVACY IN SOUTH AFRICA AND ITS HISTORICAL EVOLUTION AGAINST THE BACKGROUND OF THE DEVELOPMENT OF THE RIGHT TO PRIVACY IN OTHER MODERN LEGAL SYSTEMS, WITH PARTICULAR REFERENCE TO THE MODE OF CLASSIFICATION FOR INVASIONS OF PRIVACY GENERALLY ACCEPTED IN THE UNITED STATES.

"I give the fight up; let there be an end,
A privacy, an obscure nook for me.
I want to be forgotten even by God."

(Robert Browning "Paracelsus" pt v)

"Some thirty inches from my nose,
The frontier of my Person goes,
And all the untilled air between
Is private pagus or demesne.
Stranger, unless with bedroom eyes
I beckon you to fraternize,
Beware of rudely crossing it:
I have no gun, but I can spit."

(W.H. Auden "Prologue: The Birth of Architecture")

PREFACE

This work does not pretend to be perfect. I have chosen to examine the law of privacy in South Africa against the background of other legal systems but within the flexible principles of Roman-Dutch law in the hope that the study will be of some practical benefit to students, scholars and practitioners. I am well aware, however, that the methodology adopted may be regarded in some quarters as too casuistic and insufficiently theoretical, scientific or exhaustive.

The publication of Professor J Neethling's excellent thesis on Die Reg op Privaatheid at a time when this work was almost complete gave me some cause for concern but happily we have adopted different approaches. Our works at times overlap - for instance my coincidental choice of the United States, England, the Federal Republic of Germany and France was in part influenced by the availability of literature on the subject in those countries. My treatment of the concept in these countries, however, is necessarily more cursory than that of Professor Neethling because while I have also touched on the position in other legal systems my main concern has been the evolution and development of the law of privacy in South Africa.

I wish to express my sincere thanks to my Superviser, James Lund, for his helpful comments and suggestions particularly concerning the controversial question of animus injuriandi; to Ingrid Lister-James for the many hours spent typing from a manuscript which was often indecipherable; and to Anne Aarsen who willingly assisted Ingrid in moments of crisis.

Finally I would like to thank Norah for her patience and understanding during the many evenings and weekends sacrificed on the altar of Academe.

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ABBREVIATIONS OF JOURNAL TITLES

ALR	:	American Law Review
American ULR	:	The American University Law Review
Annual Survey	:	Annual Survey of South African Law
Aust LJ	:	Australian Law Journal
Cal LR	:	California Law Review
Cal West LR	:	California West Law Review
Cambridge LJ	:	Cambridge Law Journal
Canadian Bar R	:	Canadian Bar Review
Cape LJ	:	Cape Law Journal
Columbia LR	:	Columbia Law Review
Duke LJ	:	Duke Law Journal
Family LQ	:	Family Law Quarterly
Harvard LR	:	Harvard Law Review
ICLQ	:	International and Comparative Law Quarterly
Int Soc Sci J	:	International Social Science Journal
Israel LR	:	Israel Law Review
JCP	:	Jurisclasseur Periodique
J of Family Law	:	Journal of Family Law
J of Forensic Sci Soc	:	Journal of the Forensic Science Society
Law & Contemp Problems	:	Law and Contemporary Problems
LQR	:	Law Quarterly Review
Modern LR	:	Modern Law Review
New LJ	:	New Law Journal
NJW	:	Neue Juristische Wochenschrift
NULR	:	Natal University Law Review
NYULR	:	New York University Law Review

Rev of Contemp Law	:	Revue of Contemporary Law
Rhod LJ	:	The Rhodesian Law Journal
Rutgers LR	:	Rutgers Law Review
SALJ	:	South African Law Journal
Stanford LR	:	Stanford Law Review
St John's LR	:	St John's Law Review
Tas LR	:	University of Tasmania Law Review
THR-HR	:	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	:	Tydskrif vir Suid-Afrikaanse Reg
Tulane LR	:	Tulane Law Review
U of Chicago LR	:	University of Chicago Law Review
U of Maine LR	:	University of Maine Law Review
Vand LR	:	Vanderbilt Law Review
Willamette LJ	:	Willamette Law Journal
Yale LJ	:	Yale Law Journal

SUMMARY

The right to privacy is recognized by social scientists as essential for the preservation of an individual's human dignity including his physical, psychological and spiritual well-being. Privacy, however, has been increasingly threatened by developments in technology and the mass media which are common features of modern society.

The legal protection of privacy can be traced back to Roman and Roman-Dutch law where the texts reflect several *injuriae* which today would be regarded as invasions of privacy. The modern concept, however, was first clearly articulated in the United States at the turn of the twentieth century, although its seminal threads were also present in some Civil law jurisdictions. Certain provisions of the Civil Codes of Germany, France and a number of other European countries have been interpreted to include an action for invasion of privacy and in some instances privacy is also protected in several Penal Codes. The Common law countries on the other hand, have had to develop an entirely new tort. In the United States after some initial resistance the tort of privacy is probably more developed than in any other country, whereas in England the courts have been reluctant to recognize the wrong.

The courts in South Africa have been able to draw on the broad principles of the developed Roman law - the *actio injuriarum* or the *lex Aquilia*. All the privacy cases so far reported in South Africa have been brought under the *actio injuriarum* in terms of which the essential elements of intention, wrongfulness and impairment of personality must be proved. The South African courts have not yet defined the concept but like the social scientists have generally regarded privacy as an aspect of *dignitas* in cases where a *solatium* is claimed. In determining the question of wrongfulness, however, our judges have been influenced by developments elsewhere, particularly in the United States. Consequently it has been argued that invasion of privacy should be viewed as a separate independent wrong. Nonetheless the essential elements of the proposed new wrong have not been clearly defined nor the question of fault and its impact on freedom of speech fully considered. It seems that in South Africa in an action for invasion of privacy resulting in sentimental loss the plaintiff must prove *animus injuriandi*, except perhaps where it is perpetrated by the press.

In most cases invasions of privacy take the form of intrusions or publicity, and in the United States where the law of privacy is probably most fully developed it is generally accepted that invasions of privacy may be categorized into intrusions, publication of private facts, false light cases and appropriation. These categories provide a useful frame of reference for an analysis of the wrong in South African law, particularly its accommodation under the common law. The broad principles of the South African law of delict are generally sufficiently flexible to accommodate the American categories but as in the United States and elsewhere special measures are necessary to protect the individual against threats to his privacy by public and private data bank storage systems. Furthermore South African statute law has considerably weakened the efficacy of the common law protection of privacy by interfering in individual private life for ideological reasons to a degree which would not be tolerated in most Western European or North American countries.

Defences to an action for invasion of privacy can be divided into those which negative the wrongfulness of the defendant's conduct and those which rebut fault. Where, however, the invasion is by the press the defences are limited to the former.

The utility of the action for invasion of privacy in South Africa has not yet been fully realized, particularly its usefulness as an alternative to defamation and injurious falsehood as well as the doubtful wrong of injuria per consequentias. There is no reason in principle why in future where an invasion of privacy arises from negligence the plaintiff may not bring an action provided he can prove patrimonial loss. Proof of the latter has been made easier by the fact that patrimonial loss has been interpreted by the courts to include damages arising from emotional shock. Legislation is needed, however, to control the collection and dissemination of data bank information by public and private agencies; the activities of private investigators and security guards; and the importation, manufacture, sale or delivery of monitoring equipment.

CONTENTS

CHAPTER ONE

INTRODUCTION

A. The Desire for Privacy

The desire for privacy is common to both animals and mankind. It has been suggested that in the animal world there exists a "biological right of privacy"[1] which expresses itself in a desire for "territoriality".[2] Important aspects of this "animal privacy"[3] are "personal distance", which occurs between individual members of a group,[4] and "social distance" which is observed between the different groups themselves.[5] Similar "distances" are found in human relationships,[6] although they may vary with different cultures. For instance, the recognition of a right to privacy by individual members of a family towards each other can be equated to "personal distance",[7] while the relationship of the family itself to other families in the community can be regarded as "social distance". In some primitive societies where there are small communities, closely-knit families, and strict religious controls there may be little scope for privacy as we know it.[8]

Anthropologists have shown that with the movement from primitive to modern societies there has been an increase in the

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1) R Ardrey The Territorial Imperative (1969) 180; cf AF Westin Privacy and Freedom (1967) 8f.

2) Ardrey op cit 97 ff, 175. Cf J Fast Body Language (1971) 25f.

3) Ardrey op cit 177.

4) ET Hall The Hidden Dimension (1969) 13f; cf Westin op cit 9.

5) Hall op cit 14; Westin op cit 9.

6) E Goffman Relations in Public (1972) 51f.

7) "One aspect of family life that cannot be overlooked is the need for privacy. It is necessary to have private space in order to enjoy intimate contacts to the full. Severe overcrowding in the home makes it difficult to develop any kind of normal relationship except a violent one". D Morris Intimate Behaviour (1972) 205.

8) For instance it has been said that in Samoa "there is no privacy and no sense of shame" M Mead Coming of Age in Samoa (1965) 113; Westin op cit 12f. Nonetheless most societies recognize some form of "privacy" - even if not in the "Western" sense. Cf Westin op cit 14ff. Cf P Burns "The Law and Privacy: The Canadian Experience" (1976) 54 Canadian Bar R 1, 3.

opportunities for privacy, largely due to the anonymity of city life, the development of the small nuclear family and individual dwellings, mobility in work and residence, and the weakening of religious authority.[1] But even modern societies have differing concepts of privacy.[2] For instance, while the Germans demand closed office doors, fenced yards, separate rooms and strict person to person distancing,[3] the Americans are content with open office doors, unfenced properties and informal rules of personal and social distance.[4] The English on the other hand are accustomed to shared offices and bedrooms, and use "reserve" rather than doors and walls to preserve their privacy.[5] The French and the Arabs have been described as "sensually involved"[6] with individual members of their society in a manner which would be offensive to Germans, Englishmen and Americans.[7] It has been suggested that because the Japanese and the Arabs enjoy crowding together they have no word for "privacy",[8] but as Hall points out "one cannot say that the concept of privacy does not exist ... only that it is very different from the Western conception".[9]

Hall goes further in his theory of "proxemics"[10] to show that Americans surround themselves with concentric "zones" of distance

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1) Westin op cit 21; E Shils "Privacy: Its Constitution and Vicissitudes" (1966) 31 Law and Contemp Problems 289; cf H Storey "Infringements of Privacy and its Remedies" (1977) 47 Australian LJ 498; "In a large city many people do not even know the names of their neighbours - the paradox of social isolation of the teeming city can cause a great deal of stress and misery for many of the human zoo inmates" D Morris The Human Zoo (1969) 38.

2) C Fried "Privacy" (1968) 77 Yale LJ 475, 486f. Burns op cit 4.

3) Hall op cit 134ff; Westin op cit 29.

4) Hall op cit 138ff; Westin op cit 29.

5) Hall op cit 139f; Westin op cit 29. As do the Arabs. Hall op cit 159.

6) Hall op cit 145, 151. For instance, the intimate eye contact used by both in conversation (Hall op cit 145, 161) and the Arab's delight in "breath to breath" olfactory stimulation (Hall op cit 159f).

7) Hall op cit 134, 161.

8) Hall op cit 152, 159.

9) Ibid.

10) "Proxemics is the term ... for the interrelated observations and theories of man's use of space as a specialized elaboration of culture" Hall op cit 1.

in their relationship with others.[1] Intimate distance which extends to 18 inches and embraces very close friends and relations; personal distance, extending to four feet and used in ordinary conversation; social distance, from four to 12 feet, relating to business and social gatherings; and public distance which extends beyond 12 feet and occurs, for instance, where a speaker addresses a public meeting or delivers a lecture.[2] Goffman, on the other hand, refers to a different aspect of privacy during his discussion of the "territories of self", in which he emphasizes the "information preserve":[3]

> "There is the content of the claimant's mind, control over which is threatened when queries are made that he sees as intrusive, noisy, untactful.[4] There are the contents of pockets, purses, containers, letters and the like, which the claimant can feel others have no right to ascertain.[5] There are biographical facts about the individual over the divulgence of which he expects of maintain control.[6] And, most important ... there is what can be directly perceived about an individual, his body's sheath[7] and his current behaviour, the issue here being his right not to be stared at or examined".[8]

Psychologists have recognized that where an individual's "core self" is exposed against his will, he is likely to suffer ill-health, which may even result in suicide or a nervous breakdown.[9]

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1) It could be argued that this was what the United States Supreme Court had in mind when it referred to "zones of privacy" in Griswold v Connecticut (1965) 381 US 479, 484. Cf GL Bostwick "A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision" (1976) 64 Cal LR 1447.

2) Hall op cit 116ff; cf DJ Schneider Social Psychology (1976) 105; Fast op cit 31f.

3) Goffman op cit 63. "The set of facts about himself to which an individual expects to control access while in the presence of others" Ibid. Cf Westin op cit 33.

4) See below 223, 228.

5) See below 200, 206.

6) See below 256.

7) That is "the skin that covers the body, and at a little remove, the clothes that cover the skin". Goffman op cit 62.

8) See below.

9) Westin op cit 33f. Cf D Madgwick Privacy under Attack (1968) 2.

> "People maintain themselves in physical health and in psychological and spiritual well-being when they have a 'private place' some locus that is inviolable by others except at the person's express invitation".[1]

Shils, a sociologist, has defined privacy as a "zero-relationship" between two persons or two groups, or between a group and a person,[2] but recognizes that the mere existence of a person as a human being necessitates being placed under scrutiny.[3] In the words of Fleming:

> "The mere fact of living in the complex society of today exposes everyone to annoying contacts with others, most of which he must bear as the price of social intercourse".[4]

Chambliss and Seidman have suggested that the degree of this scrutiny or exposure will depend upon the social status of the individual and may have a significant effect on crime statistics.[5] The privacy of the poorer classes is usually ignored by law enforcement authorities,[6] and in any event their lack of privacy at home may cause them to commit offences in public.[7] Conversely the middle-classes can commit similar crimes in the privacy of their homes, secure in the knowledge that such privacy is generally respected by the authorities.[8]

Philosophers make little mention of privacy but it has been suggested that it is inherent in Locke's transcendental idea that all man makes and becomes are part of "his own person".[9]

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1) SM Jourard "Some Psychological Aspects of Privacy" (1966) 31 Law and Contemp Problems 307, 310. "Psychologically then privacy is a two-way street consisting not only of what we need to exclude from or admit into our own thoughts or behaviour, but also of what we need to communicate to, or keep from, others". OM Ruebhausen & OG Brim "Privacy and Behavioural Research" (1965) 65 Columbia LR 1184, 1189.

2) Shils op cit 281.

3) Shils op cit 286.

4) JG Fleming The Law of Torts 4 ed (1971) 527; cf J Stone Social Dimensions of Law and Justice (1966) 214; Fried op cit 486.

5) WJ Chambliss & RB Seidman Law, Order and Power (1971) 332f.

6) "/I/t is perfectly clear that police practices in the slums and ghettos systematically ignore the right to privacy of these people" Chambliss & Seidman op cit 334.

7) "Thus middle-class gambling is protected from police scrutiny by the privacy of a home, whereas a lower-class gambler must expose himself to the sanctions of the legal system by gambling in public" Chambliss & Seidman op cit 333.

8) Chambliss & Seidman op cit 334f.

9) MR Konvitz "Privacy and the Law: A Philosophical Prelude" (1966) 31 Law & Contemp Problems 272, 275.

"/E/veryman has a 'property' in his own 'person'. This nobody has any right to but himself".[1] Similarly, Marcuse's contention that man "seeks a private space in which man may become and remain 'himself'",[2] has been well expressed as follows:

> "A person may claim the right to be let alone when he acts publicly as when he acts privately. Its essence is the claim that there is a sphere of space that has not been dedicated to the public use or control. It is a kind of space that a man may carry with him into his bedroom or into the street".[3]

Konvitz claims that the transcendental concept of an "inner" and "outer" man is closer to Cooley's definition of "the right to be let alone"[4] than Warren and Brandeis' phrase "the right to privacy",[5] because the latter seems to be restricted to "what has been withdrawn from public view".[6] This may explain why the American courts have sometimes experienced difficulty in allowing an action for invasion of privacy where the act takes place in public.[7] Negley has remarked that Bentham's concern about the interference of the "legislator" in the realm of "private ethics"[8] caused him to regard "the law as an invasion of privacy which must be justified on the ground of necessary utility".[9]

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1) John Locke The Second Treatise of Civil Government (Everyman ed 1924) 129; cf Konvitz op cit 275.

2) H Marcuse One Dimensional Man (1970) 20, where he refers to "introjection" which implies the existence of an inner dimension distinguished from, and even antogonistic to the external exigencies - an individual consciousness and an individual unconscious apart from public opinion and behaviour" Ibid. Cf Shils op cit 306, who maintains that individuality consists of "the 'social space' around an individual, the recollection of his past, his conversation, his body and its image /which/ all belong to him".

3) Konvitz op cit 279f. Cf Hall op cit 157: "the Arabs ... apparently takes on rights to space as they move".

4) TM Cooley A Treatise on the Law of Torts 2 ed (1888) 29. See below 51.

5) SD Warren & LD Brandeis "The Right to Privacy" (1890) 4 Harvard LR 193. See below.

6) Konvitz op cit 279.

7) See below 55.

8) Ed JH Burns & HLA Hart, Jeremy Bentham An Introduction to the Principles of Morals and Legislation (1970) 290f.

9) G Negley "Philosophical Views on the Value of Privacy" (1966) 31 Law & Contemp Problems 319. Cf R Pound "Interests in Personality" (1915) 28 Harv LR 345: "Unhappily, in the nineteenth century legal history was written from an individualistic standpoint and was interpreted as a development of restrictions on individual aggression in the interests of individual freedom of action".

Although it may be true to say that the attempts to set up Utopian societies in the 18th and 19th centuries led to "the elimination of privacy as a source of social conflict",[1] Bentham's traditional emphasis on individual liberty was continued by John Stuart Mill who states: "Over himself, over his own body and mind, the individual is sovereign".[2] Fried sees as the essence of inter-personal relationships and worthwhile human existence the qualities of "respect, love, friendship and trust", which cannot exist without privacy.[3] "To make clear the necessity of privacy as a context for respect, love, friendship and trust is to bring out also why a threat to privacy seems to threaten our very integrity as a person".[4] Privacy is not merely an absence of information about an individual in the minds of others, but rather the individual's control over the information he has about himself.[5]

During the movement towards an urban technological society the desire for privacy was stimulated by developments in science, the separation of the church from the state and the growth of political democracy.[6] Science has allowed dwellings and places of work to become self-contained, while freedom of religious belief and political expression has led to increased recognition of the worth and dignity of the individual.[7]

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1) Negley op cit 323. Cf E Ryan "Privacy, Orthodoxy and Democracy" (1973) 51 Canadian Bar R 84.

2) JS Mill Utilitarianism, Liberty, Representative Government (everyman ed 1962) 73. Cf Mill's letter opposing the Contagious Diseases Acts which subjected prostitutes to compulsory medical inspections. L Blom-Cooper and G Drewry Law and Morality (1976) 119f.

3) Fried op cit 477f. Cf P Stein & J Shand Legal Values in Western Society (1974) 192.

4) Fried op cit 477. For "love's right to privacy" see E Cahn The Moral Decision (1966) 88.

5) Fried op cit 483.

6) Ruebhausen & Brim op cit 1185.

7) Ibid; cf Westin op cit 33.

> "The essence of privacy is no more, and certainly no less, than the freedom of the individual, to pick and choose for himself the time and circumstances under which, and most importantly, the extent to which, his attitudes, beliefs, behaviour and opinions are to be shared with or withheld from others. The right to privacy is, therefore, a positive claim to a status of personal dignity - a claim for freedom, if you will, but freedom of a very special kind".[1)]

It is this freedom which is being threatened.

B. The Threat to Privacy

Despite the increasing desire for, and availability of, privacy after the shift from primitive communities to modern cities, the new society brought with it new threats to privacy. Shils maintains that the trend began at the end of the 19th century with the introduction of a number of novel concepts. Secret police were recruited to avert threatened political anarchy, while private investigators were used in divorce actions and to safeguard industrial property.[2)] Psychological testing of intelligence and aptitude was extended from the military to ensure the ability, honesty and loyalty of employees, while growing literacy and curiosity concerning the lives of the ruling classes led to the rise of popular journalism.[3)] Subsequently criminal investigation techniques improved with the development of telephone tapping, bugging and long distance photographs, while state departments and credit bureaux began amassing information profiles on private individuals.[4)] World War II gave additional impetus to these threats with the technological "spin-offs" of the "Cold War" (viz. espionage and counter-espionage techniques), as did the post-War period of increasing empirical

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1) Ruebhausen & Brim op cit 1190; cf Fried op cit 483.

2) Shils op cit 294f.

3) Shils op cit 293ff. Cf "The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip which can only be procured by intrusion upon the domestic circle". SD Warren and LD Brandeis "The Right to Privacy" (1890) 4 Harv LR 193, 196. Cf M De Villiers The Roman and Roman Dutch Law of Injuries (1899) 138 n 32.

4) Shils op cit 298ff.

research by social scientists.[1] The American working classes apparently accept the need for electronic surveillance by government and industry for security reasons; believe that only wrongdoers are scrutinized by private detectives; and enjoy the disclosures in the popular press and television.[2] On the other hand they generally recognize that the people next door should not know what goes on in one's home, and that telephone tapping and gossiping are abhorrent.[3] Further threats have arisen from "the rapid development of techniques for the collection, storage and dissemination of information about the individual".[4]

According to Westin the technological revolution in surveillance techniques poses a threefold threat to privacy through, inter alia: physical surveillance; psychological surveillance and data surveillance.[5]

1. Physical surveillance: Spying, prying and eavesdropping, pastimes which go back to the Middle Ages[6] and beyond,[7] have become so sophisticated that their detection is almost impossible. People can be located by the use of fluorescent dyes, miniature radio transmitters and radioactive materials.[8] A person who remains on his own property may be subjected to scrutiny by a variety of cameras: infra-red cameras, automatic miniature cameras, special telephoto cameras (which can take photographs from up to a kilometre away) and cameras which take pictures in the dark - not to mention

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1) Ibid. See below 9.

2) Shils op cit 301ff. Thus it has been pointed out that "privacy is in conflict with other valued social interests, such as informed and effective Government, law enforcement and free dissemination of the news" Ruebhausen & Brim op cit 1186. Shils' views were expressed prior to the "Watergate Scandal" in the United States. Cf JF Decker & J Handler "Electronic Surveillance" (1975) 12 Cal West LR 60.

3) Shils op cit 303.

4) Stein & Shand op cit 185.

5) Westin op cit 68; cf V Packard The Naked Society (1970) 17f.

6) For instance, "peeping Toms" in England could be prosecuted under the Justices of the Peace Act of 1361. See below

7) In Jewish law it was regarded as a wrong to peer and look into another's house. Ed H Darby Baba Batra II, 4, The Mishnah 2 ed (1954) 367. Cf SH Hofstadter & G Horowitz The Right to Privacy (1964) 9. Where a neighbour builds an adjoining wall: "If higher, it must be four cubits higher, for privacy's sake" Darby The Mishnah op cit 367 n 11.

8) Westin op cit 69f.

two-way mirrors and concealed closed circuit television.[1] In addition conversations can be recorded by telephone tapping, micro-miniature radio-transmitters and a number of miniature, parabolic and directional microphones.[2]

2. Psychological surveillance: The growth of social sciences has led the development of such psychoanalytical techniques as the use of polygraphs (lie detectors) and personality tests. Polygraphs are primarily used in crime detection and can even be conducted without the knowledge of the subject.[3] Personality tests are used extensively by schools[4] and employers in the United States[5] and elsewhere.[6] According to Westin personality tests "measure emotions, attitudes, propensities and levels of personal adjustment ... /and generally require/ the subject to reveal his attitude towards sexual, political, religious and family matters".[7] Westin suggests that polygraph examinations and personality tests in the United States should be outlawed by statute except in cases of national security and employment involving special stresses.[8] Another threat which seems to have been averted in the United States[9] and England[10] is that concerning subliminal suggestion ie "the projection of messages by light or sound so quickly and faintly that they are received below the levels of consciousness".[11] As

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1) Westin op cit 70ff; Packard The Naked Society op cit 38, 40, 74f, 144f.

2) Westin op cit 73ff; Packard The Naked Society op cit 41ff.

3) Westin op cit 133ff, 211ff.

4) Cf MA Ziskind "Protecting the Privacy of School Children and their Families through the Family Educational Rights and Privacy Act of 1974" (1975) 14 Journal of Family Law 255.

5) Westin op cit 133ff, 242ff.

6) Cf D Madgwick & T Smythe The Invasion of Privacy (1974) 166f; M Jones Privacy (1974) 41ff; EPJ Myjer "Sollicitant, Privacy en Psychologische Test" (1975) 26 Ars Aequi 222.

7) Westin op cit 134.

8) Westin op cit 385; cf D Madgwick Privacy under Attack (1968) 37ff.

9) Westin op cit 292.

10) International Commission of Jurists "The Legal Protection of Privacy: A Comparative Study of Ten Countries" (1972) 24 Int Soc Sci J 418.

11) Westin op cit 279.

was mentioned above if such rechniques have the effect of penetrating the individual's "core self" without his consent the consequences can be disastrous.[1] Nonetheless individuals are still subjected to a barrage of commercial and political advertising at the instance of "the hidden persuaders".[2]

3. Data surveillance: The invention of the computer has led to a "cybermetic revolution" in the collection and processing of data concerning private individuals.[3] "A match-box can contain computer-recorded information which, in print, could scarcely be contained in a Cathedral".[4] Computers can be used to store a wealth of private and public information about persons - much of which is "volunteered" for the benefit of the community.[5] Public authorities store information concerning records of births, marriages and deaths, medical records, records of education, military service, passport applications, employment records, social security records, declarations for tax returns, applications for licenses of many kinds, motor-vehicle registrations, post-office savings-books, and telephone accounts, as well as covert police and intelligence records.[6] In South Africa much of this information is consolidated by the requirement that members of the community (apart from Blacks) must acquire a "book of life".[7] Private agencies, on the other

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1) See above 3. Thus it has been pointed out that the odd, bizarre and obscure behaviour of schizophrenics is often an attempt to conceal the "real self" from the outside world: "If the self is not known it is safe". RD Laing The Divided Self (1973) 163.

2) V Packard The Hidden Persuaders (1961) 216; "The most serious offence many of the depth manipulators commit, it seems to me, is that they try to invade the privacy of our minds. It is this right to privacy in our minds - privacy to be either rational or irrational - we must strive to protect".

3) AR Miller "Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society" (1968-9) 67 Mich LR 1089, 1093f.

4) International Commission of Jurists "The Legal Protection of Privacy: A Comparative Study of Ten Countries" (1972) 24 Int Soc Sci J 418, 427.

5) In many cases, however, the information is not freely volunteered. For instance, prospective employees submit to personality tests, and borrowers answer financial questionnaires because of economic pressures, while income tax returns and census forms must be completed by law. Stein & Shand op cit 190. Furthermore it has been pointed out that "access to governmental largesse ... has depended increasingly upon a willingness to divulge private information" Miller op cit 1103.

6) (1972) 24 Int Soc Sci J 428; cf Westin op cit 159.

7) Section 7, Population Registration Act, 30 of 1950. See below 232.

hand, compile records of bank accounts, demands for credit facilities, credit card accounts, travel records (including ticket purchases and hotel bookings) hotel registrations and the creditworthiness of the purchasing public.[1] It was this threat to privacy (which resulted in people not knowing if an "information profile" existed on them, how it was being used and whether it was accurate) which led to the introduction in the United States of the Privacy Act of 1974,[2] and suggestions for similar legislation in other countries.[3] It has been said that in the United States more than 100 million people appear on data dossiers,[4] while in the United Kingdom the largest credit protection agency has over 14 million people on its files.[5] In 1976 the leading credit bureau in South Africa had over 6 million files.[6]

In many instances the results of such surveillance may be used to invade privacy through publicity involving publication of private facts,[7] "false light" situations,[8] and the so-called "appropriation" cases.[9]

It is probably true to say that in South Africa many of the more technological invasions of privacy are still in their infancy. For instance, "lie detectors" do not appear to have been used for

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1) (1972) 24 Int Soc Sci J 428.

2) 5 United States Code §552(d). See below 68.

3) For instance, in Canada, Denmark, Norway, Sweden and the United Kingdom. (1972) 24 Int Soc Sci J 431.

4) (1972) 24 Int Soc Sci J 428. cf Westin 159f.

5) Cf Jones op cit 151f. It has been suggested that by 1976 credit bureaux in the United Kingdom would have had "prepared data on eighty per cent of the population" Stein & Shand op cit 197.

6) (1976) 11 The Credit Manager No 9, 10. See below 286.

7) See below 247.

8) See below 290.

9) See below 300.

law enforcement in this country,[1] and although computers are widely employed by the state and in industry, apparently only one credit bureau is computerized.[2] Nevertheless because of the political ideology of separate development in South Africa the state imposes numerous restrictions on the privacy of individuals in respect of their relationships with members of other race groups.[3]

> "A person's /racial/ classification will have far-reaching effects on his life: it will determine where he may own property, where he may live, and work, whether he may participate in collective bargaining with his employers or go on strike, whom he may marry, and what pension and compensation benefits he will receive. Most important of all, a person's racial group will decide his rights as a citizen of the state".[4]

In short the subjects' common law right to privacy in South Africa has been considerably reduced by legislative interference. Be that as it may there are still numerous fields where the individual's privacy is protected by the common law. The question is whether the common law is adequate to prevent increasing intrusions into personal privacy by the government, journalists, employers, social scientists and twentieth century technology.[5]

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1) The first sophisticated "lie detector" to be introduced into South Africa was given wide-spread publicity on SABC TV on 7th June 1977!

2) Information supplied by Mr P. Bartos, Managing Director of Dun & Bradstreet, during telephone interview on 17th March 1977.

3) See below 241, 337.

4) HR Hahlo & E Kahn South Africa: The Development of its Laws and Constitution (1960) 797; cf JD van der Vyver Die Beskerming van Menseregte in Suid Afrika (1975) 84ff.

5) cf Shils op cit 301.

C. Privacy and the Law

The recognition of the need for privacy by anthropologists, sociologists, psychologists and philosophers is a comparatively recent phenomenon. By contrast the law has responded to this need in one form or another since antiquity. Variations of an action for invasion of privacy are to be found in Roman law,[1] Jewish law,[2] Medieval English law,[3] Roman-Dutch law,[4] 19th century French law,[5] 20th century American[6] and German law,[7] and in a number of other jurisdictions.[8] Conversely certain legalized invasions of privacy have existed throughout history, particularly in respect of census gathering of public authorities. Examples are to be found in the Roman census,[9] the Anglo-Norman Domesday Book,[10] the Nuremburg and Swiss Cantonal censuses of the 15th century,[11] and the mass of information stored by 20th century government agencies.[12] In some countries such as Mexico,[13] Venezuela[14] and Argentina[15] the right to privacy is constitutionally protected. Moreover it has been suggested that a constitutionally recognized right of privacy also exists in the United

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1) See below 32.

2) cf Hofstadter & Horowitz op cit 9.

3) cf Justice of the Peace Act of 1361, which punished "peeping Toms". See below 78.

4) See below 44.

5) See below 96.

6) See below 55.

7) See below 89.

8) See below 110, 119.

9) See below 38.

10) cf Shils op cit 298.

11) Ibid.

12) See above 10.

13) Articles 14, 16 of Constitution of United States of Mexico, 5th February 1917. Cf (1972) 24 Int Soc Sci J 432. See also Articles 7 and 25 of the Constitution; cf (1972) 24 Int Soc Sci J 434.

14) Article 59 of the Constitution. Cf (1972) 24 Int Soc Sci J 435. See also Article 1196 of the Civil Code.

15) Article 19 of 1953 Constitution of the Republic of Argentina, and Articles 1077, 1078 of the Civil Code. Cf (1972) 24 Int Soc Sci J 437f.

States.[1] In other countries like South Africa,[2] Ceylon[3] and Scotland[4] where the common law has been derived from the Civil Law, the courts have been able to develop general principles of personality rights.

Where the right to privacy is threatened by the authority of the State it can be classified as a human right,[5] and as such it has been enshrined in the Universal Declaration of Human Rights[6] and the European Convention on Human Rights.[7] The degree of interference by the state, however, varies from society to society.

> "In Poland, for example, the law does not interfere in the sphere of conjugal sexual life, however perverse it may be; while the law in parts of the United States of America forbids so-called unnatural sexual behaviour between husband and wife".[8]

Legal philosophers have experienced difficulty in trying to determine how far the state may interfere. It has been suggested that Hart's basic criterion for determining the limits of the law, viz whether the acts are done in public or private[9] must be qualified.[10]

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1) Griswold v Connecticut (1965) 381 US 479. See below 56, 61.

2) See below 125.

3) CF Amerasinghe Aspects of the Actio Injuriarum in Roman-Dutch Law (1966) 174ff.

4) cf DM Walker The Law of Delict in Scotland (1966) II 708ff.

5) Cf J Neethling Die Reg of Privaatheid (1976) 21: "Dit is slegs waar die persoonlikheidsreg teen totalitêre staatsoorheersing en arbitrêre optredes van staatsorgane beskerm word, dat dit as 'n mensereg tipeer word". For whether it can be recognized as a "right" in England see DN MacCormick "A Note upon Privacy" (1973) 89 LQR 23ff.

6) Article 12. See below 142 n 1.

7) Article 8. See below 108.

8) A Podgorecki Law and Society (1974) 251f.

9) HLA Hart Law, Liberty and Morality (1963) 47.

10) MP Golding Philosophy of Law (1975) 61f.

"Hart cannot possibly say that private sado-masochistic acts between consenting adults are beyond legal prohibition".[1] Conservative jurists like Stephen[2] and Devlin[3] also recognize that privacy should be respected. The former however regards "public indecency as an invasion of privacy",[4] while the latter contends that the claims of privacy have to be weighed against "the public interest in the moral order".[5] In the United States it has been said that "as against the Government, the right to be let alone /is/ the most comprehensive of rights and the right most valued by civilised men".[6]

This comprehensive right also extends to social relationships between individual members of society, and has been seen as an integral part of the concept of "justice".

> "Justice requires that in every social relation there should be presupposed as ideal basis an original 'right to solitude', inherent in every one of the subjects who share in it, so that in the actual concrete structure of social life there may be reaffirmed and developed (it may be even through apparent denials, as moments of dialectic process) that ideal element of autonomy which constitutes the inviolable essence of the person".[7]

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1) Golding op cit 62.

2) JF Stephen Liberty, Equality, Fraternity (1882) 160; cf Golding op cit 63 n 22.

3) PA Devlin The Enforcement of Morals (1965) 18.

4) Stephen op cit 162.

5) Devlin op cit 18. It is interesting to note that the European Commission on Human Rights considered that laws prohibiting homosexual behaviour were justified under Article 8(2) of the European Convention on Human Rights as being "for the protection of health and morals". FG Jacobs The European Convention on Human Rights (1975) 127. Cf Doe v Commonwealth's Attorney (1976) 425 US 985, where the United States Supreme Court upheld the constitutionality of a Virginian sodomy statute providing for the prosecution of homosexual relations carried on in private between consenting adult males. See T O'Neill "Doe v Commonwealth's Attorney: A Setback for the Right of Privacy" (1977) 65 Kentucky LJ 748.

6) Per Brandeis J (dissenting) in Olmstead v US (1928) 277 US 438, 478.

7) G Del Vecchio Justice (1956) 116.

The difficulties attendant upon defining the legal limits of such an "ideal element of autonomy" has led some writers to suggest that a separate right to privacy is not warranted. Kalve n complains that "the tort has no legal profile",[1] while Stein and Shand maintain that "if privacy cannot be defined with any precision then it is a right that cannot and should not be upheld by the courts".[2] Such criticisms may be true of an action based on Anglo-American Common Law, but do not necessarily apply to actions derived from the Civil law.[3] South Africa has a Civil law system and most delicts are actionable under the general principles of either the actio injuriarum, for sentimental damages, or the lex Aquilia, for patrimonial loss.[4] In both cases the essential elements have been clearly defined by the courts. Consequently an invasion of privacy which falls within one or other of these actions will assume the profile of the appropriate principle action. Therefore, unlike Anglo-American law, an action for invasion of privacy in South Africa may well have an identifiable profile. The question of wrongfulness (ie. whether the courts will recognize a particular interest as worthy of legal protection)[5], however, is a matter of policy, and here the courts sometimes find it useful to consider recent developments in other jurisdictions.[6]

This work is primarily concerned with the developments of the common law action for invasion of privacy in South African law. It

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1) H Kalven "Privacy and Tort Law - Were Warren and Brandeis Wrong?" (1966) 31 Law & Contemp Problems 326, 333: "We do not know on what basis damages are to be measured, we do not know whether the basis of liability is limited to intentional invasions or includes also negligent invasions and even strict liability".

2) Stein & Shand op cit 187.

3) Cf Paragraph 35 HMSO Report of the Committee on Privacy (1972 Cmnd 5012); cf MacCormick op cit 24.

4) RG McKerron The Law of Delict 7 ed (1971) 10; NJ van der Merwe & PJJ Olivier Die Onregmatige Daad in die Suid-Afrikaanse Reg 2 ed (1970) 16f.

5) Cf Foulds v Smith 1950 (1) SA 1 (AD) 10 (actio injuriarum); Herschel v Mrupe 1954 (3) SA 464 (AD) 490 (lex Aquilia). See below 170.

6) Cf O'Keeffe v Argus Printing & Publishing Co Ltd 1954 (3) SA 244 (C) 248; Rhodesian Printing & Publishing Co Ltd v Duggan 1975 (1) SA 590 (RAD) 593f.

is intended to trace the historical roots of the action in our law, but as the action in its modern form is largely a twentieth century development, it is necessary to examine its growth in other modern legal systems. Some reference, therefore, will be made to the position in the United States, England, West Germany and France, and incidentally, to other European jurisdictions. The ensuing analysis of contemporary law, however, does not pretend to be comprehensive,[1] as the work is mainly concerned with South African developments. Where the discussion focuses on the recognition of the right to privacy in our law, a comparison will be drawn primarily with American law as the courts have made frequent reference to it on this question.[2] Before considering the modern law, however, it is necessary to analyse the origins of the action in Roman and Roman-Dutch law.

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1) For a detailed analysis of the position in West Germany, France the United States and England see Neethling Privaatheid op cit 22, 117, 152, 241.

2) Cf O'Keeffe v Argus Printing & Publishing Co Ltd supra 248; Rhodesian Printing & Publishing Co Ltd v Duggan supra 593f. See below 171.

CHAPTER TWO

HISTORICAL DEVELOPMENT : ROMAN AND ROMAN-DUTCH LAW

A. ROMAN LAW

Although a right to privacy is not specifically mentioned by Roman (or Roman-Dutch) jurists, several *injuriae* or affronts to personality which are very similar to the modern right were recognized. The Roman Law *actio injuriarum* forms the basis for the protection of personality rights in Scotland,[1] Ceylon[2] and South Africa.[3] In order to establish whether the Romans developed a wrong analogous to the modern action for invasion of privacy it is necessary to trace the history of the *actio injuriarum* from its beginning. It is intended to consider the different stages in the development of the *actio injuriarum* from the XII Tables to the time of Justinian with a view to illustrating how there was a gradual movement in Roman Law from specific wrongs towards a general action.[4]

1. The XII Tables (c. 450 B.C.)

It is generally accepted that the XII Tables primarily protected personality rights pertaining to bodily injury.[5] It is true that most of Table VIII (relating to *injuria*) specifies penalties for bodily injury but Clause 1 provided penalties

> "*si quis occentavisset sive carmen condidisset quod infamiam faceret flagitiumve alteri*"[6]

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1) DM Walker *The Law of Delict in Scotland* (1966) II 708ff.

2) CF Amerasinghe *Aspects of The Actio Injuriarum in Roman-Dutch Law* (1966) 174ff.

3) RG McKerron *Law of Delict* 7 ed (1971) 9; NJ van der Merwe & PJJ Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* 2 ed (1970) 336f.

4) M de Villiers *The Roman and Roman-Dutch Law of Injuries* (1899) 2 n 15.

5) F Schultz *Classical Roman Law* (1951) 593f; WW Buckland *Textbook of Roman Law* 3 ed (1966) 589; JAC Thomas *Textbook of Roman Law* (1976) 369.

6) IT Pritchard & D Nasmith *Ortolan's History of Roman Law* (1871) 114.

which Ortolan interprets as "decreed against libellers and public defamers".[1] Goodwin[2] attempts a more literal translation:

> "If anyone shall publish a libel, that is, shall write verses imputing crime or immorality to another".[3]

De Villiers states that Table VIII.1 relates to "public vituperation of another and to defamatory compositions tending to bring another into disrepute and disgrace".[4]

Other writers, however, have contended that the penalties were introduced to eliminate "sorcery" and "evil incantations" by one person against another,[5] on the basis that the wording of Table VIII.1 was originally "qui malum carmen incantassit".[6] The conflict is attributed to Pliny and Cicero giving "different versions and different interpretations",[7] with Pliny referring to sorcery[8] and Cicero mentioning defamation.[9] Jolowicz and Nicholas suggest

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1) Ibid.

2) F Goodwin The XII Tables (1886).

3) Goodwin op cit 13, who gives the Latin as "si quis occentaverit, sive carmen condid erit quod infamiam faciat flagitiumve alteri".

4) De Villiers op cit 1, who offers: "si qui occentassit, carmenve condisset, quod infamiam faxit, flagitiumve alteri". Cf DH van Zyl Geskiedenis en Beginsels van die Romeinse Privaatreg (1977) 344 n 377. SP Scott The Civil Law (1973) I 70, translates the passage as "when anyone publicly abuses another in a loud voice, or writes a poem for the purpose of insulting him, or rendering him infamous", but ascribes it to Table VII, LAW XIII!

5) HF Jolowicz & B Nicholas Historical Introduction to the Study of Roman Law 3 ed (1972) 171; HJ Roby Roman Private Law (1902) 220; cf P van Warmelo 'n Inleiding tot die Studie in die Romeinse Reg (1965) 340; W Kunkel An Introduction to Roman Legal and Constitutional History 2 ed (1973) 29; P van Warmelo An Introduction to the Principles of Roman Civil Law (1976) 220.

6) Jolowicz & Nicholas op cit 171f n 9.

7) Ibid.

8) Jolowicz & Nicholas op cit 171f n 9, refer to Pliny Historia Naturalis 24.4.18, but see below 20 n 2.

9) Jolowicz & Nicholas op cit 171f n 9, give as authority Cicero De Re Publica 4.12. Ortolan op cit 114 n 4, cites Cicero De Re Publica 4.10, while De Villiers op cit 1 n 3 uses Cicero Tusculan 4.2. See also P C Pauw Persoonlikheidskrenking en Skuld in die Suid-Afrikaanse Privaatreg - 'n Regshistoriese en Regsvergelykende Ondersoek (1976) 1.

that Pliny gave the primitive meaning and Cicero a rationalization thereof,[1] but it seems that the learned writers have confused Table VIII.1 with Table VIII.25. According to both Ortolan[2] and Goodwin[3] the first part of Table VIII.25 read "qui malum carmen incantasset", although Goodwin interprets the clause as a wrong against reputation.[4] Ortolan gives as the authority for the fragment of Table VIII.25, Pliny,[5] but the reference differs from that referred to by Jolowicz and Nicholas.[6] In any event there is no good reason for supposing that Cicero's rendition of Table VIII.1 was less accurate than that of Pliny - after all Cicero's De Re Publica was published about 51 BC,[7] whereas Pliny's Historia Naturalis appeared later probably some time after 77AD.[8]

Assuming therefore that the translations of Table VIII.1 by Ortolan, Goodwin and De Villiers[9] are substantially accurate, it can be argued that public utterances of defamatory compositions constituted an affront to a person's reputation and dignity. It has been said that such acts were regarded as crimes against the state because they were "treated as a breach of public order",[10] but another possible explanation is that the provisions of Table VIII.1 were introduced to assuage wounded feelings in order to prevent victims taking the law into their own hands and thus destroying the fabric of the state.

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1) Jolowicz & Nicholas op cit 171f n 9.

2) Ortolan op cit 119, who translates the words as referring to a person "who practices enchantments". Scott op cit 71, is again out of step when he attributes the clause to Table VII, Law XIV, although he correctly interprets it as applying to "magic incantations".

3) Goodwin op cit 66.

4) Ibid. Confusion may have arisen because the word "carmen" may be interpreted as either "a song, verse or poem" or as a "magical incantation". CT Lewis & C Short A Latin Dictionary (1900) 293. Similarly the word "incanto" can mean "to sing" or "to bewitch" Lewis & Short op cit 917.

5) Pliny Historia Naturalis 28.2; cf Ortolan op cit 119 n 3.

6) See above 19 n 8.

7) P Harvey The Oxford Companion to Classical Literature (1951) 135. Cicero lived from 106 to 43 BC. Harvey op cit 100.

8) Harvey op cit 334, who gives Pliny's lifetime from AD 23 or 24 to 79. But contra Pauw op cit 2 who favours Pliny's interpretation.

9) See above 18f.

10) JC Ledlie Sohm's Institutes of Roman Law 3 ed (1907) 422 n 7, who translates "carmen famosum" as "the public singing of ribald songs".

Clauses 2 and 3 of Table VIII dealt with "membrum rupsit"[1] and "os fraxit"[2] respectively, both of which are clearly instances of bodily injury. The former concerned broken limbs,[3] while the latter is generally translated as meaning "broken bones",[4] although "os" literally refers to the mouth,[5] and has been interpreted as "the bone (of the mouth)".[6] Table VIII.4, on the other hand merely stated:

> "si injuriarum faxit alteri, XXV peonae sunto",[7]

which Ortolan renders as

> "for any injury whatsoever committed upon another the penalty shall be 25 asses".[8]

The word "injuriarum" in this context has never been satisfactorily translated, but the popular view is that it only referred to trivial assaults.[9] For instance, it has been said that:

> "In all probability this refers merely to blows such as do not result in serious injury [because] ... it is unlikely that fifth century Romans were very susceptible to insult".[10]

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1) De Villiers op cit 1; cf Goodwin op cit 13. Ortolan op cit 114, uses "membrum rupit".

2) De Villiers op cit 1. Goodwin op cit 13, refers to "os fractum" and Ortolan op cit 114f n 6 does the same in his reconstruction of the lost fragment.

3) De Villiers op cit 2; Ortolan op cit 114; Goodwin op cit 13. See also Scott op cit 70, who assigns it to Table VII, Law IX and substitutes "member" for "limb". Cf Pauw op cit 2, 5.

4) Cf De Villiers op cit 2; Goodwin op cit 13. Cf Pauw op cit 3,5+

5) Lewis & Short op cit 1281, ie "os fractum" means literally "a mouth having been broken".

6) Ortolan op cit 114. Cf Scott op cit 71, where Table VII, Law X is translated as "when anyone knocks a tooth out of the gum of a free man".

7) De Villiers op cit 1; cf Ortolan op cit 115; Goodwin op cit 13.

8) Ortolan op cit 115. Scott op cit 70, not only attributes the clause to Table VII, Law VII, but also reduces the punishment to "a fine of twenty asses"!

9) De Villiers op cit 2; Sohm op cit 422; M Bliss Belediging in die Suid-Afrikaanse (1933) 12; WA Joubert Grondslae van die Persoonlikheidsreg (1953) 78; F Schultz Roman Legal Science (1953) 51; van Warmelo Inleiding op cit 340; D Pugsley The Roman Law of Property and Obligations (1972) 102; Thomas op cit 369; Van Warmelo Introduction op cit 220.

10) Jolowicz & Nicholas op cit 171; cf Schultz Classical Roman Law op cit 594; Buckland Textbook op cit 589. See also Ed E A Whittuck E Poste Gaius Institutes of Roman Law 4 ed (1904) 429. Cf Pauw op cit 6.

It is submitted, however, that in the light of the discussion concerning Clause 1 above[1] it can be argued that the word did include affronts to a person's honour,[2] although it is conceded that the following translation by Goodwin is unduly free:

> "If anyone wilfully violates the personal freedom, safety of reputation of another let the penalty be 25 sestertii".[3]

If Clause 1 of Table VIII dealt with aggressions on reputation and dignitas,[4] and Clauses 2 and 3 with bodily injury, there is no reason in principle why Clause 4, which appears to be a general clause, should not have included both affronts to personality and minor assaults. The word "injuria" means "injustice, wrongdoing ... injury, outrage, affront ... harm, injury of any kind" [5] not physical injury.[6]

It has also been suggested that the sum of 25 asses was too little to warrant blanket coverage for other injuriae,[7] but it is submitted that this can be explained in two ways:

(a) The early Romans recognized affronts to reputation and dignity but apart from those mentioned in Clause 1 above,[8] regarded such affronts as being in the same class as trivial assaults. The ancient

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1) See above 18ff.

2) Cf Joubert Persoonlikheidsreg op cit 81 n 13. AM Pritchard Leages' Roman Private Law 3 ed (1961) 41, states: "It followed that the grossest insult could be atoned for by a payment of 25 asses under the Twelve Tables". Cf D Pugsley "Book Review" (1970) 86 LQR 425, 426. Furthermore JA Crook Law and Life of Rome (1970) 83 suggests that: "The small aristocratic society of early Rome, valuing above all overt esteem (existimatio, dignitas), dreaded its loss exceedingly".

3) Goodwin op cit 13.

4) See above 18ff; Cf Scott op cit 13: "Well defined ideas of the personal responsibility incurred by the publication of slanders and libels were entertained at the epoch of the adoption of the Twelve Tables, and he who defamed another by attacking his reputation for probity, or publicly insulted him, as well as the author of pasquinades was scourged until he died". (My italics)

5) Lewis & Short op cit 956.

6) Cf F De Zulueta Institutes of Gaius: Part 11 (1963): "How a word which properly meant any unlawful act had come to have the special meaning of physical assault is a mystery".

7) Jolowicz and Nicholas op cit 171: "[I]f we imagine that injuria can here refer to the innumerable different kinds of attack on a man's personality which it covered in the later law, it is difficult to explain how they could all be punished by the same fine".

8) See above 18f.

Greeks had long recognized the wrong of hybris which dealt with insults, initially those which "incurred the wrath of heaven",[1] but later probably included "actions which did not amount to physical assault".[2] Pound points out that in early law injury to honour was more important than injury to the body[3] and that

> "/I/n Greek law every infringement of the personality of another is ... (contumelia); the injury to honour, the insult, being the essential point, not the injury to the body".[4]

It is generally accepted that although the XII Tables were essentially derived from Latin custom "there was some innovation and apparently some incorporation of the rules of Greek law".[5] This view holds good whether "the story of a special commission being sent to Greece is literally acceptable or not",[6] as it is fairly certain that the Roman codifiers had access to the Greek legal codes.[7] Therefore if the fifth century Greeks recognized an action for infringement of personality rights,[8] it seems to be an oversimplification to say that the fifth century Romans were not very susceptible to insults. It was an injuria to slap a man's

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1) JW Jones: Law and Legal Theory of the Greeks (1956) 249; "It was only overweening pride or boasting, arrogating to oneself superhuman deference, abuse of power, resort to excessive and unreasonable measures for redressing or punishing even genuine wrongs which received the wrath of heaven; in short hybris".

2) ARW Harrison The Law of Athens: The Family and Property (1968) 169. Cf Bliss op cit 15 n 4 who states that it has been demonstrated "met sekerheid dat die Injuria en Hybris dieselfde ontwikkeling deurgemaak het".

3) R Pound "Interests of Personality" (1915) 28 Harvard LR 343, 357; "the beginnings of law measure composition not by the extent of the injury to the body, but by the extent of the injury to honour and the extent of the desire for vengeance".

4) Pound op cit 357. Cf SH Hofstadter & G Horowitz The Right of Privacy (1964) 9.

5) Buckland Textbook op cit 1f; F Schultz Principles of Roman Law (1967) 7; HS Maine Ancient Law (1906) 19 n A; Poste op cit xxi.

6) Maine op cit 19 n A; Cf Goodwin op cit 6.

7) Jones op cit 312.

8) Cf B Perrin Plutarch's Lives: Solon (1967) XXI.1, 461: "He also forbade speaking ill of the living in temples, courts-of-law, public offices and at festivals; the transgressors must pay three drachmas to the person injured and two more into the public treasury". Solon lived from c640 - c558 BC, and introduced his laws about 594 BC. Harvey op cit 400.

face not only because it was an attack on his physical person but also because it affected his dignity.[1]

(b) Originally the value of 25 asses was sufficiently high to act as a deterrent to persons who contemplated committing an injuria, although by the second century the as had been reduced to 1/12 of its former weight.[2] Gaius mentions that "in those days of excessive poverty such sums seemed to be an adequate reparation",[3] and it has been pointed out that even during the second century the value of 25 asses was "about 1/160th of the annual cost of living of a free labourer".[4]

In the light of the above it is submitted that Clause 4 can be interpreted to include both affronts to reputation and dignity as well as to the person.[5]

Whatever the position under the XII Tables by the second century with the decline in the value of money[6] and the increasing

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1) De Villiers op cit 2 n 14: "The amount of the penalty shows that injuria only referred to an assault of a minor degree of gravity; but possibly the idea of some degree of ignominy was also involved". Cf B Ranchod Foundations of the South African Law of Defamation (1972) 4 n 19; but cf Poste op cit 429: "There seems to be no necessary connection between bodily harm and dishonour, although both may have been denoted in Latin by the word injuria".

2) De Villiers op cit 4. Cf A Berger Encyclopedic Dictionary of Roman Law (1953) 367: "As. A Roman coin originally of one pound of bronze ... In later times the as was reduced to four and then two ounces". Sohm op cit 422 n 7, suggests that originally an as was worth only about five shillings - presumably at 1902 prices!

3) Gaius III 223.

4) Jolowicz & Nicholas op cit 273 n 9.

5) Cf Pound op cit 357.

6) Thomas op cit 369. The example is frequently given of L Veratius who is supposed to have indulged in the practice of walking down the street and wantonly slapping the faces of persons whom he met, while a slave followed behind with a tray full of (devalued) asses from which he paid out the legal penalty of 25 asses. De Villiers op cit 4; EE Whitfield Salkowski's Roman Private Law (1886) 673 n 1; A Watson Law Making in the Later Roman Republic (1974) 46. This story has, however, been doubted due to the value of 25 asses even in the second century (Jolowicz & Nicholas op cit 273 n 9; A Watson Law of Obligations in the Later Roman Republic (1964) 248 n 3) - but see above 23. Watson Law Making op cit 47, submits that "so long as each as weighed approximately 10 ounces", one slave would not have been able to carry sufficient to give Veratius much pleasure, and that the story would be more plausible if the event occurred after the halving of the weight of the as". Even then the wretched slave would have to carry 125 ounces of asses for each victim!

appreciation of the importance of personal dignity and character[1] the praetor was obliged to intervene to ensure more comprehensive protection for the personality rights of the victims of *injuriae*. It is not clear whether under the XII Tables *culpa* or *dolus* was necessary for an action but it seems that either was sufficient.[2] Although Chapter 1 of the *Lex Aquilia* (287 BC) reduced the importance of *membrum ruptum* and *os fractum*, at first in the case of slaves,[3] and then freemen,[4] by providing compensation for medical expenses and loss of income,[5] any claim for sentimental loss or mental or bodily injury had still to be brought under the XII Tables.

2. *Praetorian Reforms* (c. 2nd century BC to 81 BC)

The praetor introduced a number of clauses in his edict which generally abrogated the provisions of the XII Tables. The first of these was the *edictum generale* which provided a general action of *injuriae* which seems to have replaced Clause 2 (*membrum fractum*) Clause 3 (*os fractum*) and Clause 4 (injuria) of Table VIII of the XII Tables,[6] although it has been argued that it only applied to Clause 4.[7] Under the edict the plaintiff had to specify the nature of the *injuria* complained of and the amount claimed and the case would then be tried by *recuperatores* (later by a *judex unus*)[8] who would fix an amount considered to be *bonum et aequum*.[9]

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1) De Villiers op cit 4. *Contra* CF Amerasinghe *Defamation and Other Injuries* (1968) 318, who suggests that the Roman Law developed empirically rather than under some guiding philosophical concept of law.

2) De Villiers 2 n 12; Joubert *Persoonlikheidsreg* op cit 78; A Watson *Roman Private Law Around 200 BC* (1971) 156; Jolowicz & Nicholas op cit 173f; cf Ranchod op cit 6.

3) Digest 9.2.1. pr; cf De Villiers op cit 3; RW Lee *Elements of Roman Law* (1956) 392.

4) Digest 9.12.13; cf De Villiers op cit 3.

5) Digest 9.2.7. FP Van den Heever *Aquilian Damages in South African Law* (1944) 53.

6) De Villiers op cit 7; Buckland *Textbook* op cit 590; Jolowicz & Nicholas op cit 272; van Warmelo *Introduction* op cit 220.

7) Bliss op cit 14; Watson *Obligations* op cit 248f; Watson *Law Making* op cit 48; who states: "The *edictum generale* was confined to cases of physical assault and did not in any way change the substantive law". D Daube "*Nocere* and *Noxa*" (1939) 7 *Camb LJ* 23, 45ff, goes further and submits that serious damage was not included in the edict; but cf Watson *Obligations* op cit 250.

8) Bliss op cit 13; Thomas op cit 369; JL Strachan-Davidson *Problems of the Roman Criminal Law* (1969) I 218ff.

9) Buckland *Textbook* op cit 590; Schultz *Classical Roman Law* op cit 594.

In addition the praetor introduced a number of other clauses to replace Clause 1 of Table VIII and were apparently intended to deal with affronts to dignity and reputation.[1] These included inter alia the following:

(a) Convicium - the calling together or assembling of persons adversus bonos mores at somebody's house and raising an insulting and abusive clamour.[2] This was probably introduced to prevent verbal defamation of another[3] but it was later regarded as an affront to the victim's dignitas.[4] It is submitted that this action is not unlike an early form of invasion of privacy.[5]

(b) Ademptata pudicitia - offences against the dignitas of a respectable woman by kidnapping her attendant,[6] or indecently accosting her,[7] or by constantly following her about.[8] Although the action was aimed at preserving the chastity, dignity and reputation of such women it is fairly similar to the modern action for invasion of privacy in cases of persistent following.[9]

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1) De Villiers op cit 6f; Cf Jolowicz & Nicholas op cit 273. De Villiers op cit 4f, has attempted a reconstruction of the clauses in the praetor's edict.

2) Digest 47.10.15.2.; Cf Pauw op cit 9.

3) De Villiers op cit 7.

4) Cf Joubert Persoonlikheidsreg op cit 84; De Villiers op cit 6f n 33.

5) Cf AH Robertson Privacy and Human Rights (1973) 97, where it is suggested that the Scottish concept of convicium also covers invasion of privacy.

6) Digest 47.10.15 15.; Cf Pauw op cit 10.

7) Digest 47.10.15.15, 20.; Cf Pauw op cit 11.

8) Digest 47.10.15.19; Joubert Persoonlikheidsreg op cit 84. Cf Pauw op cit 13.

9) Cf Epstein v Epstein 1906 TH 87; R v Jungman 1914 TPD 8; R v Van Meer 1923 OPD 77. See below 224.

(c) Infamandi - a general clause which allowed an action for any form of conduct which brought infamy upon a person, usually in respect of his reputation.[1] Daube seems unconsciously to recognize an element of privacy when he states that such wrongs consisted "in coming presumptuously upon one's neighbour, in encroaching upon another's personal sphere, in putting a man to shame".[2]

De Villiers classifies convicium and ademptata pudicitia as injuriae ad dignitatem pertinens and infamandi as an injuria ad infamiam pertinens.[3] It has been said that for convicium and ademptata pudicitia intention is irrelevant provided the act is done contra bonos mores, whereas for infamandi intention must be proved.[4] Although this seems to emerge from the texts,[5] it is difficult to understand why a dignitary wrong should be tested objectively and a wrong to reputation subjectively. Where reputation is at stake the logical test would seem to be the objective one as was the case in the common law development of libel and slander in England.[6] The better view seems to be that in all cases although the test for the wrongfulness of the injuria was objective, the test for fault was subjective.[7] The Roman law defences to the actions indicate a subjective test for animus not injuria (e.g. infantes or lunatics were not liable).[8] Similarly the rule dissimulatione aboletur indicates that the test for the effect on the plaintiff's personality also subjective.[9]

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1) Digest 47.10.15.25, 27. Cf Pauw op cit 13E.

2) Daube op cit 46; Watson Obligations op cit 250.

3) De Villiers op cit 7.

4) Ranchod op cit 8; but cf Thomas op cit 370, who contends that intention was required in all cases.

5) Digest 47.10.15.20; 23; cf Digest 47.10.15.27, where the words "ut alium infamet" (so that he brings another into disrepute) and "ut puta" (which is calculated) are used.

6) In English law the emphasis is on loss of reputation whereas in Roman law it was on "outraged feelings" thus under the former publication and not intention by the defendant was important. Cf WW Buckland & AD McNair Roman Law and Common Law 2 ed (1952) 380.

7) Cf M Tselentis "Book Review" 1972 Acta Juridica 246.

8) Digest 47.10.3.1. Cf Tselentis op cit 246.

9) Digest 47.10.11.1. Tselentis op cit 246, criticizes Ranchod's proposition (Ranchod op cit 15) that dissimulation was required because it was thought to be in conflict with the interests of society that a person who does not take an injuria to heart after sustaining it should at a later stage be able to change his mind and institute an action. Tselentis maintains that the real reason was that for contumelia the conduct must be objectively insulting and subjectively hurtful to the plaintiff's feelings. Tselentis op cit 246. Cf J C. van der Walt "Regspraak: Jackson v NICRO" (1977) 1 TSAR 72.

By the end of the Republic it appears that the praetor's edict had become unified in the actio injuriarum aestimatoria and was available for any injuria or wanton aggression upon plaintiff's personality rights.[1] Buckland points out that the edictum generale

> "lent itself to juristic interpretation, so that in the law as we know it, the wrong consisted in outrage or insult or wanton interference with rights, any act, in short, which showed contempt of the personality of the victim or was such as to lower him in the estimation of others, and was so intended".[2]

Contumelia in the sense of a deliberate insult to the victim's feelings became an important element,[3] and intent was the gist of the action.[4] Despite the fact that the third and second centuries BC have been described as "the period of greatest Greek influence on Roman life"[5] the view that the actio injuriarum was influenced by Greek law has been doubted.[6]

3. Lex Cornelia de Injuriis (c. 81 BC)

The praetor's development of the actio injuriarum was interrupted in about 81 BC by the lex Cornelia which was introduced by Sulla to curb the lawlessness and social upheavals which arose towards the end of the Republic.[7] A number of crimes or quasi-crimes

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1) Schultz Classical Roman Law op cit 595; WW Buckland Main Institutions of Roman Private Law (1931) 337; cf Van Warmelo Inleiding op cit 340; Bliss op cit 13; De Zulueta op cit 219.

2) Buckland Textbook op cit 590; cf Sohm op cit 442f; Salkowski op cit 668.

3) Joubert Persoonlikheidsreg op cit 80; van Warmelo Introduction op cit 221; cf De Villiers op cit 9; Watson Obligations op cit 218.

4) Buckland Textbook op cit 590 n 7; cf De Villiers op cit 9.

5) Watson Law Making op cit 186; cf Jones op cit 312.

6) Schultz Principles of Roman Law op cit 128; Watson Law Making op cit 187; but cf Ranchod op cit 6; Joubert Persoonlikheidsreg op cit 83.

7) De Villiers op cit 8; cf Buckland Textbook op cit 590.

were created and included the offences of pulsare (striking), verberare (beating) and vi domum introire (forcibly entering another's house).[1] Such wrongs were not strictly crimes as the actions had to be instituted by the injured person but special criminal courts (quaestiones) were set up to try offenders.[2] It is probable that the State did not mete out punishment except in severe cases of treason or social crimes.[3]

Buckland mentions that there were two views concerning the impact of the lex Cornelia on the development of the actio injuriarum: (a) that it excluded the action altogether until late in the classical age when it was restored by a Rescript of Severus and Caracalla; and (b) that both the actio injuriarum and the lex Cornelia existed side by side,[4] with the latter being preferred by the praetor if

> "the offence is of so grave or public a character as to make it rather an offence against public order than an injury or an insult to an individual".[5]

It is submitted that the latter is the better view because Gaius gives several examples of injuriae actionable under the praetor's edict.[6] Although it is not certain when Gaius was born or died it is known that he lived during the reigns of Antonius

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1) Buckland Textbook op cit 590; Joubert Persoonlikheidsreg 80; De Villiers op cit 8; Jolowicz & Nicholas op cit 274.

2) EM Burchell & PMA Hunt South African Criminal Law and Procedure (1970) I 3; JC de Wet & HL Swanepoel Strafreg 3 ed (1975) 4. Cf Pauw op cit 15.

3) Burchell & Hunt op cit 3. Cf Crook op cit 252: "A court de injuriis was amongst the standing jury courts established by Sulla; technically it was not a criminal court". Cf Jolowicz & Nicholas op cit 274.

4) Buckland Textbook op cit 590f.

5) Roby op cit 225; Cf Watson Obligations 254f; Salkowski op cit 675; De Villiers op cit 282 n 230; Burchell & Hunt op cit 4; Thomas op cit 371.

6) Gaius III 220 cf Jolowicz & Nicholas op cit 274, who submit that "the statute merely provided an alternative procedure for those cases".

Pius (138-61 A.D.) and Marcus Aurelius (161-80 A.D.) and was still alive in 178 A.D.[1] Septimus Serverus (193-211 A.D.) and Caracalla (211-217 A.D.) both reigned several years after Gaius[2] and it therefore seems that the praetor's edict existed side by side with the lex Cornelia de injuriis for several years prior to their Rescript.[3]

One of the most important innovations under the lex Cornelia de injuriis was the recognition of an action for the forcible entering of another's home (vi domum introire),[4] and this is often regarded as the best example of the recognition of a right to privacy by the Romans.[5] The action was not based on ownership or possession but on occupation of the residence by the injured party. It did not matter whether the person whose domus was interfered with was in his own home or staying as a guest in the house of another.[6] Domus did not include lodgings and stables and this strengthens the view that the action was aimed at preserving the privacy of the family occupying the habitation rather than the property rights of the owner or possessor of the buildings.[7]

> "The act of intrusion was regarded not as a mere infringement of the right of property but as a violation of the sanctity of the private residence of the Roman citizen".[8]

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1) Lee Elements op cit 32.

2) Lee Elements op cit xxvi.

3) Cf Buckland Textbook op cit 591 n 2.

4) Digest 47.10.5. pr.

5) Cf Joubert Persoonlikheidsreg op cit 87; CF Amerasinghe Actio Injuriarum in Roman Dutch Law (1966) 177; but cf Ranchod op cit 11 who says it was also an offence against the person.

6) Digest 47.10.5.2.; CF Amerasinghe Defamation and Other Injuries (1968) 326; Joubert Persoonlikheidsreg op cit 88.

7) Digest 47.10.5.5.; cf Amerasinghe Defamation op cit 327. The action also included persons on board ships Digest 47.10.15.7.

8) De Villiers op cit 259 n 38.

Joubert states that although the protection of the privacy of the home shows that the concept of injuria had been widely extended, the wrongs of pulsare and verberare indicate that the old concept of injuria was still maintained.[1] It can, however, be argued that at an early stage the praetor recognized an analogous action for forcible entry into another's house. Aulius Ofilius who lived in the last century of the Republic and was the first commentator on the praetor's Edict[2] mentions that such an action for injuria lay even though the entry was made to summon the inhabitant to court.[3]

It is interesting to note that the first real action in Roman law to safeguard the privacy of the home and family life, arose from the troubled social conditions of the last century of the Republic,[4] just as the modern concept of privacy developed from the social pressures of the mass media and modern technology on the sanctity of family life in the early 20th Century.[5]

4. Classical Law (c. 27 B.C. - 305 A.D.)

The classical jurists applied a liberal interpretation to the praetor's Edict in its developed form. This together with the influence of the lex Cornelia de injuriis, enabled the actio injuriarum to be extended to include any wilful disregard for another's personality rights.[6] At the same time they appear to have given the intention to injure, animus injuriandi, full recognition as a requirement for injuria.[7] Despite the fact that classical injuriae are

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1) Joubert Persoonlikheidsreg op cit 80.

2) Berger op cit 607.

3) Digest 47.10.23.

4) JM Kelly Roman Litigation (1966) 15f; De Villiers op cit 8.

5) WL Prosser "Privacy" (1960) 48 Cal LR 383. See above 7.

6) Cf Sohm op cit 422; Salkowski op cit 668; Buckland Main Institutions op cit 337; Jolowicz & Nicholas op cit 273; Schultz Classical Roman Law op cit 595. Cf Pauw op cit 16.

7) Cf Digest 47.10.31: "injuria ex affectu facientis consistat"; Digest 47.10.3.2: "nisi qui scit se injuriarum facere". Digest 9.2.41. pr. Cf De Villiers op cit 9; Van Warmelo Inleiding op cit 341; Bliss op cit 18; Contra Ranchod op cit 15, Cf Tselentis op cit 246. Contra Pauw op cit 17ff.

sometimes described as relating to corpus, dignitas or fama a broad principle of protection for personality rights emerges.[1] Joubert points out that only corpus and fama were clearly defined and that dignitas was left open for development.[2]

Therefore although only forcible entry into another's home[3] and the premature disclosure of the contents of another's will (while he was still alive)[4] are usually regarded as examples of the protection of privacy in Roman law[5] it is submitted that several other injuriae which were primarily affronts to dignitas but also reflected on chastity or reputation may be included. These are very similar to the modern concept of invasion of privacy in the United States[6] and may be subsumed under the same heads, namely: (a) intrusions; (b) publication of private facts; and (c) putting a person in a false light.[7]

(a) Intrusions:

(i) Forcibly entering another's home or the house where he is residing as a guest.[8]

(ii) Accosting a woman with immoral intentions.[9] Although this was aimed at preserving chastity it can be regarded as a dig-

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1) Cf Joubert Persoonlikheidsreg op cit 102; Amerasinghe Defamation op cit 322; Salkowski op cit 669.

2) Joubert Persoonlikheidsreg op cit 83, 85f; cf Amerasinghe Actio Injuriarum op cit 173f; De Wet & Swanepoel op cit 233 n 92; Contra De Wet & Swanepoel op cit 232f.

3) Digest 47.10.5. pr.

4) Digest 9.2.41. pr.

5) Joubert Persoonlikheidsreg op cit 87; Amerasinghe Actio Injuriarum op cit 177.

6) See below 51.

7) WL Prosser Law of Torts 4 ed (1971) 804f American Restatement on Torts, Second (1971) § 652A. The category of "Appropriation" has been excluded as it appears to be more concerned with the "right to publicity" and can be covered by the other categories. See below 311.

8) Digest 47.10.5; cf Joubert Persoonlikheidsreg op cit 87; Amerasinghe Actio Injuriarum op cit 177.

9) Digest 47.10.15.20.

nitary wrong[1] and is analogous to the modern action for invasion of privacy.[2] But such an act was not contra bonos mores if the woman was dressed as a prostitute.[3]

(iii) Harrassing a person by unjustifiably summoning them to Court[4] or by persistently following them about.[5]

(iv) Convicium - calling together a mob to shout insults outside a person's home[6] was recognised as an affront to a person's dignitas.[7] This is similar to the modern action which regards the continual interruption of a person's peaceful and tranquil life as an invasion of privacy.[8]

(v) Wrongfully and intentionally subjecting one's ex-wife to an inspectio ventris on the pretext of proving adultery.[9]

(b) Publication of Private facts:

(i) A depositary disclosing publicly during the lifetime of a testator the contents of a will entrusted to him.[10]

(ii) (Quaere) Revealing a person's poverty or humble station in life.[11]

(iii) (Quaere) Divulging the contents of a private letter without the writer's consent.[12]

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1) Cf De Villiers op cit 7.

2) Such an act may also be crimen injuria cf R v Van Meer 1923 OPD 77.

3) Digest 47.10.15.15.

4) Digest 47.10.13.3.

5) Digest 47.10.15.22, 23; cf C Wright Cases on the Law of Torts 3 ed (1963) citing Institutes 4.4.1. Cf Epstein v Epstein 1906 TH 87.

6) Digest 47.10.15.3 - 8.

7) Cf De Villiers op cit 7. Cf Scottish law. See above 26 n 5.

8) For instance, where a person is inundated with a barrage of offensive letters and telephone calls as a result of an appeal by a television announcer. Robbins v Canadian Broadcasting Corp (Que) (1957) 12 DLR 2d 35; Wright op cit 29f. Cf Salmond op cit 44 n 31.

9) Digest 25.4.18; cf Ranchod op cit 22; DH Van Zyl "Custodia Ventris and Custodia Partus" (1969) 32 THR-HR 43ff.

10) Digest 9.2.41 pr.; cf Joubert Persoonlikheidsreg op cit 87; Amerasinghe Actio Injuriarum op cit 177.

11) De Villiers op cit 86, who refers to Code 9.35.2. But cf Code 10. 34.2 prelude (Scott's translation): "For what is so harsh or inhuman as by the exhibition and display of private property to reveal the wretchedness of poverty and expose wealth to any."

12) De Villiers op cit 142f. See below 248f. Cf Digest 47.2.14.17 which deals with theft of a letter.

(c) False light:

(i) Falsely claiming or asserting a freeman to be one's slave.[1)]

(ii) Falsely advertising the sale of a pledge[2)] where defendant publishes a notice of the sale indicating that he has received the pledge from the plaintiff (thus implying that the plaintiff is indebted to him and cannot not pay his debts).

(iii) Wrongfully addressing a person who is not indebted to you as a debtor.[3)]

(iv) Requesting payment from someone's surety even though the principal debtor is prepared to pay.[4)]

(v) Falsely sealing up the house of an absent debtor[5)] thus implying that he is unable to pay his debts.[6)]

(vi) Wearing mourning clothes in order to create the false impression that you have been grievously wronged by another.[7)]

It is submitted that several of the injuriae mentioned in (c) above also relate to reputation, but nevertheless most of them would be recognised as invasions of privacy in modern law.[8)] It would be

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1) Digest 47.10.11.9.; Digest 47.10.12.

2) Digest 47.10.15.32.

3) Digest 47.10.15.33. Cf Kelly op cit 21. See below 128f.

4) Digest 47.10.19. Cf Kelly op cit 21.

5) Digest 47.10.20.

6) Cf De Villiers op cit 279 n 209.

7) Digest 47.10.15.27. Cf Kelly op cit 21. But cf Ranchod op cit 10 n 60.

8) For the position in the United States see Hofstadter & Horowitz op cit 167; cf American Jurisprudence, Second (1964) 62 Torts §5. Most South African cases have been decided on the basis of defamation; Pickard v SA Trade Protection Society (1905) 22 SC 89 (false publication that a person was a debtor); cf Conroy v Bennett (1886) 4 HCG 201; Lappan v Grahamstown Town Council 1906 EDC 40. See below 128f.

impossible to establish empirically that the Romans recognised all or indeed many of the invasions of privacy actionable today,[1] but is clear that the classical actio injuriarum was wide enough to allow for the emergence of "a general remedy for any vexatious violation of another person's rights".[2]

The action remained penal in that it was available per consequentias[3] and was not transmissible against the wrongdoer's heirs.[4] Furthermore, as it was vindictam spirans it was lost on the death of the plaintiff[5] or if he displayed indifference.[6] The action prescribed within one year.[7] In order to succeed the plaintiff had to establish that the act was done intentionally and that it was wrongful i.e. contra bonos mores.[8] If the action was brought vexatiously and unsuccessfully it exposed the plaintiff to infamia.[9]

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1) In some instances the public's right to use the public amenities took precedence over the individual's right to privacy (e.g. a person may stand in front of your villa to fish in public waters). Notwithstanding this public right "it /became/ a practice to forbid persons from fishing in front of one's house or of one's portico, but for this there is no legal justification". Digest 47.10.13.7.

2) Sohm op cit 422f; cf Buckland Main Institutions op cit 336f; Jolowicz & Nicholas op cit 273.

3) Digest 47.10.1.3; Schultz Classical Roman Law op cit 597; Thomas op cit 370; Van Warmelo Introduction op cit 221.

4) Buckland Textbook op cit 591; Lee Elements op cit 390; Van Zyl Geskiedenis op cit 346.

5) Gaius 4.112. Cf Thomas op cit 371; Van Warmelo Introduction op cit 222.

6) Digest 47.10.11.1. Cf Tselentis op cit 246; Thomas op cit 371.

7) Amerasinghe Defamation op cit 348; Lee Elements op cit 390; Van Warmelo Introduction op cit 222.

8) Tselentis op cit 246: "/T/he classical actio injuriarum was probably a streamlined and sophisticated action which lay when the three essential elements of overt conduct, subjective and objective contumelia, and animus injuriandi in the sense of motive were present". Cf Joubert Persoonlikheidsreg op cit 92ff, 96 where he states that contumelia was not always necessary.

9) Gaius 4.177. Cf Kelly op cit 67; Lee Elements op cit 391.

5. Post-Classical or Vulgar Law (305 A.D. - 527 A.D.)

After Diocletian (284 - 305 A.D.) the actio injuriarum was no longer carefully delimited and more emphasis was placed on the criminal law.[1] It has been pointed out that this caused a loss of the precise meaning of injuria with a resulting concentration by scholastic theorists on animus injuriandi at the expense of the objective elements of the wrong.[2] Early attempts had been made to codify the law in the Codex Gregorianus and Codex Hermogenianus[3] and after the division of the Empire and the deteriorating position in the West, Roman jurisprudence reached its lowest point with the introduction of the Law of Citations by Theodosius II in 426 A.D. whereby the opinions of certain classical jurists had to be estimated by weight, not number.[4] The confusion in the West continued with the introduction of Codes by the conquering Barbarian chiefs e.g. the Lex Romanum Visigothorum (506 A.D.), Edictum Theoderici (500 A.D.) and the Lex Romanum Burgundionum (500 A.D.)[5] while in the East the Codex Theodosianus (438 A.D.) attempted to systematise the Roman law.[6]

It was left to Justinian's codifiers to rediscover the classical law.

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1) Ranchod op cit 20.
2) Ranchod op cit 21, citing HF Jolowicz Digest 47.2 - De Furtis (1940) lviii.
3) Buckland Textbook op cit 37; van Zyl Geskiedenis op cit 50f.
4) Buckland Textbook op cit 33f; van Zyl Geskiedenis op cit 42f; Van Warmelo Introduction op cit 21; Thomas op cit 54.
5) Buckland Textbook op cit 36; Ranchod op cit 24f; van Zyl Geskiedenis op cit 54ff.
6) Buckland Textbook op cit 38; C Pharr The Theodosian Code (1952); van Zyl Geskiedenis op cit 51f.

6. The Law of Justinian

Justinian was responsible for the revival of classical law when he commissioned the Corpus Juris Civilis.[1] The classical concept of injuria was accepted with little change[2] although the examples given in the Digest are often more detailed and extensive. Thus the injuriae mentioned in Gaius' Institutes are the same as those appearing in Justinian's Institutes and Digest.

The Digest itself is a codification of the writings of the classical jurists. Ulpian and Paul make up nearly half and Papinian and Julian are widely quoted as well as about 30 other classical jurists.[3] The Novels added nothing new to the actio injuriarum and the action reflected in the Digest and Institutes was the classical action which

> "long before the time of Justinian ... had come to be regarded as a general remedy for any wrongful aggression upon the person, dignity or reputation of another".[4]

In the light of the above it is submitted that many of the examples of injuriae given in the Digest would today be recognized as invasion of privacy.[5] Furthermore on the approach adopted by Warren and Brandeis in their classic exposition on the emergence of the right to privacy in Anglo-American law,[6] it can be argued that under the developed actio injuriarum Roman Law recognized a general right to privacy.

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1) See generally Buckland Textbook op cit 39ff; Jolowicz & Nicholas op cit 479ff; Thomas op cit 56f.

2) Cf Joubert Persoonlikheidsreg op cit 107.

3) Buckland Textbook op cit 41.

4) McKerron op cit 9.

5) See above 32.

6) SD Warren & LD Brandeis "The Right to Privacy" (1890) 4 Harv LR 193; Cf WL Prosser "Privacy" (1960) 48 Cal LR 383.

7. Privacy and the State

Notwithstanding the recognition of a right to privacy in Roman law, the Romans themselves were subject to State-imposed invasions of privacy analogous to those experienced in modern societies. For instance in 433 BC Censores were introduced, who were responsible for making a census of all citizens by classifying them according to their wealth and rank for taxation, electoral and military reasons.[1]

> "The head of each family was obliged to make a written statement, upon oath, of the number of persons composing his family, of his property of every description, and its fair estimated value, under penalty of confiscation of any article omitted".[2]

The ancient Romans therefore were faced with similar obligations to those imposed on South African residents in respect of population registration[3] and income tax returns.[4] Furthermore not only could the censores disenfranchise a person by excluding him from a particular class,[5] but like their modern counterparts[6] they controlled the morality of the Roman people.[7] The reasons for entering a "censorial mark" or nota censoria against a person's name in the census lists were unrestricted.[8] In many instances the exercise of their powers resulted in blatant invasions of privacy. Thus

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1) Van Warmelo Introduction op cit 5; Jolowicz & Nicholas op cit 52; Thomas op cit 15; Van Zyl Geskiedenis op cit 18; R Dannenbring Kaser's Roman Private Law 2 ed (1968) 257.

2) Ortolan op cit 57.

3) See below 232.

4) See below 234.

5) Ortolan op cit 151.

6) Cf Publications Act, 42 of 1974, s 9.

7) Ortolan op cit 150: "The entire moral influence that can exist in a state was lodged in their hands. As guardians of public and private morals, they could blast the reputation of a plebian, a senator, a consul, and even the people. Thus they restrained the luxury of the rich; the licence of the libertine; the ill-faith of the truthless; the indolence of the knight, of the soldier, of the cultivator; and the weakness of the magistrate". cf Kaser op cit 22; Thomas op cit 15; van Zyl Geskiedenis op cit 18.

8) Jolowicz & Nicholas op cit 52.

a man might even be penalized for "some action in his private life, such as luxurious living, or divorcing a wife without taking the opinion of a family council".[1] The nota therefore provided a strong extra-legal sanction against offensive behaviour.[2]

Initially the censores were elected for five years but this was later reduced to 18 months,[3] and after 22 BC they were no longer appointed.[4]

Conclusions: In the developed actio injuriarum there were three main elements:

(a) the act had to be done intentionally (animus injuriandi) - with the intention to injure;[5]

(b) there must have been an impairment of a person's personality, i.e. his fama, corpus or dignitas[6] - the latter being very widely defined;[7]

(c) the wrong itself had to be contra bonos mores i.e. wrongful according to the prevailing mores of society.[8]

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1) Ibid.

2) Crook op cit 83; cf Jolowicz & Nicholas op cit 52f.

3) Ortolan op cit 149; Thomas op cit 15.

4) Jolowicz & Nicholas op cit 53.

5) Digest 47.10.3.1; Digest 47.10.1; cf Buckland Textbook op cit 590 n 7; WA Joubert "Die Persoonlikheidsreg: 'n Belangwekkende Ontwikkeling in die Jongste Regspraak in Duitsland" (1960) 23 THR-HR 23, 41; Amerasinghe Defamation op cit 321; Ranchod op cit 12; van Warmelo Introduction op cit 221; Contra Watson Roman Private Law op cit 156.

6) Buckland Textbook op cit 590; Joubert Persoonlikheidsreg op cit 83f, 85f; Amerasinghe Defamation op cit 322.

7) Joubert Persoonlikheidsreg op cit 110; Amerasinghe Actio Injuriarum op cit 173. Joubert Persoonlikheidsreg op cit 84, defines "dignitas" as "daardie rustig -waardige houding wat hulle [the Romans] so belangrik beskou het". De Wet & Swanepoel op cit 233, however, interpret "dignitas" as "status" and synonymous with "existimatio", and argue that every "injuria" affected "dignitas" including those relating to "corpus" and "fama".

8) Digest 47.10.15. 2,5,6; Joubert Persoonlikheidsreg op cit 102; Ranchod op cit 7 f.

The developed actio injuriarum protected a person's personality rights, and the concept of dignitas was flexible enough to incorporate the right to privacy. The latter was recognized by the Romans except in the case of such State-authorized invasions of privacy as those conducted by the censores.[1)]

The classical concept of injuria was taken over by the Roman-Dutch law jurists when the Roman law was received into the Netherlands.

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1) See above 38.

B. ROMAN-DUTCH LAW

After the revival of Roman law in Western Europe by the Medieval Glossators, Ultramontani and the Commentators[1] most Roman-Dutch jurists, apart from Grotius,[2] appear to have adopted the approach of Justinian's Digest and Institutes.[3] Some attempt, however, was made to classify injuries according to their common constituent elements.

Grotius divides injuriae in the wide sense into wrongs against the body,[4] honour (hoon),[5] and reputation (lastering),[6] while in the narrow sense he regards such injuries as "wrongs against personal liberty".[7] Van der Keesel follows Grotius and states that:

> "an injuria can be committed against us whenever we are hindered not according to law in the exercise of those rights which we have to body, freedom, property, dignity and reputation".[8]

Van der Linden only briefly discusses the concept,[9] while Van Leeuwen includes the wrong in "crimes against honour and reputation".[10] Huber describes an injuria as "a crime deliberately committed with the effect of bringing another into ridicule and contempt"[11] and most of his examples are limited to defamation or insult.[12] Matthaeus, however, adopts a more flexible and wider

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1) For the revival of Roman law see generally P. Vinogradoff Roman Law in Medieval Europe 3 d (1961) 24ff; cf B Ranchod Foundations of the South African Law of Defamation (1972) 26ff.

2) RW Lee An Introduction to Roman-Dutch Law 5 ed (1961) 329, is of the view that Grotius was influenced by Teutonic jurists, but it has been suggested that he relied more upon the Medieval Romanist and Spanish Scholastic writers. Ranchod op cit 62.

3) Cf Voet 47.10; Vinnius Inst 4.4.1; Huber 6.8 cf Joubert Persoonlikheidsreg op cit 108; Ranchod op cit 72f.

4) Grotius 3.34.

5) Grotius 3.35.

6) Grotius 3.37; cf Ranchod op cit 68; JC de Wet & HL Swanepoel Strafreg 3 ed (1975) 234.

7) Grotius 3.35.1.

8) Van der Keesel Praelectiones 47.10.2; cf Ranchod op cit 73; De Wet & Swanepoel op cit 234.

9) Van der Linden 2.5.15, 16; 1.16.3, 4; cf De Wet & Swanepoel op cit 234.

10) Van Leeuwen Roman-Dutch Law 4.37; cf Ranchod op cit 73 n 6.

11) Huber 6.8.2.

12) cf Huber 6.8.14, 15; 6.9.9, 10.

definition of injuria which he described as "an insult inflicted upon someone contra bonos mores".[1] Voet on the other hand follows Ulpian's classical definition of:

> "a wrongful act committed in contempt of a free person by which his person, dignity, or reputation is intentionally impaired".[2]

Like the Medieval Glossators,[3] most of the Roman-Dutch law writers regarded animus injuriandi as the gist of the action.[4] The requirement of animus is referred to by Voet,[5] Matthaeus,[6] Van Leeuwen,[7] Van der Linden,[8] Van der Keesel,[9] and Huber,[10] but not by Grotius.[11] The interpretation of the Roman-Dutch law concept of animus injuriandi has given rise to a contraversy in modern South African law.[12]

It has been said that the Roman-Dutch law jurists had no philosophical basis for their treatment of injuria and that the wrong developed empirically.[13] This was probably because in many instances the jurists were more concerned with taking over the developed

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1) Mattheus De Crim 47.4.1, 1; cf Ranchod op cit 74 n 9. For the advantages of such an approach see below 172.

2) Voet 47.10.1; cf De Wet & Swanepoel op cit 234.

3) As to which see Ranchod op cit 34f.

4) Cf Maisel v Van Naeren 1960 (4) SA 836 (C) 840f, 847; M Bliss Belediging in die Suid Afrikaanse Reg (1933) 45f; Ranchod op cit 75ff.

5) Voet 47.10.20.

6) Matthaeus De Crim 7.4.7; 47.4.1.7; cf Bliss op cit 48.

7) Van Leeuwen Censura Forensis 5.15.1 - 6. Van Leeuwen Roman-Dutch Law 4.37.4, however omits animus injuriandi as a requirement.

8) Van der Linden 1.16.4.

9) Van der Keesel Praelectiones 47.10.2.

10) Huber 6.8.3.

11) Grotius 3.35.1. cf Ranchod op cit 69; See above 41 n 2.

12) See below 148f

13) CF Amerasinghe Aspects of the Actio Injuriarum in Roman-Dutch Law (1966) 173. Cf P C Pauw Persoonlikheidskrenking en Skuld in die Suid-Afrikaanse Privaatreg - 'n Reghistoriese en Regsvergelykende Ondersoek (1976) 72. See Pauw op cit 77f, for a discussion of animus injuriandi in Roman-Dutch law.

Roman law to fill the lacunae existing in their local legal systems than in critically analyzing Roman legal principles.[1]

Injuriae are often divided into wrongs against the corpus, dignitas or fama of another,[2] but there are many instances where the different elements overlap (eg. an assault may injure a person's body as well as his feelings, or a defamatory statement may affect a person's reputation as well as his dignity). It has been suggested that injuries relating to fama and corpus have developed into the modern wrongs of defamation, malicious prosecution, assault and false imprisonment,[3] while the concept of dignitas has been left open to accommodate any future development of the law relating to injuries.[4] In the words of Meleus de Villiers:

> "Injuries against dignity evidently comprise all those injuries which are not aggressions upon either the person or the reputation; in fact, all such indignities as are violations of the respect due to a free man as such".[5]

Most actions for invasions of privacy seem to involve an impairment of dignitas,[6] but such invasions may also affect the injured party's corpus (eg. where he is subjected to a blood test or medical examination without his consent)[7] or fama (eg. where he is held out in a false light).[8]

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1) Van der Linden 1.1.4 states: "In order to answer the question what is the law in such and such a case we must first inquire whether any general law of the land or local ordinance (Plaatselike Keur) having the force of law or any well-established custom can be found affecting it. The Roman law as a model of wisdom and equity is, in default of such a law, accepted by us through custom in order to supply this want". Lee Introduction op cit 5f; cf Grotius 1.2.22; Van Leeuwen Roman-Dutch Law 1.1.11.

2) Voet 47.10.7; cf Amerasinghe Actio Injuriarum op cit 173; WA Joubert Grondslae van die Persoonlikheidsreg (1953) 102. Contra De Wet & Swanepoel op cit 235.

3) Amerasinghe Actio Injuriarum op cit 173.

4) Amerasinghe Actio Injuriarum op cit 174ff; WA Joubert "Die Persoonlikheidsreg; 'n Belangwekkende Ontwikkeling in die Jongste Regspraak in Duitsland" (1960) 23 THR-HR 23; DM Walker The Law of Delict in Scotland (1966) II 708ff.

5) M De Villiers The Roman and Roman-Dutch Law of Injuries (1899) 24 n 19. Cf De Wet & Swanepoel op cit 235, who submit that there is no convincing Roman and Roman-Dutch law authority "vir die opvatting dat 'dignitas' 'n besondere persoonlikheidsreg was".

6) See below 185.

7) See below 238.

8) See below 290.

It is submitted that in many of the examples of injuries given by the Roman-Dutch writers one can discover the seminal threads of an action for invasion of privacy. As in the case of Roman Law many such injuries may be classified into the modern categories of (a) intrusions, (b) publication of private facts, and (c) putting a person in a false light.[1)]

1. Intrusions

(a) Forcible entry into a person's home.[2)] Protection against such an act recognised that:

> "it was the individual's right to keep free from intruders his retreat where his life could be enjoyed in private and away from the public gaze".[3)]

The gist of the action therefore was the protection of dignitary rather than proprietary rights.[4)]

(b) Trespassing upon the property of another against the latter's prohibition.[5)] It seems, however, that in Roman law such trespassing was justified where the trespasser was using public amenities (eg. fishing in public waters).[6)] Voet does not elaborate on this type of injuria[7)] but relies upon passages in the Institutes[8)] and Digest[9)] which are primarily concerned with catching fish or snaring birds on the property of another without his consent.

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1) See above 32 n 7.

2) Voet 47.10.7.

3) Amerasinghe Actio Injuriarum op cit 177.

4) cf De Villiers op cit 81 n 35. For instance the action applied to both tenants and guests. Joubert Persoonlikheidsreg op cit 88.

5) Voet 47.10.7.

6) Digest 47.10.13.7. See above 35 n 1.

7) Voet 47.10.7.

8) Institutes 2.1.12.

9) Digest 8.3.16; 41.1.3.1; 47.10.13.7.

(c) Hindering a person in the disposal or use of his own property, or from using a right of the public, or from using a public road, or public place, or from fishing in the sea.[1] De Villiers suggests that:

> "the indignity suffered in such cases may perhaps be regarded as a reason for rather classing them amongst injuries ad dignitatem pertinentes".[2]

(d) Summonsing a person before a tribunal for the purpose of harassing him.[3] It is submitted that such conduct constitutes an invasion of privacy[4] as well as an abuse of judicial proceedings.[5] The fact that a person is compelled to leave the peace and tranquility of his home or office and is made to appear in open court seems to be a clear invasion of privacy.

(e) An ex-husband falsely subjecting his ex-wife to undergo an inspectio ventris after divorce to establish whether or not she was pregnant by him.[6] Such an act would constitute a flagrant invasion of the woman's privacy.

(f) Dishonourably intercepting a woman with a view to unchastity.[7] Where such an interception does not take place in the presence of others it is submitted that it can be regarded as an intrusion into the woman's right to peace and tranquility of mind while out walking viz. an impairment of her dignity.[8]

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1) Voet 47.10.7.

2) De Villiers op cit 80 n 24.

3) Voet 47.10.7.

4) See below 228 (debt collections).

5) ARB Amerasinghe "Actions for Malicious Abuse of Judicial Proceedings in the Law of South Africa and Ceylon" 1965/1966 Acta Juridica 177, 179.

6) Voet 47.10.2. Cf DH van Zyl "Custodia Ventris and Custodia Partus" (1969) 32 THR-HR 43. See below 121.

7) Voet 47.10.7. See below 110f.

8) cf De Villiers op cit 80 n 30. But contra Amerasinghe Actio Injuriarum op cit 178.

(g) Persistently following a decent woman about with "lustful intention".[1] In Roman-Dutch law such conduct was probably considered to be a wrong to reputation "since such a person brings about some loss of good name by his persistent crowding",[2] but it can be argued that in modern South African law it is primarily a dignitary wrong.[3]

(h) Maliciously intervening to prevent the banns of marriage being published on Sundays or market days according to custom.[4] It is submitted that such interference is an impairment of the dignity of the prospective spouses.

2. Publication of Private Facts

(a) Boasting of carnal intercourse with a "decent woman or girl".[5]

(b) Revealing that a person suffers from poverty or a particular physical deformity or disease, for instance, taunting a person with being "crippled, one-eyed, blind, bald, humpbacked, crooked, twisted, flat-footed, itchy or mangy".[6] The fact that such revelations need contain "nothing opprobrious"[7] or "no baseness"[8] seems to indicate that it was the plaintiff's dignity rather than his reputation which was being impaired.[9]

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1) Voet 47.10.7.

2) Ibid; cf the approach adopted by the Court in Epstein v Epstein 1906 TH 87, 88. See below 224f.

3) Cf R v Jungman 1914 TPD 8; R v Du Toit 1930 TPD 205. See below 111.

4) Voet 47.10.7.

5) Voet 47.10.8; cf Huber 6.9.9, who refers to false disclosures concerning such relationships.

6) Voet 47.10.8; Huber 6.8.8.

7) Voet 47.10.8 (De Villiers translation).

8) Voet 47.10.8 (Gane's translation).

9) Cf SA Associated Newspapers Ltd v Schoeman 1962 (2) SA 613 (AD) 617; cf DJ McQuoid-Mason "Calling White Black" (1972) 1 NULR no. 1, 15f. In England it has been held that it is defamatory to publish a photograph of a woman without any teeth (Funston v Pearson, The Times March 12, 1915; cf RFV Heuston Salmond on Torts 16 ed (1973) 35 n 36, but it is submitted that such publication constitutes an invasion of privacy. Cf DJ McQuoid-Mason "Invasion of Potency?" (1973) 90 SALJ 26f.

(c) Publicly revealing the contents of a will during the lifetime of the testator with the intention of disparaging him.[1] But it seems that the action only lay against the depositary and not against a third party who made the disclosure.[2]

In the light of the above it is submitted that the empirical approach of the Roman-Dutch jurists clearly recognised the seminal threads of an action for invasion of privacy. Nonetheless it is conceded that the courts in South Africa will be influenced by developments in other modern legal systems (particularly the United States) in determining whether or not such an action will lie.[3]

3. False light

(a) Falsely seizing the goods of a debtor or advertising pledges for sale where the debtor is willing and able to pay.[4] The seizure of the debtor's goods is an invasion of his property rights, but the public advertisement of his goods for sale is an impairment of both his reputation and his dignity which places him in a false light in the eyes of the public.

(b) Demanding payment from sureties even though the debtor has the ability and willingness to pay.[5] It is true that such demands may reflect upon the reputation of the debtor but the false representation that he has been unfaithful to his sureties also affects his dignity, particularly where such demands do not go beyond the sureties themselves.

(c) Wearing mourning or dirty clothes, or letting the beard grow long to failing to cut the hair so as to arouse ill-will against another.[6] Such conduct implied that a person who had been charged with crime was likely to be convicted.[7] Therefore where the plaintiff had never been charged with a crime or there was no likelihood

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1) De Villiers op cit 83; Joubert Persoonlikheidsreg op cit 88; Amerasinghe Actio Injuriarum op cit 177.

2) Joubert Persoonlikheidsreg op cit 88.

3) Cf O'Keeffe v Argus Printing & Publishing Co Ltd 1954 (3) SA 244 (C) 249; Rhodesian Printing & Publishing Co Ltd v Duggan 1975 (1) SA 590 (RAD) 593f.

4) Voet 47.10.2.

5) Voet 47.10.7.

6) Voet 47.10.7.

7) De Villiers op cit 84.

of the plaintiff being convicted the defendant's behaviour would place him in a false light.

(d) Falsely stating that one had entered into marriage with someone[1] "with the object of defaming and bringing shame" upon that person.[2] Such a statement seems to have been just as punishable as boasting of some impropriety with a man or a woman.[3]

(e) Falsely casting doubts on the validity of a marriage, or the chastity of a betrothed woman, a wife or a widow.[4] Generally a wife would not sue for insults to her husband during his life-time or after his death unless she was directly injured by the wrong.[5]

(f) Falsely denying that a person of noble birth who is applying for high office is noble or born in wedlock.[6]

(g) Where a person's deceased parent has been falsely referred to as a slave or a worthless person or a criminal such a person may bring an action.[7] Such person would have an actio injuriarum per consequentias.[8]

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1) This compares with the position in the United States where posing as the plaintiff's wife was held to be an invasion of privacy. Burns v Stevens (1926) 236 Mich 443, 210 NW 482; cf Prosser Torts op cit 805.

2) Huber 6.9.10, who states that such action was regarded as a crime: "Otherwise it would be unjust that a mere asseveration of marriage should be punished so heavily".

3) Huber 6.9.9.

4) Voet 47.10.6.

5) Voet 47.10.6.

6) Voet 47.10.20.

7) Voet 47.10.5; cf Spendiff v East London Daily Despatch Ltd 1929 EDL 113.

8) See below 351.

Conclusion: The actio injuriarum in Roman-Dutch law was essentially the same as that recognized by the Romans and likewise included a number of injuriae analogous to the modern action for invasion of privacy. Therefore in order to succeed under the Roman-Dutch law action the plaintiff would again have to prove:

(a) that the wrongdoer had the intention to injure viz. animus injuriandi;[1)]

(b) that there had been an impairment of the plaintiff's person, dignity or reputation;[2)] and

(c) that the act itself was wrongful[3)] or contra bonos mores.[4)]

In determining the latter the courts in South Africa have indicated that they will be influenced by developments in other modern legal systems.[5)] It is therefore necessary to examine briefly how some of these systems have attempted to solve the problem.

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1) Voet 47.10.1; De Villiers op cit 27f; cf Maisel v Van Naeren 1960 (4) SA 836 (C) 842; See above 42. See below 147.

2) Voet 47.10.7; De Villiers op cit 52f; Amerasinghe Actio Injuriarum op cit 173; see above 41.

3) De Villiers op cit 37f. See below 170.

4) Voet 47.10.8; De Villiers op cit 22; See below 172.

5) Cf O'Keeffe v Argus Printing & Publishing Co Ltd supra 249; Rhodesian Printing & Publishing Co Ltd v Duggan supra 593f.

CHAPTER THREE

HISTORICAL DEVELOPMENTS : MODERN LAW

A. Introduction

It is trite that the South African law of delict is primarily based on the Roman and Roman-Dutch law principles of the lex Aquilia and actio injuriarum.[1] Furthermore any action for sentimental damages arising from an invasion of privacy will lie under the actio injuriarum,[2] in which case the plaintiff will have to prove: (a) that the defendant acted intentionally; (b) that the defendant's act constituted an aggression on his personality rights; and (c) that the defendant's act was wrongful.[3] The latter requirement of wrongfulness is essentially a question of policy which, in cases where there is little authority in our law, often may be answered by reference to developments in other legal systems.[4] As this work is mainly concerned with South African law no detailed analysis of foreign legal systems will be attempted.[5] In any event it seems that the overriding consideration in most jurisdictions, from ancient Rome to the modern Western democracies, is the Court's conception of the prevailing mores of the society concerned.[6]

It is intended to consider briefly the evolution of the right to privacy in the United States, England, West Germany and France - not only because these countries possess considerable literature on

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1) RG McKerron The Law of Delict 7 ed (1971)10; NJ Van der Merwe & PJJ Olivier Die Onregmatige Daad in die Suid-Afrikaanse Reg 2 ed (1970) 186.

2) See below 125, 142.

3) Whittaker v Roos & Bateman 1912 AD 92, 130f; Bredell v Pienaar 1924 CPD 203, 210; Foulds v Smith 1950 (1) SA 1 (AD)10; O'Keeffe v Argus Printing & Publishing Co Ltd 1954 (3) SA 244 (C) 249.

4) O'Keeffe v Argus Printing & Publishing Co Ltd supra 249; Rhodesian Printing & Publishing Co Ltd v Duggan 1975 (1) SA 590 (RAD) 593f.

5) For such an analysis see J Neethling Die Reg op Privaatheid (1976) (LL.D. Thesis) 22, 117, 152, 241.

6) See above 39, 49; cf Neethling Privaatheid op cit 313f, 406. See below 180.

the subject but also because they illustrate the contrasting approaches of Common law and Civil law systems. In Common law countries the courts have recognised the action in the United States[1] but not in England.[2] In Civil law although German academics had argued for the recognition of a right to privacy since before the end of the 19th century,[3] formal judicial approval of the concept was only given in the 1950's.[4] Conversely in France a seminal right to privacy was recognised by the courts in the early 1900's,[5] yet academic articulation of the right only occurred at the end of the 1930's.[6] In the past South African courts, faced with invasions of privacy, have primarily referred to developments in the United States,[7] but it seems useful also to examine the position in other jurisdictions.

B. The United States[8]

Invasion of privacy seems to have emerged as a tort in the United States during the second half of the 19th century. The "right to be let alone" was recognized by Judge Cooley as early as 1879.[9] By the 1880's it seems that the problem had already been

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1) See below 51.
2) See below 72.
3) Cf Neethling Privaatheid op cit 24; see below 84.
4) See below 86.
5) See below 96.
6) Cf Neethling Privaatheid op cit 118.
7) O'Keeffe v Argus Printing & Publishing Co Ltd supra 249; Rhodesian Printing & Publishing Co Ltd v Duggan supra 593f.
8) For a succinct detailed discussion see Neethling Privaatheid op cit 152ff.
9) Cf TM Cooley A Treatise on the Law of Torts 2 ed (1888) 29; cf AF Westin Privacy and Freedom (1967) 344.

considered by the courts, for instance, in respect of an intrusion by the owner of a house into a guest's room for the purposes of a sexual assault,[1] and the unauthorized attendance by an unqualified stranger at a child birth in a private house.[2]

There was, however, no clear articulation of the tort of privacy until the celebrated article by Warren and Brandeis in 1890.[3] In their article the learned authors pointed out how the common law had progressed from merely protecting the individual against physical interferences with person or property, to the recognition of the need for the protection of his spiritual feelings and intellect.[4] Such common law actions, however, were cloaked under the traditional torts of property rights, contractual rights, defamation and breaches of confidence, whereas in fact the courts had recognized a right to privacy.[5] For instance, the remedies allowed to authors of literary and artistic compositions and private letters whose works are published without consent, are not concerned with protecting property rights but with the plaintiff's "inviolate personality rights".[6]

Warren and Brandeis were only concerned with publication of private facts by the press[7] and their adoption[8] of Cooley's "right

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1) Newell v Whitcher (1880) 53 Vt 589, 39 Am Rep 703; cf Westin op cit 344.

2) De May v Roberts (1881) 46 Mich 160; 9 NW 146, 41 Am Rep 154; cf TL Yang "Privacy: A Comparative Study of English and American Law" (1966) 15 ICLQ 175, 180.

3) SD Warren & LD Brandeis "The Right to Privacy" (1890) 4 Harv LR 193. For a colourful description of why the article was written see WL Prosser "Privacy" (1960) 48 Cal LR 383, 423.

4) Warren and Brandeis op cit 193f.

5) Warren and Brandeis op cit 213.

6) Warren and Brandeis op cit 205.

7) H Kalven "Privacy in Tort Law - Were Warren and Brandeis Wrong?" (1966) 31 Law & Contemp Problems 326, 330.

8) Warren & Brandeis op cit 195.

to be let alone"[1] has been criticized as "totally inadequate in a complex society".[2] Nonetheless after their article there was a gradual acceptance of the "new" tort. It was accepted by the lower courts in New York where a doctor's name and facsimile signature had been used without his consent to advertise a patent medicine[3] and where the plaintiff's portrait had been published, despite his protest, in connection with a popularity contest,[4] but rejected by the State court in Robertson v Rochester Folding Box Co[5] where a photograph of an attractive young woman had been used to advertise flour products without her consent. Notwithstanding a strong dissenting judgment by Gray J who argued that the plaintiff had the same property right in protecting the use of her face by defendant for commercial gain, as she would have had had he published her literary writings,[6] the majority of the court in Robertson's case denied her an action on the grounds that: (a) there was no precedent; (b) the injury was purely mental; (c) recognition would open the floodgates of litigation; (d) it was too difficult to distinguish public from private figures; and (e) recognition would restrain the freedom of the press.[7] The decision caused a storm of public outrage[8] with the result that a statute was passed a year

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1) Cooley op cit 29.

2) P Stein & J Shand Legal Values in Western Society (1974) 189. Cf JW Wade "Defamation and the Right of Privacy" (1962) 15 Vand LR 1093, 1124: "the principle behind the law of privacy is much broader than the idea of privacy itself". See also GL Bostwick "A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision" (1976) 64 Cal LR 1447, 1450. But cf MR Konvitz "Privacy and the Law: A Philosophical Prelude" (1966) 31 Law & Contemp Problems 272, 279; see above 5.

3) Mackenzie v Soden Mineral Springs Co (1891) 27 Abb NC 402; 18 NYS 240, 249; cf SH Hofstadter & G Horowitz The Right of Privacy (1964) 25.

4) Marks v Jaffa (1893) 6 Misc 290, 292; 26 NYS 908; cf Hofstadter & Horowitz op cit 25.

5) (1902) 171 NY 64 NE 442; cf PH Winfield "Privacy" (1931) 47 LQR 23, 35; cf Hofstadter & Horowitz op cit 26f.

6) Robertson v Rochester Folding Box Co supra 450; cf Yang op cit 181.

7) cf Yang op cit 180 n 25; Hofstadter & Horowitz op cit 27.

8) So much so that one of the majority judges defended the judgment in a law journal article: O'Brien (1902) 2 Cal LR 437, 445; cf WL Prosser Law of Torts 4 ed (1971) 803; Hofstadter & Horowitz op cit 27.

later making it a misdemeanour and a tort to use the name, portrait or picture of any person for advertising or trade without their consent.[1)]

Elsewhere in the United States the right to privacy was recognized as a common law tort at an early stage. In Pavesich v New England Life Insurance Co[2)] a photograph of plaintiff had been published without his consent in an advertisement next to another photograph of an "ill-dressed sickly-looking man". The plaintiff's photograph was captioned "Do it now. The man who did". The other photograph was headed "Do it while you can the man who didn't".[3)] The court followed Gray J's dissenting judgment in Robertson v Rochester Folding Box Co[4)] and held that although there was no strict precedent, the common law was flexible enough to recognize a right of privacy - otherwise a person's photograph "may be reproduced and exhibited anywhere [for instance, to] ornament the bar of a saloon-keeper, or decorate the walls of a brothel".[5)] In Foster-Milburn Co v Chinn[6)] it was held that the unauthorized publication in a directory (circulation 8 million) of a picture of the plaintiff together with a short biography and a forged recommendation by him concerning a patent medicine, was a violation of his right to privacy.

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1) NY Sess Laws 1903 Ch 132, ss 1-2; cf Prosser Torts op cit 803 n 13. The statute was subsequently consolidated as Article 5 of the Civil Rights Law "Hofstadter & Horowitz op cit 28.
Cf MA Franklin Injuries and Remedies: Cases and Materials on Tort Law and Alternatives (1971) 804f.

2) (1905) 122 Ga 190; 50 SE 68; cf L Brittan "The Right to Privacy in England and the United States" (1963) 37 Tulane L R 233, 237.

3) Brittan op cit 237.

4) Robertson v Rochester Folding Box Co supra 450; cf Yang op cit 181.

5) Pavesich v New England Life Insurance Co supra 129; Winfield op cit (1931) 47 LQR 36; cf Peck v Tribune Co (1908) 214, US 185, 189, Winfield op cit (1931) 47 LQR 34f, decided on the basis of libel.

6) (1909) 134 Ky, 424; 120 SW 364.

Several jurisdictions, however, refused to recognize the action,[1] but by the time it was included in the first edition of the Restatement of Torts[2] it had been accepted by eleven states.[3] The Restatement referred to the wrong as follows:

> "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or is likewise exhibited to the public is liable to the other".[4]

Since its inclusion in the Restatement the action has been widely recognized and is now accepted by most jurisdictions.[5] Some 70 years after the seminal article by Warren and Brandeis, Prosser was able to extract from the numerous reported cases on privacy four distinct categories of invasions: intrusions, public disclosures of private facts, placing a person in a false light and appropriation of another's name or likeness.[6]

1. Intrusions: The intrusion or prying into the plaintiff's seclusion or solitude or his private affairs must be "offensive or objectionable to a reasonable man" and must concern something which is private.[7] Therefore it excludes inquiries into public records[8] or

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1) For instance, Rhode Island, in Henry v Cherry & Webb (1909) 30 RI, 13, 73, A 97 (Hofstadter & Horowitz op cit 189) and Washington, in Hillman v Star Publishing Co (1911) 64 Wash 691, 117 Pac 594 (Hofstadter & Horowitz op cit 119f).

2) Restatement of Torts (1939), § 867.

3) The figure eleven emerges from the pre-1939 cases quoted by WL Prosser "Privacy" (1960) 48 Cal LR 383, 386.

4) Restatement of Torts (1939), § 867. No reference is made to fault cf Kalven op cit 333.

5) Prosser Torts op cit 804. It has been suggested that privacy is a constitutional right and that the decisions of states denying recognition of the right should be overruled. Prosser Torts op cit 816. It is submitted, however, that the constitutional right only extends to the Fourth and Fifth Amendments. See below.

6) Prosser op cit (1960) 48 Cal LR 389. Prosser Torts op cit 804.

7) Prosser Torts op cit 808. See generally Franklin op cit 836f.

8) Cf Gotthelf v Hillcrest Lumber Co (1952) 280 App Div 668, 116 NYS 2d 873 (recording of pretrial testimony); Bowles v Misle (1946) 64 F Supp 835 (D Neb) (public disclosure of corporate records required by statute).

the following about[1] or photographing[2] of a person in a public street.[3] An individual is constitutionally protected against intrusions by the Fourth and Fifth Amendments,[4] although it has been argued that protection under the latter has been weakened.[5] Apart from illegal searches of another's home[6] or person[7] the action has been extended to cover wire-tapping,[8] electronic surveillance,[9] peeping toms[10] and persistent telephone calls.[11] In Dietemann v Time Inc[12] it was held that the First Amendment does not allow the press to invade privacy "during the course of newsgathering".[13]

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1) Cf Forster v Manchester (1963) 410 Pa 192, 189 A 2d 147, unless it constitutes "rough shadowing" Pinkerton Nat Detective Agency v Stevens (1963) 108 Ga App 159, 132 SE 2d 119. See below.

2) Cf Forster v Manchester supra; Gill v Hearst Publishing Co (1953) 40 Cal 2d 224, 253 P 2d 441. See below 259.

3) Prosser Torts op cit 808. It is submitted that in our law, however, such conduct may well give rise to an action for invasion of privacy.

4) Cf Note "Formalism, Legal Realism, and Constitutionally Protected Privacy under the Fourth and Fifth Amendments" (1977) 90 Harvard LR 945.

5) Note op cit (1977) 90 Harvard LR 974f.

6) Dietemann v Time Inc (1968) 284 F Supp 925 (DC Cal); cf Prosser Torts op cit 807. See below 201.

7) Cf Sutherland v Kroger Co (1959) 144 W Va 673, 110 SE 2d 716. See below 200.

8) Rhodes v Graham (1931) 238 Ky 225, 37 SW 2d 46. Le Crane v Ohio Bell Telephone Co (1961) 114 Ohio App 299, 182 NE 2d 15. Cf CS Fishman "The Interception of Communications without a Court Order: Title III, Consent, and the Expectation of Privacy" (1976) 51 St John's LR 41. See below 210.

9) Roach v Harper (1958) 143 W Va 869, 105 SE 2d 564; Elson v Bower (1967) 83 Nev 515, 436 P 2d 12; cf Prosser Torts op cit 807. Cf JF Decker & J Handler "Electronic Surveillance: Standards, Restrictions and Remedies" (1975) 12 Cal West LR 60. See below 215.

10) Souder v Pendleton Detectives Inc (1956) 88 So 2d 716 (La App); cf Pinkerton Nat Detective Agency v Stevens supra. See below 199.

11) Housh v Peth (1956) 165 Ohio St 35, 133 NE 2d 340. See below 223,228

12) (1971) 449 F 2d 244 (9th Cir). Cf A Hill "Defamation and Privacy under the First Amendment" (1976) 76 Columbia LR 1206, 1278.

13) At 249. Cf Branzburg v Hayes (1972) 408 US 665, 691f.

In Dietemann's case two newspaper reporters who invaded the home of a "medical quack" and used a hidden camera and radio transmitter to record his activities were held liable for invasion of privacy.[1] It has been pointed out, however, that newspapers should not be held liable for the publication of matter in the public interest which has been obtained through "tainted" methods[2] as this would have prevented such beneficial disclosures as those concerning the Pentagon Papers[3] and Watergate.[4]

2. Public Disclosures of Private Facts: An action for invasion of privacy will lie where private information is given publicity "of a highly objectionable kind" even if the information is true.[5] The principle has been applied to publicity concerning: a reformed prostitute,[6] the plaintiff's outstanding debts,[7] a person's anatomy[8] and a woman's eccentric behaviour and masculine characteristics.[9] Prosser submits that the publicity must not be to a single individual or a small group unless it constitutes "a breach of contract, trust or confidential relation which will afford an independent basis for relief",[10] but this view has been criticized for being based on "a misreading of the cases".[11] Hill goes further, however, and claims

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1) Hill op cit 1278.

2) Hill op cit 1279.

3) Ibid. Cf New York Times Co v United States (1971) 403 US 713.

4) Hill op cit 1280.

5) Prosser Torts op cit 809.

6) Melvin v Reid (1931) 112 Col App 285, 297, P 91. See below 174.

7) Trammell v Citizen News Co (1941) 285 Ky 529, 148 SW 2d 708; Biederman's of Springfield Inc v Wright (1959) 322 SW 2d 892 (Mo); Tollefson v Price (1967) 247 Or 398, 430 P 2d 990. Cf Prosser Torts op cit 809. See below 228f.

8) Feeney v Young (1920) 191 App Div 501, 181 NYS 481 (films of caesarian operation); Banks v King Features Syndicate (1939) 30 F Supp 352 (SD NY) (X-rays of a woman's pelvic region); Griffin v Medical Society (1939) 11 NYS 2d 109 (deformed nose); cf Prosser Torts op cit 809. See below 258, 305.

9) Cason v Baskin (1945) 155 Fla 198, 20 So 2d 243; (1947) 159 Fla 31, 30 So 2d 635. Prosser Torts op cit 80f. See below 256.

10) Prosser Torts op cit 810.

11) Hill op cit 1286. It is submitted that in any event the rule does not apply in South African law. See below 255.

that where publication of private facts is the sole basis of the action "the plaintiff has almost invariably lost", probably because "newsworthiness has largely swallowed up the tort".[1] In order to safeguard the freedom of the press the courts have denied an action where a person has been publicized as: a victim of a crime;[2] a criminal;[3] (erroneously) charged with a crime;[4] a bystander photographed appearing to be criminally involved;[5] and the relative of a victim of a newsworthy event.[6] Where, however, the disclosures are "shocking" or "unconscionable"[7] so as to "outrage the community's notions of decency"[8] the publication may be actionable, although the Supreme Court has held that such disclosures are protected if they reflect a truthful extract from "official court records".[9]

3. False light: Publicity which places a person in a false light in the public eye will be actionable if it is "objectionable to the

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1) Cf Kalven op cit 336, 338. Hill op cit 1255: "Yet it was precisely this aspect of the tort that was the concern of Warren and Brandeis." Cf Franklin op cit 819f.

2) Hubbard v Journal Publ Co (1962) 69 NM 473, 368 Pd 147.

3) Barbieri v News-Journal Co (1963) 56 Del 67, 189 A 2d 773; Leopold v Levin (1970) 45 Ill 2d 434, 259 NE 2d 250.

4) Williams v KCMO Broadcasting Corp (1971) 472 SW 2d 1 (Mo CE App).

5) Jacova v Southern Radio & Television Co (1955) 83 So 2d 34 (Fla). See generally Hill op cit 1256.

6) Smith v Doss (1948) 251 Ala 250, 37 So 2d 118; Corabi v Curtis Publ Co (1971) 441 Pa 432, 469, 273 A 2d 899, 918. See below 359.

7) Hill op cit 1258f, who submits that this is the basis of liability laid down in Sidis v F-R Publishing Corp (1940) 113 F 2d 806 (2 Cir); (1940) 311 US 711, which is consistent with the decision in Melvin v Reid supra. See below 174.

8) Time Inc v Hill (1967) 385 US 374, 383 n 7; cf Hill op cit 1263. Cf Deaton v Delta Democrat Publ Co (1976) 326 So 2d 471 (Miss) (story and photographs of mentally retarded school children). Cf Commonwealth v Wiseman (1969) 356 Mass 251, 249 NE 2d 610; (1970) 398 US 960, where the showing of the "Titicut Follies" film on criminally insane inmates in an institution, which included scenes of "naked patients ... desperately attempting to hide ... their privates with their hands", was restricted to "judicially-approved audiences". Hill op cit 1260.

9) Cox Broadcasting Corp v Cohn (1975) 420 US 469, 471 n 1. Cf Hill op cit 1264f.

ordinary reasonable man"[1] and does not amount to minor inaccuracies or misrepresentations.[2] On the other hand it has been suggested that the constitutional privilege referred to in Time Inc v Hill[3] should be extended to cover collateral falsehoods if the main allegations are true,[4] but it is submitted that this depends upon the degree of falsity. Hill favours false light cases being treated as analogous to defamation with the same fault element,[5] but without the libel/slander dichotomy,[6] and it seems that this form of invasion of privacy is becoming blurred with defamation.[7]

4. Appropriation: The appropriation of the plaintiff's name or likeness for the defendant's benefit or advantage is also an actionable invasion of privacy.[8] Prosser points out that there is no exclusive protection of a person's name in the United States,[9] but that in privacy cases the plaintiff's name is seen as a "symbol of identity".[10] The plaintiff's "personal feelings" must not be ignored but the decisions seem "to recognize the plaintiff's name as being analogous to a "species of trade name" and his likeness to a "kind of trade mark".[11] This was the first form of invasion of privacy recognized by the American courts[12] and usually takes the form of the

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1) Prosser Torts op cit 812. Cf Restatement of Torts, Second §652E (Test Draft No 22, 1976), which states the invasion must be "highly offensive to a reasonable person" Hill op cit 1270.

2) Prosser Torts op cit 813.

3) Supra.

4) Hill op cit 1272.

5) Hill op cit 1274.

6) Hill op cit 1275.

7) See below 62f.

8) Prosser Torts op cit 804.

9) Cf France (FP Walton "The Comparative Law of the Right to Privacy" (1931) 47 LQR 219, 223; Justice Report Privacy and the Law (1970) 21, para 92. Cf Neethling Privaatheid op cit 128ff. See below 107; Federal Republic of Germany (Article 12 BGB; Neethling Privaatheid op cit 42f). See generally Ed AH Robertson Privacy and Human Rights (1973) 45.

10) Prosser Torts op cit 805.

11) Prosser Torts op cit 807.

12) Prosser Torts op cit 804. See above 53.

unauthorized use of another's name or likeness for advertising purposes.[1] The "advantage or benefit", however, need not be pecuniary and a plaintiff has recovered where his name has been used as a candidate for political office;[2] to advertise for witnesses of an accident;[3] to provide a father for a child on a birth certificate;[4] and to enable the defendant to pose as the plaintiff's common law wife.[5] Newspapers clearly operate for profit and in order to prevent an unconstitutional interference with the freedom of the press[6] the appropriation provisions of the New York privacy statute[7] have been interpreted to exclude publication of "news, history, biography, and other factual subjects of public interest".[8] Hill argues that the unauthorized use of another's image or likeness in a newspaper advertisement is closer to the false light situation,[9] but it is submitted that in South African law the distinction is irrelevant.[10]

Notwithstanding criticism of Prosser's classification by Bloustein,[11] who regards invasion of privacy as a dignitary wrong,

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1) Prosser Torts op cit 805.

2) La Follette v Hinkle (1924) 131 Wash 86, 229 P 317.

3) Hamilton v Lumberman's Mut Cas Co (1955) 82 So 2d 61; 226 La 644, 76 So 2d 916.

4) Vanderbilt v Mitchell (1907) 72 NJ Eq 910, 67 A 97. See below.

5) Burns v Stevens (1926) 236 Mich 443 210 NW 482.

6) Prosser Torts op cit 806f.

7) NY Civ Rights Law §50; cf Hill op cit 1300. Cf Franklin op cit 805f.

8) Spahn v Julian Messner Inc (1964) 23 App Div 2d 216, 219, 260 NYS 2d 451, 453; cf Hill op cit 1300. Cf Zacchini v Scripps-Howard Broadcasting Co (1976) 47 Ohio St 2d 224, 351 NE 2d 454; (1977) 97 S Ct 730, where a 15 second telecast of the plaintiff's entire performance as a "human cannonball" was held to be "of legitimate public interest" and not appropriation; cf Hill op cit 1276 n 335.

9) Hill op cit 1277.

10) See below 295. In most cases of invasion of privacy the action will be governed by the provisions of the actio injuriarum. The fact that the plaintiff was presented in a false light may, however, be an aggravating factor in the assessment of damages. See below.

11) EJ Bloustein "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39 NYULR 962.

on the basis that Warren and Brandeis had distinguished an invasion of privacy - or inviolate personality - as an "act wrongful in itself" and that considerations of reputation or the monetary value of a person's name or likeness were irrelevant,[1] Prosser's view prevailed and was subsequently adopted by the Restatement of Torts (Second).[2]

It has been argued that Prosser's categories have been superceded by the Supreme Courts' recognition of a constitutionally protected right of privacy and that there is a need for a new "toxonomy" of privacy.[3] Such a toxonomy would take into account biological, sociological and psychological factors,[4] and includes three classes of privacy,[5] ie "the privacy of repose",[6] "the privacy of sanctuary",[7] and "the privacy of intimate decision".[8] A good illustration of the Courts' apparent recognition of human behavioural patterns is Griswold v Connecticut[9] where Douglas J referred to "zones of privacy".[10] In Griswold's case the Supreme Court declared

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1) Bloustein op cit 967; cf H Gross "The Concept of Privacy" (1967) 42 NYULR 34, who suggests that there are two meanings to privacy viz a primary meaning, dealing with intrusions and disclosures, and a secondary meaning, dealing with mental repose and autonomy. cf Neethling Privaatheid op cit 163f.

2) Restatement of Torts (Second) (1971), §652A. Cf EJ Juta "Some Comments on the Privacy of Public Figures in England and the United States" (1972) 1 NULR No 1, 21, 25.

3) Bostwick op cit 1450, who states that Prosser's analysis "does not accommodate subsequent cases involving contraceptives, abortion and state regulation of sexual and ingestive activities".

4) See above 2ff.

5) Bostwick op cit 1450.

6) Bostwick op cit 1451: "Repose is freedom from anything that disturbs or excites ... the right to be let alone in its most classic form". See below "Intrusions" 198.

7) Bostwick op cit 1456: "Sanctuary means prohibiting other persons from seeing, hearing and knowing." See below "Publicity" 246.

8) Bostwick op cit 1466: "The zone of intimate decision is an area within which the personal calculus used by an individual to make fundamental decisions must be allowed to operate without the injection of disruptive factors by the state".

9) (1965) 381 US 479.

10) Griswold v Connecticut supra 484; cf Osborn v United States (1966) 385 US 323, 352, Douglas J dissenting. Cf Bostwick op cit 1449.

unconstitutional state laws which imposed criminal sanctions for dissemination of birth control information and contraceptives on the basis that they violated the right to marital privacy.[1] Subsequently in Roe v Wade[2] the Supreme Court held that the constitutional right of privacy includes a woman's decision whether or not to terminate her pregnancy by abortion up to the time when the foetus becomes viable.[3] More recently the right to privacy has been invoked in a wide variety of cases such as:

> "Whether a city may refuse to allow political advertising on its buses,[4] whether a father has the right to order that life support systems be disconnected from his comatose daughter,[5] whether a state may prohibit sodomy between consenting adults in private,[6] whether a city can restrict the number of unrelated individuals living in one house,[7] and whether evidence is admissible if it results from a search founded upon a warrant granted because of the positive reaction of marijuana-sniffing dogs to a trailer parked in a public space.[8]" [9]

Some writers have gone so far as to suggest that the tort of privacy is becoming so wide in the United States that it not only impinges on freedom of expression but also threatens to swallow up other actions.[10] For instance, the principle in defamation cases that a public figure may only recover damages if he can prove that the defendant acted with "actual malice" (ie knowledge that a statement was false or reckless disregard of whether it was false or not)[11]

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1) Westin op cit 353ff.

2) (1973) 410 US 113.

3) Cf HR Hahlo "Nasciturus in the Limelight" (1974) 91 SALJ 73, 78f; MB Cane "Whose Right to Life? Implications of Roe v Wade" (1973)7 Family Law Quarterly 413.

4) Lehman v Shaker Heights (1974) 418 US 298.

5) In re Quinlan (1976) 355 A 2d 647. Cf In South Africa where Dominee J van Loggernberg's request to a hospital to withdraw life-support facilities for his comatose wife was acceded to without obtaining a court order. Rapport June 12, 1977.

6) Doe v Commonwealth Atty (1975) 403 F Supp 1199 (ED Va).See above 15n5

7) Belle Terre v Boraas (1974) 416 US 1.

8) United States v Solis (1976) 536 F 2d 880 (9th Cir).

9) Bostwick op cit 1447.

10) Cf Prosser Torts op cit 813ff; cf DE Brown "The Invasion of Defamation by Privacy" (1971) 23 Stanford LR 547f. See below 133f.

11) New York Times v Sullivan (1964) 376 US 254; cf A Hill "Defamation and Privacy under the First Amendment" (1976) 76 Cal LR 1206, 1211. Cf Franklin op cit 813f.

was extended to false light privacy cases in Time Inc v Hill[1] irrespective of whether the plaintiff is a public or private figure - provided it concerned "matters of public interest".[2] Conversely the principle in Hill's caseappears to be threatened by Gertz v Robert Welch Inc[3] which held that a public figure must prove "actual malice" by the defendant whereas "any showing of fault greater than strict liability" was sufficient in the case of private individuals.[4] Confusion was further confounded in Time Inc v Firestone[5] where a plaintiff suing for defamation was able to recover for "mental injury and anguish" without alleging or proving injury to reputation.[6] It has been submitted that in order to prevent "media self-censorship" and to protect freedom of speech under the First Amendment this confusion should not be allowed to water down the "actual malice" requirement adumbrated in Hill's case.[7] Furthermore, privacy situations constitutionally protected by the Fourth (security against unreasonable searches and seizures) and Fifth (prevention of self-incrimination in criminal cases) Amendments[8] are generally distinguishable from those which overlap with with the constitutionalization of defamation under the First Amendment.[9]

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1) (1967) 385 US 374. Cf Franklin op cit 812f.

2) Note "Defamation, Privacy and the First Amendment" 1976 Duke LJ 1016, 1017f.

3) (1974) 418 US 323 (a defamation case). Cf Note op cit 1976 Duke Law J 1019.

4) Note op cit 1976 Duke LJ 1018; cf Hill op cit 1212.

5) (1976) 424 US 448.

6) Note op cit 1976 Duke LJ 1017.

7) Note op cit 1976 Duke LJ 1018.

8) Cf Note "Formalism, Legal Realism, and Constitutionally Protected Privacy under the Fourth and Fifth Amendments" (1977) 90 Harv LR 945; MG Hill, HM Rossen & WS Sogg Smith's Review : Torts (1975) 226: "Although the Constitution does not specifically mention any right of privacy, the US Supreme Court has recognized that right which has its roots in the First, Fourth and Fifth Amendments and and in the penumbras of the Bill of Rights, in the Ninth Amendment and in the concept of liberty guaranteed by the first section of the Fourteenth Amendment."

9) For instance, "Intrusions". See below 198f.

5.Data Banks: At common law where information concerning an individual was released to another by a data bank, the former would only be able to recover damages if he could prove that the information placed him in a false light,[1] or was used for appropriation purposes,[2] or that an action lay for defamation or negligence.[3] A Report by the Department of Health, Education and Welfare (HEW)[4] recommended that: (i) there should be no secret data bank systems; (ii) an individual ought to be able to find out what information is on record and how it is used; (iii) an individual should be able to prevent information obtained for one purpose being used for another; (iv) an individual must be able to correct or amend identifiable information about himself;& (iv)any agencies creating, maintaining, using or disseminating identifiable information must assume the reliability of the data and take precautions against its misuse.[5] Most of these principles have been embodied in legislation to control the activities of data banks in both the private and public sector.

a) Private Sector: The Fair Credit Reporting Act[6] is designed to meet the needs of commerce "in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information".[7] The Act is, however, concerned "primarily with the accuracy of the reporting system and secondarily with preventing the unauthorized disclosure of consumer information".[8] The privacy aspect is further weakened by the provision that credit reports may contain information on an individual's

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1) See above 58.

2) See above 59.

3) Cf Note "Protecting the Subjects of Credit Reports" (1971) 80 Yale LJ 1035, 1049f, 1068.

4) US Dept of Health, Education and Welfare Report of the Secretary's Advisory Committee on Automated Personal Data Systems : Records, Computers and the Rights of Citizens (1973) paras 20-1, 41; Cf HMSO Computers : Safeguards for Privacy (1975, Cmnd 6354) 42.

5) Computers: Safeguards for Privacy op cit 47, cf also 46.

6) 15 United States Code §1681 (1970).

7) Ibid; cf DP Rothschild & DW Carroll Consumer Protection : Text and Materials (1973) 269.

8) Note "The Fair Credit Reporting Act" (1971) 23 U Maine LR 253,257.

"character, general reputation, personal characteristics, or mode of living".[1] In addition the Act does not cover the gathering of such information for an agency's "internal use", nor where a company reports on its own experiences with an individual.[2] Consumer reports which generally concern a person's financial standing for the purposes of a loan, are distinguished from "investigative consumer reports" which consist of information about a person's character,[3] and "is obtained through personal interviews with friends, neighbours or acquaintances of the subject".[4] If an individual is refused a job, credit or insurance due to a report from a consumer reporting agency, the user of the information must inform him of the adverse report and give him the name and address of the agency.[5] Where such adverse information was not supplied in a consumer report, the user of the information must not only advise the consumer of the adverse action, but also that upon written request within 60 days of learning of the adverse action the consumer is entitled to a disclosure of the nature of the information.[6] If an investigative consumer report is involved, within 3 days of the date that the report is requested the consumer must be informed that such an investigation is being made, and is entitled on written request, to receive "a complete and accurate disclosure of the nature and scope of the investigation".[7] A data subject also has the right, upon request and proper identification, to be informed of the nature and substance of all information (except medical) in the agency's file.[8] The agency is obliged to provide trained personnel to explain the information. Disclosures may be made in person or by telephone after a written request, and the data subject may be accompanied in his inspection by a person of his

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1) 15 United States Code § 1681 d(a).

2) Rothschild & Carroll op cit 270.

3) 15 United States Code § 1681 a(e). See below 122 n 6.

4) Rothschild & Carroll op cit 270.

5) 15 United States Code § 1681 a(f).

6) Ibid; cf Rothschild & Carroll op cit 270.

7) 15 United States Code § 1681 d (1970); Rothschild & Carroll op cit 270f.

8) 15 United States Code § 1681 g, § 1681 b (1970); Rothschild & Carroll op cit 271.

own choosing.[1] The data subject may dispute the accuracy of his file and if this is not resolved, may file his own information which the agency must send out with all future reports. If investigation shows that the subject's version is correct, the agency must, on request by him, notify any designated person who has received a copy of the report during the past 6 months (2 years if he is an employer).[2] Where information is gathered from public records, there is the danger of errors (eg individuals with the same name). Therefore in the case of reports for employers agencies are required to inform the subject that public record information is being sent to the user (giving the latter's name and address). Furthermore the agencies must maintain "strict procedures designed to insure "that the public information is complete and up to date".[3] There are some limitations on the use of information. Adverse information over 7 years old may not be reported except if it involves credit transactions of over $50,000,[4] and a report not furnished in response to a court order or at the subject's consent may only be given for "a legitimate business need".[5] An adverse statement in one investigative consumer report may not be included in a subsequent investigative report unless the information had either been received within 3 months of the subsequent report or has been re-verified.[6] It has been pointed out that there are 3 main defects in the Act:[7] (1) No one need inform the subject that he has a right to be told what is in his file - the user of the report need only disclose the name and address of the reporting agency, and the agency need only make a disclosure concerning the report when requested to do so by the data subject. (2) The existence of adverse

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1) Ibid.

2) 15 United States Code §1681 i(d); Rothschild & Carroll op cit 272.

3) 15 United States Code §1681 k; Rothschild & Carroll op cit 272.

4) 15 United States Code §1681 c (1970); cf Rothschild & Carroll op cit 272.

5) 15 United States Code § 1681 1 (1970).

6) Ibid; cf Rothschild & Carroll op cit 273.

7) Rothschild & Carroll op cit 273.

credit information is not disclosed to the subject until the adverse action is taken. (3) Some credit bureaux discriminate against married women by merging a wife's credit record with her husband's file. The Act can be enforced publicly by the Federal Trade Commission,[1] and privately by the individual concerned. In the latter the individual may only sue for negligent or wilful non-compliance with the Act and recover actual damages (plus court costs and reasonable attorney's fees) and punitive damages respectively.[2] Actual damages, however, will usually be nominal for refusal of credit, but may be substantial for loss of employment or insurance.[3] The Act virtually excludes actions for defamation, invasion of privacy and negligence and seems to make the remedies granted in it exclusive.[4]

b) Public Sector: The aftermath of the Watergate scandal saw the introduction of legislation to not only give wider access to government records, but also to provide some control over the collection of private information by Federal agencies. The Crime Control Act of 1973[5] provides limited access to a person's criminal records for alteration, and prohibits unauthorized disclosure of personally identifiable research or statistical information. Furthermore only information relevant to law enforcement and criminal investigation may be retained.[6] The Freedom of Information Act[7] provides that all information held by governmental agencies, subject to certain exceptions,[8] should be available to the public.[9] The Act was amended in

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1) 15 United States Code §1681 s; cf Rothschild & Carroll op cit 273f.

2) 15 United States Code §1681 n, §1681 o.

3) Cf Rothschild & Carroll op cit 274.

4) 15 United States Code §1681 h(e); Rothschild & Carroll op cit 275.

5) 42 United States Code §3701f (Supp IV, 1974).

6) JJ Hanus & HC Relyea "A Policy Assessment of the Privacy Act of 1974" (1976) 25 American ULR 555, 567f.

7) 5 United States Code §552 (1970; Supp IV, 1974).

8) 5 United States Code §552 (b) (Supp 1976) exempts information relating to" (i) national defence and foreign policy; (ii) internal personnel rules and practices of an agency; (iii) matters specifically excluded by statute; (iv) trade secrets, privileged or confidential commercial or financial matters; (v) interagency or intra-agency memorandums or letters; (vi) personal privacy, where the invasion would be clearly unwanted; (vii) investigating files compiled for law enforcement purposes; (viii) reports of agencies responsible for the regulation and supervision of Financial Institutions; and (ix) geological and geophysical data concerning oil wells. See generally M Gorski "Access to Information? Exemptions from Disclosure under the Freedom of Information Act and the Privacy Act of 1974" (1976) 13 Willamette LJ 135.

9) Hanus & Relyea op cit 556. Cf RJ Hausen "Freedom of Information Act - Exemption 7(A) Rejected as Discovery Tool in NLRB Enforcement Proceedings" (1977) 51 St John's LR 251.

1974 to specify the procedures for answering requests[1] and allow for an in camera examination by a federal district court.[2] Privacy receives limited protection in the Freedom of Information Act by the proviso that "personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" need not be disclosed.[3] This provision has received conflicting interpretations by the courts,[4] The popular view seems to be that the courts should balance the right of privacy of affected individuals against the right of the public to be informed, although the words "clearly unwarranted" indicate that the balance should be tilted in favour of disclosure.[5] The Family Educational Rights and Privacy Act of 1974[6] provides the parents of students (and in some cases students themselves) access to educational records of their children, as well as specifying procedures for challenging the substance of records and limiting the dissemination of records to third parties.[7]

The Privacy Act of 1974[8] "requires the federal government to give notice of the record systems it establishes, restricts intergovernmental transfer of personally identifiable records and ensures a data subject's access to his own record".[9] It also places certain restrictions on parties to whom federal agencies may disseminate information and requires agencies to allow data subjects to correct

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1) 5 United States Code § 552 (a)(6)(A)(i), § 552 (a)(6)(C); cf Gorski op cit 137. The agency must within 10 working days, find the record and send it, or decide if it is exempt from disclosure and advise requester accordingly. Gorski op cit 137.

2) 5 United States Code §552 (a)(4)(B); Gorski op cit 137.

3) 5 United States Code §552 (b)(6); cf Gorski 152f.

4) Cf Robles v Environmental Protection Agency (1973) 484 F 2d 843 (4th Cir); Gorski op cit 153.

5) Rose v Dept of the Air Force (1976) 425 US 352, 381, where the court noted that an in camera inspection procedure accommodated both the individual's rights to privacy and public rights to government information. Gorski op cit 154.

6) 20 United States Code §1232 g (Supp IV 1974).

7) Hanus & Relyea op cit 569.

8) 5 United States Code §552 a (Supp 1976).

9) Hanus & Relyea op cit 573.

errors in the information held.[1] The Privacy Act protects any personally identifiable records,[2] and agencies may only retain information which is "relevant and necessary to accomplish a purpose of the agency" in terms of a statute or executive order of the President.[3] Data should (as far as possible) be collected directly from the subject, if it may result in adverse determinations,[4] and the individual must be informed of the authority of the agency, whether the response is mandatory or optional, its main purpose and use, and the effect of not providing all or part of the information.[5] The agencies must publish at least annually a notice in the Federal Register setting out the existence and character of the records held by them.[6] The Act prohibits the disclosure of any record to any person or agency without the prior written consent of the individual concerned,[7] except for instance, where it is made to an officer of the same agency in the course of his duties or for "routine" purposes,[8] or in terms of the Freedom of Information Act,[9] or to another agency

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1) Ibid.

2) 5 United States Code §552 a(a)(4) (Supp IV 1974). These include not only notations describing education, financial transactions, medical history, criminal records, employment history etc, but also fingerprints, voice prints and photographs. Cf Hanus & Relyea op cit 577.

3) 5 United States Code §552a(e)(1) (Supp IV 1974). Agencies may not however, keep records as to how a person exercises his 1st Amendment rights (5 United States Code §552a(e)(8)).

4) 5 United States Code §552 a(e)(2) (Supp IV 1974); cf Hanus & Relyea op cit 577.

5) 5 United States Code §552 a(e)(3) (A) - (D) (Supp IV 1974). Hanus & Relyea op cit 578.

6) 5 United States Code §552 a(e)(4) (Supp IV 1974). The notice must specify: (i) the names and locations of the record systems; (ii) the categories of individuals recorded; (iii) the routine uses of the records; (iv) the agency official responsible for the records; (v) how an individual can ascertain whether he is the subject of a file; and (vi) how a subject can inspect and contest information in the file. Hanus & Relyea op cit 578.

7) 5 United States Code §552 a(b) (Supp IV, 1974).

8) 5 United States Code §552 a(b)(1), §552 a(b)(3).

9) 5 United States Code §552 a(b)(2).

legally authorized to conduct civil or criminal law enforcement activity.[1] Set procedures are specified concerning accessability of information. On request the agency must: inform the individual whether it holds records on him,[2] permit him (accompanied by a person of his own choosing) to review any such records,[3] and allow him to recover a copy thereof in a comprehensible form and at a reasonable cost.[4] A person wishing to challenge, correct or explain any information in his record may also submit a request to the agency.[5] One provision of the Act also applies to local, state and federal agencies and limits the use of social security numbers as universal identifiers or indexing tools.[6] The Act imposes both civil and criminal penalties for contraventions of its provisions.[7]

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1) 5 United States Code §552 a(b)(7). Hanus & Relyea op cit 578. No agency is exempt from giving notice of the existence and nature of record systems, but some are exempted from the provisions regarding accessibility and the right to challenge (5 United States Code §552 a(j) - (k) (Supp IV 1974)). General exemptions are provided for the CIA and law enforcement agencies (5 United States Code §552 a (j) (Supp IV, 1974)) while specific exemptions apply to:(i) classified material; (ii) investigative material compiled for law enforcement purposes; (iii) records maintained by protective service agencies; (iv) statistical records; (v) investigative material regarding qualifications for federal employment; (vi) testing or examination material; and (vii) evaluation material for promotion in the armed services. (5 United States Code §552 a(k) (Supp IV, 1974); cf Gorski op cit 163ff).

2) 5 United States Code §552 a(d)(1) (Supp IV, 1974).

3) Ibid.

4) 5 United States Code §552 a(f)(5).

5) 5 United States Code §552 a(d)(2) (Supp IV, 1974). The applicant must within 10 days either be allowed to correct the record or be informed of the refusal, together with the reasons therefor and the procedures for review by the head of an agency, and the business address of the official denying the request. (Ibid) A request to the agency head to review the agency's refusal to amend must be acted upon within 30 working days (5 United States Code §552 a(d)(3)). If the reviewing official also declines, the individual may file a statement of reasons for disputing the record (Ibid) which must be given to any person to whom his file is or had been disclosed (5 United States Code §552 a(d)(4)). In addition the unsuccessful individual may sue in a federal district court for an order to have his record amended (5 United States Code §552 a(g)(1) (A) - (B), §552 (g)(2)(A). See generally Hanus & Relyea op cit 582f.

6) Hanus & Relyea op cit 587f. See Pub L No 93 - 579. §7 (Dec 31 1971) which prohibits any government agency from denying an individual any right, benefit, or privilege provided by law because of a refusal to disclose his social security number, unless a statute specifies otherwise.

7) 5 United States Code §552 a(g), §552 a(i) (Supp IV, 1974).

While the Freedom of Information Act makes access to government records available to the public at large, the Privacy Act limits accessibility to the data subjects.[1] The Privacy Act does not protect privacy, but rather controls information held by federal (as opposed to local, state or private agencies,[2] by ensuring its accuracy, fairness, relevance and security.[3] The Privacy Act is further weakened by the exemption concerning information accessible under the Freedom of Information Act.[4] The cost of obtaining information under the Privacy Act is less than under the Freedom of Information Act,[5] but information is more accessible under the latter.[6]

Conclusion: The right to privacy in the United States appears to have developed on a policy basis which may provide useful guidelines for our courts when considering the question of wrongfulness - but the American concept should not be followed blindly.[7] Furthermore there appears to be little analysis of the fault element in privacy actions in the United States - apart from the false light cases where the wrong is becoming confused with defamation.[8] On the other hand the statutory controls over invasions of privacy in the United States give a good indication of how shortcomings in the common law can be rectified.

The different aspects of the right to privacy in the United States will be discussed in more detail during the analysis of the actions in South African law.

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1) Hanus & Relyea op cit 573.
2) Ibid.
3) Hanus & Relyea op cit 589.
4) Cf Gorski op cit 140: "even if a record has been declared exempt under the Privacy Act, access may still be sought under the [Freedom of Information Act]."
5) Hanus & Relyea op cit 583f.
6) Gorski op cit 171.
7) See below 178f.
8) See above 133.

C. ENGLAND[1)]

1. Common Law

Although Warren and Brandeis had based their seminal article in part on several English cases,[2)] the English courts themselves seem reluctant to recognize a tort of privacy.[3)] It has been suggested that Prince Albert v Strange[4)] (which was relied upon by Warren and Brandeis) laid the foundation for a right to privacy in English law[5)] and that it is still open to the House of Lords to recognize the action.[6)] At an early stage the concept was also rejected by English writers,[7)] although subsequently it has been referred to as an "emergent tort",[8)] and sometimes as a "doubtful tort".[9)] An infringement of privacy in England however may be actionable if the plaintiff can bring his complaint within one of the existing nominate torts.[10)] In several instances such torts cover Prosser's four categories of invasions:[11)]

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1) For a detailed analysis of the English law see J Neethling Die Reg op Privaatheid (1976) 241ff.

2) SD Warren and LD Brandeis "The Right to Privacy" (1890) 4 Harv LR 194, 202ff.

3) B Neill "The Protection of Privacy" (1962) 25 Modern LR 393, 394; Justice Report Privacy and the Law (1970) 8, para 30.

4) (1849) 2 De G & Sm 652, 64 Eng Rep 293 (Ch); cf Warren and Brandeis op cit 202. Here the Prince Consort successfully obtained an injunction preventing the publication of copies of privately exhibited etchings of the Royal Family made by Queen Victoria and himself.

5) During the Debate on Lord Mancroft's Right of Privacy Bill (see below 30) Lord Denning said: "So in 1848, the courts of this country were ready to give a remedy for the infringement of privacy" (House of Lords Debates (1961) vol 229, Col 638). Cf P Stein & J Shand Legal Values in Western Society (1974) 187: "It is difficult to see, in the absence of any likelihood that the Prince might wish to exploit then commercially, what other right could have been infringed by publication than his right to personal integrity and peace of mind". But cf Neill op cit 395 n 15.

6) PH Winfield "Privacy" (1931) 47 LQR 23, 34; PH Winfield & JA Jolowicz Winfield & Jolowicz on Torts 9 ed (1971) 501.

7) Cf TE Holland Jurisprudence 8 ed (1895) 165: "One's good name, for instance, though invaluable, may be regarded ... as an "airy nothing ... Still less tangible would be the 'right to privacy' or 'right to be let alone', which, it has been suggested, ought to be so far recognized as to shield a man from the publication, without his consent, of his portrait, or of the details of his private life".

8) RFV Heuston Salmond on Torts 16 ed (1973) 34.

9) Winfield & Jolowicz op cit 501

10) Neill op cit 394, Salmond op cit 35; TL Yang "Privacy: A Comparative Study of English and American Law" (1966) 15 ICLQ 175; Justice Privacy op cit 8, para 31.

11) See above 55: cf Salmond op cit 44f.

(a) Intrusions: These are actionable under the law relating to:

(i) Trespass: where there is some physical contact with the plaintiff's property[1] or person,[2] but the action will fail if the offence takes place from off the property (eg. a 'peeping Tom' from across the street)[3] or the plaintiff does not own the property (eg. a hotel guest),[4] or the plaintiff's property is photographed from an aircraft.[5]

(ii) Nuisances: where there is an unreasonable interference with the use or enjoyment by the plaintiff of his property,[6] but the plaintiff must have a legitimate interest in such property,[7] and in any event there is nothing to prevent a landowner from opening new windows which look over his neighbour's premises.[8]

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1) Sheen v Clegg, Daily Telegraph June 22, 1961; cf Salmond 35 n 28 (listening device placed above plaintiff's marital bed on his wedding night). Cf Joliffe v Wilmett & Co [1971] 1 All ER 478 (QB) 484 (private detective).

2) Salmond 122 (eg. where the plaintiff's fingerprints are wrongfully taken).

3) Justice Privacy op cit 9, para 35. But ownership of property has been extended to include the subsoil of a highway adjoining the plaintiff's property in a "peeping Tom" case Harrison v Duke of Rutland (1893) 1 QB 142. cf Winfield op cit (1931) 47 LQR 25; Justice Privacy op cit 9, para 35.)

4) Justice Privacy op cit 9, para 35; AH Robertson Privacy and Human Rights (1973) 98.

5) Bernstein v Skyviews & General Ltd (1977) 127 New LJ 153, unless perhaps the plaintiff is subjected to "the harassment of constant surveillance of his home". But contra Salmond op cit 44, who submits that the Civil Aviation Act of 1949 "might enable damages to be recovered for such an invasion of privacy as aerial photographs of one's house".

6) Salmond op cit 51; Winfield & Jolowicz op cit 326. For instance, where the plaintiff is hounded by continuous telephone calls, Justice Privacy op cit 10, para 40. Cf Robbins v Canadian Broadcasting Corp (Que) 1957) 12 DLR 2d 35; C Wright Cases on the Law of Torts 4 ed (1967) 29f, where a doctor was inundated with a barrage of offensive letters and telephone calls. The same would apply where a person is subjected to watching and besetting, Jolowicz & Winfield op cit 502; cf Lyon v Wilkins (1899) 1 Ch 255. But compare the case of the Balham dentist who was unable to interdict his neighbour from using special mirrors to watch the agonized expressions on his patient's faces. Winfield op cit (1931) 47 LQR 27.

7) Malone v Laskey (1907) 2 KB 141; Salmond op cit 54; Robertson op cit 99.

8) Tapling v Jones (1865) 11 HLC 290; Jolowicz & Winfield op cit 502.

(iii) Intentional infliction of emotional distress: eg. where the plaintiff's peace of mind was disturbed by a false report that her husband had been badly injured in a collision,[1] or where the plaintiff was told by private detectives that unless she procured certain letters from her mistress they would publicly disclose that her fiancee who had been interned during World War I was a traitor.[2] It has been pointed out, however, that:

> "many outrageous intrusions upon a person in his private life, home, family and correspondence which, though offensive and humiliating, may not produce any physical harm".[3]

(b) Publication of Private Facts: Here the plaintiff may be protected by the law of:

(i) Defamation: where the plaintiff's reputation has been lowered in the eyes of right-thinking members of society,[4] eg. where a newspaper article about the plaintiff's marriage gave the impression that she was so lacking in "sensitivity, dignity and reserve" that she was prepared to make intimate disclosures concerning her private family life.[5] There is no liability, however, where the statement or words are not defamatory.

(ii) Copyright: where the copyright in the published item vests in the plaintiff, eg. where a photographer sells a photograph of plaintiff's wedding day (which included a picture of his murdered father-in-law), for publication in a newspaper report about the murder,[6] or the defendant publishes a catalogue of private etchings without the consent of the artists.[7]

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1) Wilkinson v Downtown (1897) 2 QB 57.
2) Janvier v Sweeney (1919) 2 KB 316.
3) Justice Privacy op cit 13, para 53.
4) Sim v Stretch [1936] 2 All ER 1237 (HL) 1240.
5) Fry v Daily Sketch, The Times, June 28, 1966; Justice Privacy op cit 10, para 42. The plaintiff in Fry's case had also been subjected to persistent telephone calls and banging on her front door.
6) Williams v Settle [1960] 2 All ER 806 (CA); cf Justice Privacy op cit 12, para 45.
7) Prince Albert v Strange supra.

(iii) Breach of confidence: where the defendant publishes intimate letters written to him after he has fallen out with the plaintiff,[1] or makes intimate disclosures concerning married life with the plaintiff,[2] or where disclosures are made concerning what has passed between a doctor and patient,[3] lawyer and client,[4] or banker and client.[5]

(c) False light: where a person is placed in a false light he may recover under the law relating to:

(i) Defamation: which has been extended to cover such situations as where an effigy of a person is unjustifiably placed near a "Chamber of Horrors" at a waxworks exhibition;[6] or a "suggestive" composite photograph of the plaintiff is used in an advertisement;[7] or it is implied that a well-known amateur golfer has prostituted himself by posing for advertisements;[8] or that a member of an exiled Royal Family had been ravished by a "mad monk",[9] or that someone's wife was his mistress.[10] But an action has failed where it was falsely stated that a physician had recommended certain pills;[11] where a famous physician's name was used to advertise pills;[12] and where a defendant published a series of bad postcard portraits of plaintiff depicting imaginary incidents in her life.[13]

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1) Cf Gee v Pritchard (1818) 2 Swan 402, 418; cf Warren & Brandeis op cit 204 n 1.

2) Argyll v Argyll [1965] 1 All ER 611 (HL) 620, 623ff; cf DJ McQuoid-Mason "Invasion of Potency?" (1973) 90 SALJ 23, 31f. See generally Justice Privacy op cit 14, para 56(c).

3) AB v CD (1851) 14 Dunlop 177; cf Neethling Privaatheid op cit 253.

4) Taylor v Blacklow (1836) 3 Scott 614; cf Neethling Privaatheid op cit 253.

5) Tournier v National Provincial & Union Bank (1924) 1 KB 461; cf M Jones Privacy (1974) 145f.

6) Monson v Tussaud (1894) 1 QB 671 (CA); cf L Brittan "The Right to Privacy in England and the United States" (1963) 37 Tulane LR 233, 257f.

7) Honeysett v News Chronicle Ltd (1935) KB, The Times, May 14, 1935.

8) Tolley v JS Fry & Sons Ltd [1931] All ER Rep 131 (HL).

9) Youssoupoff v MGM Pictures (1934) 50 TLR 581 (CA); Wright op cit 969.

10) Cassidy v Daily Mirror [1929] All ER Rep 117 (CA).

11) Dockrell v Dougall (1899) 80 LT 556; (1899) 15 TLR 333.

12) Clark v Freeman (1848) Ch 11 Beav 112, 83 Rev Rep 127.

13) Corelli v Wall (1906) 22 TLR 532.

(ii) Passing-off: This occurs where in the course of his business a person represents his goods to be those of another in a manner calculated to deceive members of the public into thinking that such goods are those of that other.[1] On this basis Lord Byron was able to enjoin the publication of a book of spurious poems falsely attributed to him.[2] Passing-off is limited however to persons engaged in a field of common business activity,[3] with the result that a well-known actor could not restrain another from imitating his voice in a television commercial.[4] An Australian case, however, has held that such an action may succeed where the plaintiff has a commercially saleable reputation.[5]

(d) Appropriation: Where a person's image or likeness is used he may recover under:

(i) Defamation: eg. where an advertisement implies that an amateur sportsman has prostituted his amateur status,[6] or that a person suffers from a physical defect[7] or is a 'foppish old gentleman'.[8] Truth, however, is a defence, and consequently a boxer was unable to interdict the showing of a film of a fight which he had lost.[9]

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1) Salmond op cit 408.

2) Lord Byron v Johnston (1816) 2 Mer 29, 35 ER 851.

3) Cf Clark v Freeman supra.

4) Sim v Heinz [1959] 1 All ER 547 (CA); but cf Performer's Protection Act, 1963.

5) Henderson v Radio Corporation Pty Ltd [1960] SR (NSW) 576; cf H Storey "Infringement of Privacy and its Remedies" (1973) 47 Aust LJ 498, 505.

6) Tolley v JS Fry & Sons Ltd supra.

7) Plumb v Jeyes Sanitary Compounds Co The Times, April 15, 1937; cf RE Megarry Miscellany-at-Law (1969) 200.

8) Dunlop Rubber Co Ltd v Dunlop (1921) 1 AC 367.

9) Palmer v National Sporting Club Ltd (1906) MacGillivray Copyright Cases (1905-10) 55; cf Winfield op cit (1931) 47 LQR 32 n 45.

(ii) Breach of Contract: protects the plaintiff where there is an express or implied contract between the parties: eg. where a family portrait is used by the photographer on a Christmas card,[1] or extra copies of a portrait are sold commercially.[2] But there is no such protection where there is no such contract eg. a photographer may sell photographs taken at a dog show if there is no restriction on the taking of such photographs.[3]

(iii) Breach of (Commercial) Confidence: occurs where a person uses another's confidential material for his own commercial gain: eg. by publishing recipes purloined from another's recipe book,[4] or using a secret medical compound,[5] or publishing unpublished lecture notes belonging to another,[6] or appropriating another's business plans.[7]

It has been pointed out, however, that generally the English courts

> "have shown no inclination to take advantage of the proof of other torts, such as trespass or assault, in order to award parasitic damages for a co-extensive invasion of privacy".[8]

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1) Pollard v Photographic Co (1889) 40 Ch D 345, 353; cf Warren and Brandeis op cit 209.

2) Tuck v Priester (1887) 19 QB 639; cf Warren & Brandeis op cit 208.

3) Sports & General Press Agency Ltd v "Our Dogs" Publishing Co (1917) 2 KB 125 (CA); Brittan op cit 239.

4) Yovatt v Winyard (1820) 1 J & W 394; (1819-20) 21 R & R 194; Warren & Brandeis op cit 212.

5) Morison v Moat (1851) 9 Hare 241, 255; (1850-52) 89 R & R 416, 427; Warren & Brandeis op cit 212 n 2.

6) Abernethy v Hutchinson (1825) 3 LJ Ch 209; (1823-26) 26 R & R 237; Warren & Brandeis op cit 207f.

7) Saltman Engineering Co Ltd v Campbell Engineering Co [1963] 3 All ER 413 (CA) 414; cf Seager v Copydex Ltd [1967] 2 All ER 415 (CA).

8) Stein & Shand op cit 195. Cf Joliffe v Willmett & Co [1971] 1 All ER 478 (QB) 484.

2. Criminal Law

The common law protection against invasions of privacy afforded by the nominate torts has been supplemented by certain statutes which impose criminal penalties for several categories of intrusions. "Peeping Toms", for instance, can be prosecuted under the Justices of the Peace Act,[1] while watching and besetting another's house is also a crime.[2] Other offences include persistently ringing another's telephone,[3] transmitting or receiving telegraphic, telephonic or postal communications,[4] opening postal packets and telegrams,[5] intercepting or disclosing contents of telegrams or telephonic conversations,[6] and using wireless telegraphing apparatus to pick up messages sent over the air.[7] Furthermore certain Acts prevent disclosures of information obtained by computer services,[8] or income tax officials,[9] and prohibit the harrassment and eviction of tenants by landlords.[10]

3. Proposed Legislation

Notwithstanding the wide area covered by the nominate torts and the supplementary protection afforded by legislation, the need for a comprehensive right to privacy in England has been recognized for many years.[11] Several unsuccessful attempts have been made at

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1) Act of 1361. The Act could be interpreted to include telescopic lenses and binoculars, but not electronic devices. Justice Privacy op cit 15, para 62.

2) Conspiracy and Protection of Property Act, 1875. But the Act cannot be invoked unless the object of such watching and besetting is to force somebody to do or abstain from doing something. Justice Privacy op cit 15, para 63.

3) Post Office Act, 1953, s 66.

4) Wireless Telegraphy Act, 1949, s 1(1); cf M Jones Privacy (1974) 143.

5) Post Office Act, 1953, s 58(1).

6) Telegraph Act, 1868, s 20. This Act does not, however, provide for protection against telephone tapping Justice Privacy op cit 15, para 67 .

7) Wireless Telegraphy Act, 1949, s 5(b); cf Jones op cit 143.

8) Post Office (Data Processing Service) Act, 1967, s 2.

9) Income Tax Management Act, 1964. Section 4 requires officials to sign a sworn declaration that information received will not be disclosed, in terms of Schedule 1. But see Jones op cit 187f.

10) Rent Act, 1965, s 30. See generally Justice Privacy op cit 15 ff.

11) Cf H Montgomery Hyde Privacy and the Press (1947) 8.

introducing a statutory tort of invasion of privacy.[1]

In 1961 Lord Mancroft introduced his Right of Privacy Bill in the House of Lords, and although it was passed by a majority (74 to 21) on the Second Reading it was withdrawn due to pressure from the Government.[2] Lord Mancroft's Bill defined privacy in broad terms and was primarily concerned with intrusions through the publication of words calculated to cause distress or embarrassment.[3] The main opposition to the Bill was on the basis of the difficulty in determining what is "in the public interest",[4] and the fear that the proposed tort would be "imposing a new and severe restriction on the freedom of the Press".[5]

In 1967 Mr Alexander Lyon MP was also unsuccessful in his efforts to introduce a Bill on Privacy, but unlike Lord Mancroft he did not attempt to create a right which covered the whole area.[6] He proposed that any serious and unreasonable interference with "the right of any person to preserve the seclusion of himself, his family or his property from the public" would give rise to an action.[7]

Arising out of the Justice Report on Privacy,[8] Mr Brian Walden MP attempted to introduce a Bill which defined the right to privacy along American lines.[9] Privacy was defined as "a right of any person to be protected from intrusion upon himself, his home, his family,

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1) See generally D Madgwick & T Smythe The Invasion of Privacy (1974) 11ff.

2) Neill op cit 393; Brittan op cit 261f; Yang op cit 188; Justice Privacy op cit 18, para 79.

3) Robertson op cit 105.

4) House of Lords Debates (1961) Vol 229, Col 622; cf JE Juta "Some Comments on the Privacy of Public Figures in England and the United States" (1972) 1 NULR 21, 23; cf Robertson op cit 102.

5) Brittan op cit 265; cf Robertson op cit 103.

6) Robertson op cit 105f.

7) Robertson op cit 106.

8) Op cit.

9) For the position in the United States see above 51.

his relationships and communications with others, his property and his business affairs",[1] and different types of intrusions were listed.[2] Such intrusions however would only be actionable if there was a "substantial and unreasonable" infringement of privacy.[3]

Despite the above attempts the Younger Committee on Privacy in 1972[4] decided against recommending a general right of privacy because, inter alia:

> "the courts would have difficulty, greater than in other areas, in balancing by reference to the 'public interest', society's interest in the circulation of truth against the individual's claim for privacy; the law would become uncertain until sufficient precedents were established; the judicial role might be extended too far into the determination of controversial questions of a social and political character".[5]

It has been pointed out however, that such arguments are exaggerated and that the courts have often succeeded in balancing such competing interests and deciding on uncertain legal issues.[6] Nonetheless the Younger Committee did recommend the introduction of a criminal offence of "surreptitious surveillance by means of a technical device".[7]

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1) Justice Privacy op cit 61; Appendix 'J' Draft Right of Privacy Bill, s 9(1).

2) For instance: a) spying, prying, watching or besetting; b) the unauthorized overhearing or recording of spoken words; c) the unauthorized making of visual images; and d) the unauthorized reading or copying of documents. Justice Privacy op cit 61; cf Taylor op cit 303.

3) Justice Privacy op cit 35, para 138; Appendix "J" Draft Right of Privacy Bill, s 1.

4) H M S O Report of the Committee on Privacy (1972 Cmnd 5012). For a description of the terms of reference and work done by the Committee see Madgwick & Smythe op cit 15ff.

5) Cf G Dworkin "The Younger Committee Report on Privacy" (1973) 36 Modern LR 399, 401; cf Stein & Shand op cit 187.

6) Dworkin op cit 401; cf Knuller v Director of Public Prosecutions [1972] 2 All ER 898 (HL) 929f; Attorney-General v Times Newspapers Ltd [1973] 1 All ER 815 (CA) 822.

7) Jones op cit 200.

4. Data Banks: Unlike the United States there is little English common law protection against abuses by data collection agencies. There is no common law control over the nature, accuracy and accessibility of data bank information except where the use of such information amounts to defamation,[1] or can be regarded as passing-off.[2] The gravity of the threat by data banks has been recognized,[3] and a number of attempts have been made to introduce Bills for their control,[4] cut none have become law.[5] One such Bill was the Personal Records (Computers) Bill[6] which proposed that any person whose personal profile had been recorded should be able to: (a) object against the type of information stored; (b) apply to the Registrar of Data Banks for the removal of such information; (c) be informed that such a profile exists; and (d) obtain a copy of the original profile and any subsequent amendments.[7] Recently the Consumer Credit Act[8] has provided some protection concerning data collected by credit reference agencies. The Consumer Credit Act allows a consumer to: (a) obtain the name and address of any credit reference agency from which the other contracting party has applied for information about his financial standing;[9] (b) on payment of a small fee, obtain a copy of the file relating to him kept by such an agency;[10] (c) give notice to the agency

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1) See above 74; cf London Association for Protection of Trade v Greenlands (1916) 2 AC 15, 26.

2) See above 76; Henderson v Radio Corporation (Pty) Ltd (1960) SR (NSW) 576; cf CL Pannam "Unauthorized Use of Names of Photographs in Advertisements" (1967) 40 Aust LJ 4, 7f.

3) "The Government is now committed to introducing some form of legislation on computers and privacy, even though privacy has yet to be defined". The Financial Times March 14, 1977, 9; cf HMSO Computers and Privacy (1975 Cmnd 6353); Computers: Safeguards for Privacy (1975 Cmnd 6354).

4) For instance, the Industrial Information Bill 1968; the Private Investigator's Bill 1969; the Data Surveillance Bill 1969; the Personal Records (Computers) Bill 1969. Cf Madgwick & Smythe op cit 12; Justice Privacy op cit 18.

5) Robertson op cit 106.

6) AR Miller The Assault on Privacy (Computers, Data Banks and Dossiers) (1971) 227; cf Neethling Privaatheid op cit 267 f.

7) Ibid. Cf Justice Privacy op cit 55, where similar controls are proposed.

8) Of 1974; cf AG Guest & MG Lloyd The Consumer Credit Act 1974 (1975) 158f.

9) Section 157.

10) Section 158.

requiring it to remove or amend certain information in his file;[1] in the case of a dispute apply to the Director General of Fair Trading for a ruling on the matter.[2] But neither the Personal Records (Computers) Bill nor the Consumer Credit Act give the subject of the data profile any control over who has access to the information about him. Such accessibility is once again governed by the limited common law remedies.[3]

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1) Section 159.

2) Section 159(s).

3) The Younger Committee on Privacy in the United Kingdom found that both banking institutions (HMSO Report of the Committee on Privacy (1972 Cmnd 5012); cf M Jones Privacy (1974) 145f) and credit rating agencies (cf Jones op cit 150f) were giving confidential information to interested persons with little or no control over such disclosures. Notwithstanding the contention by the banks that "/i/t is one of the first principles that any member of the staff realizes, absolute secrecy of any information in that branch bank" (cf Jones op cit 145f), the Younger Committee was given numerous examples of when investigators and others had been able to obtain information from a bank without the consent of the banker's client, and without the latter even knowing about the enquiry (cf Jones op cit 147f). The Younger Committee investigated the nature and extent of disclosures by credit rating agencies, but rejected the need for a proposed Control of Information Bill which would set up a Data Bank Tribunal. (Jones op cit 154f). It decided that where such information was compiled from public records (eg at the courts) it was justifiable for the credit bureaux to record such information as part of their business information (Jones op cit 153). The Younger Committee also heard evidence concerning students and privacy. Concern was expressed about the dangers inherent in the statistical records held by the Universities Central Council on Admissions (UCCA) which include basic biographical facts (age, sex, marital status, nationality, parents' occupation), plus a record of academic progress up to his first employment (Jones op cit 164). The main threat however arises in those universities which kept files on their students' extra-curricular activities, including who was living with who, who was on drugs (Jones op cit 164) and who was involved in undesirable political activity eg organising protests and demonstrations (Jones op cit 170; cf the American Family Educational Rights and Privacy Act of 1974, see above below). The Younger Committee recognised the following data-protection principles: (i) information collected for a specific purpose should not be used for another without authority; (ii) access should be confined to authorized persons; (iii) the amount of information collected should be the minimum necessary; (iv) statistical information should allow for separation of identities from the rest of the data; (v) the subject should be told about the information concerning him; (vi) the level of security by the user should be specified and precautions taken against misuse; (vii) provision should be made for detecting violations of security; (viii) the period information can be stored should be limited; (ix) steps should be taken to ensure the accuracy of data and provision made for correction and updating; and (x) care must be used in coding value judgments (Report of the Committee on Privacy op cit paras 592-599; cf Computers and Privacy op cit, Table 1.) Concerning value judgments see EF Ryan "Privacy Orthodoxy and Democracy" (1973) 51 Canadian Bar R 84, 88f.

Conclusion: Self-imposed professional controls[1] and the nominate torts of English law are inadequate for protecting an individual's privacy, and unless the House of Lords is prepared to extend the principle in Prince Albert v Strange,[2] legislation is necessary. In any event it is necessary to introduce legislation to control effectively the activities of data bank organisations, particularly in respect of who has access to their records.

Certain other aspects of the English legislative proposals will be considered when discussing the developments of the right to privacy in South African law.

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1) Cf E Hall Williams "Committee on the Law of Defamation. The Porter Report" (1949) 12 Modern LR 217, 218: "The real remedy lies with the Press, as the Committees point out; for the matter is in fact 'one of internal discipline' and 'good taste'." But cf Stein & Shand op cit 198. In 1976 the British Press Council issued a "Declaration on Privacy" presumably to discourage any further attempts to introduce a statutory right of privacy. Comment (1976) 73 Law Society's Gazette 751.

2) Supra. See above 72.

D. FEDERAL REPUBLIC OF GERMANY[1]

1. Civil Law

Since the end of World War II many invasions of privacy recognized in American law have been accommodated in Germany under the rubric of "personality rights" (persönlichkeitsrechte) - a concept much wider than privacy alone.[2]

Although a general "right of personality" had been contended for by Jhering[3] and Gierke[4] during the nineteenth century, German law tended to follow the Anglo-American approach of recognizing a number of separate torts each with its own characteristics.[5] The actio injuriarum[6] was limited to actions for insult and subsequently to criminal cases,[7] and there was no broad-based civil law action for the protection of personality rights. When Friederich Nietzsche's relatives sued after his death to prevent the threatened posthumous publication of certain of his letters the Reichsgericht (RG) dismissed an action based on personality rights, but subsequently allowed the plaintiffs to succeed on the basis of breach of copyright.[8] Kohler[9] has also argued that the German Civil Code (BGB)[10] provided for the recognition of different personality rights in Article 826 which states that:

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1) For a detailed analysis of the position in West Germany see J Neethling Die Reg op Privaatheid (1976) 22ff.

2) HD Krause "The Right to Privacy in Germany - Pointers for American Legislation?" Duke LJ 481, 503.

3) R von Jhering Jahrbucher für Dogmatik 23, 155; cf HC Gutteridge "Comparative Law of the Right to Privacy" (1931) 47 LQR 203, 204.

4) OF von Gierke Deusches Privatrecht (1895) 1, §203; cf WA Joubert "Die Persoonlikheidsreg: 'n Belangwekkende Ontwikkeling in die Jongste Regspraak in Duitsland" (1960) 23 THR-HR 23, 29; Krause op cit 485.

5) Gutteridge op cit 206; Krause op cit 405f.

6) See above 39. Cf PC Pauw Persoonlikheidskrenking en Skuld in die Suid-Afrikaanse Privaatreg - 'n Regshistoriese en Regsvergelykende Ondersoek (1976) 93.

7) Joubert op cit (1960) 23 THR-HR 29; cf Neethling Privaatheid op cit 25.

8) (1908) 69 RGZ 404f; cf Gutteridge op cit 205; Krause op cit 485f. Cf A Lögdberg "The Right in a Person's Own Likeness" (1967) 11 Scandinavian Studies in Law 213, 216 re the death-bed photographing of Bismarck.

9) J Kohler Personlichkeitsrecht 1, 587; Joubert op cit (1960) 23 THR-HR 30.

10) Burgerliches Gesetz Buch of 1896.

> "One who intentionally damages another in a manner violating good morals (gute sitten) is obliged to compensate him for such damage".[1]

It has been said that the Reichsgericht refused to follow Kohler's suggestion even though Article 826 was introduced to protect those interests of personality which were not specifically mentioned in the Code,[2] but it seems that there were some indications that the Article could be construed to cover intentional invasions of privacy violating "good morals".[3] For instance, where a defendant made privileged disclosures to his client concerning the plaintiff's criminal conviction 20 years previously and such privilege was exceeded,[4] or where the defendant had maliciously disseminated old newspaper-clippings relating to the plaintiff's criminal past.[5]

After the Reichsgericht was replaced by the Bundesgerichthof (BGH) there was a revival of interest in the "allegemeines Persönlichkeitsrecht" probably due to the influence of the new Federal Constitution (Grundgesetz) of 1949:

> "Article 1(1). The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority".
>
> "Article 2(1). Everyone shall have the right to the free development of his personality in so far as he does not infringe the rights of others or offend against the constitutional order or the moral code".[6]

Notwithstanding the suggestion that there was a "general pragmatic development of personality right protection on the basis of Article 826 of the Civil Code and of Articles 1 and 2 of the Federal Constitution",[7] it seems that it was the latter rather than the former

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1) Translation in Justice Report Privacy and the Law (1970) 21f, para 97; cf Krause op cit 518.

2) Joubert op cit (1960) 23 THR-HR 30; Krause op cit 520.

3) Krause op cit 487.

4) (1927) 115 RGZ 416; cf Krause op cit 487f.

5) (1911) 76 RGZ 110, 112. On the facts there was no evidence of malice and the court held that Article 826 had not been breached. Krause op cit 487 n 27.

6) Translation in Justice Privacy op cit 21, para 95; cf Joubert op cit (1960) 23 THR-HR 31.

7) Justice Privacy op cit 21, para 97.

which provided the break-through in the recognition of such a right.[1] The turning point came in 1954 in the Schacht case,[2] where an attorney had written to a newspaper on behalf of his client (Hitler's former Economics Minister) demanding that the paper correct certain statements made in an article about his client. The letter however was printed in the "reader's column" as if the attorney had written in his personal capacity. The attorney's claim for an order compelling the paper to publish a statement that he had not written in his personal capacity was upheld by the BGH on the basis that a "general right of personality" could be derived from Articles 1 and 2 of the Federal Constitution.[3] The principle in Schacht's case was subsequently reaffirmed in Wagner's case,[4] concerning the publication of the diaries and letters of Cosima Wagner, and the Paul Dahlke case[5] in which the photograph of a well-known actor on a motor scooter was used in an advertisement without his consent.

In 1957 the BGH went even further in a case involving the confidentiality of medical reports, where information in such a report had been given to a third party by an insurance company.[6] The court considered the problem in the light of Article 823(1) of the Civil Code which states:

> "One who intentionally or negligently, wrongfully injures the life, body, health, freedom, property or any other right of another is obligated to compensate him for damage arising therefrom".[7]

In the past it seems that the Article was strictly construed and that the trend was against the recognition of privacy as "any

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1) Cf EJ Cohn Manual of German Law 2 ed (1968): "the 'right to privacy' is derived by a somewhat strained interpretation from arts. 1 and 2 of the Basic Law".

2) (1954) 13 BGHZ 334; cf Joubert op cit (1960) 23 THR-HR 31; Krause op cit 488; Cf Pauw op cit 103.

3) Krause op cit 488f.

4) (1954) 15 BGHZ 249; Krause op cit 521f.

5) (1956) 20 BGHZ 345; Krause op cit 522; Pauw op cit 104.

6) (1957) 24 BGHZ 72 (Arztzeugnis); Krause op cit 522f.

7) Translation by Krause op cit 518.

other right" on the basis that it was excluded by the eiusdem generis rule (ie "other right" referred to proprietary rights).[1] The BGH, however, held that the Article could accommodate privacy as one of the constitutionally guaranteed rights of personality, although its scope in each instance was to be limited by balancing the values and interests involved.[2] The effect of this decision therefore was to render negligent, as well as intentional, invasions of personality rights actionable.

The extended interpretation of Article 823(1) was subsequently applied in a number of other cases, for instance : where a newspaper had published a photograph, and appeared to support a developing boycott, of a plaintiff landlady who had refused to extend the lease of one of her tenants to allow occupation by the latter's husband who had just been released by the Russians;[3] the "Herrenreiter" case where without his consent, the photograph of a famous horse-rider was used to advertise a patent medicine to improve sexual potency;[4] and the unauthorised use of secret tape recordings of private conversations.[5] In the latter case which concerned recordings of conversations between plaintiff and defendant about the settlement of their long-standing differences the court found it unnecessary to consider the possible application of Article 826.[6]

This broad interpretation by the BGH has been criticized on the basis that: (a) it is illogical to include a general right of personality in interpreting a provision which is concerned with specific interests in life, body, health, freedom and property;[7]

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1) Gutteridge op cit 206.

2) Krause op cit 522f; cf Joubert op cit (1960) 23 THR-HR 32.

3) (1957) 24 BGHZ 200. The court held that by approving the boycott the newspaper had exceeded its privilege. Krause op cit 523.

4) (1958) 26 BGHZ 349; Joubert op cit (1960) 23 THR-HR 33; Krause op cit 524. In this case the Court also relied on Articles 1 and 2 of the Federal Constitution. Joubert loc cit 34.

5) (1958) 27 BGHZ 284; cf Krause op cit 524f; Joubert op cit (1960) 23 THR-HR 35; Cohn op cit 65. Except where such recordings are made for the detection of blackmail or the recording of factual business messages. Justice Privacy op cit 24 para 99(b).

6) Krause op cit 525.

7) K Larenz "Das 'allegemeine Persönlichkeitsrecht' im Recht der unerlaubten Handlungen" (1955) 8 NJW 521, 523f; cf Krause op cit 505 n 96.

and (b) such an interpretation raises the danger of a "boundless extension" of tort law.[1] Nevertheless the development appears to have been generally welcomed,[2] and the use of Article 823(1) as "the sole vehicle for protection of personality seems [to have gone] beyond the point of no return".[3] The latter view is reinforced by the text of the proposed (1958, revised 1959) "Draft Law for the Reform of the Protection of Personality and Honour in Private Law" which included a new Article 823(1):

> "One who intentionally or negligently wrongfully injures another in his personality or who, intentionally or negligently, wrongfully injures the property or any other right of another is obliged to compensate him for the damage resulting therefrom".[4]

The proposed Draft Bill provided for protection against a number of injuries including personality in general;[5] life, body, health and freedom of person;[6] insult and defamation;[7] publication of private facts or letters not in the public interest;[8] taking another's name;[9] unauthorized publication of a person's picture;[10] unauthorized recording of another's words;[11] and unauthorized use of a listening device.[12] The Bill was shelved however because it seems that the Government felt that the case law developments by the BGH had solved most of the problems concerning the protection of personality,[13] and that the Bill posed a threat to the freedom of the Press.[14]

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1) Krause op cit 507 n 103; cf Gutteridge op cit 217.
2) H Hubmann Das Personlichkeitsrecht 2 ed (1967); cf DT Donaldson "Book Review" (1968) 1 Modern Law and Society 147.
3) Krause op cit 509.
4) Translation in Justice Privacy op cit 23, para 98 (my italics); cf Krause op cit 493.
5) Article 12
6) Article 13
7) Article 14
8) Article 15
9) Article 16
10) Article 17. Except where the subject is of secondary interest, or part of a procession or assembly, or the publication refers to a current event, or is in the interests of science or art. cf Justice Privacy op cit 23, para 97. See also Lögdberg op cit 217, 220.
11) Article 18.
12) Article 19.
13) Krause op cit 495.
14) Neethling Privaatheid op cit 28; cf Cohn op cit 65f.

The "court-made" right to privacy in West Germany, supplemented by certain provisions of the Penal Code, has developed to the extent that it is possible to distinguish Prosser's categories of intrusions, publication of private facts, false light and appropriation.[1)]

(a) Intrusions: The Federal Supreme Court has ruled that the law guarantees for everyone a personal sphere in his private life which is indispensable for the development of his personality and includes the inviolability of the home.[2)] Therefore infringements of the private sphere of another are actionable,[3)] except if necessary for crime detection, for instance: authorized searches,[4)] blood tests,[5)] photographs and fingerprints,[6)] physical examinations,[7)] mail interceptions and telephone tapping.[8)] Conversely the Penal Code prohibits the use of truth drugs, lie detectors and hypnosis,[9)] and imposes penalties for the unauthorized opening of letters or other sealed documents[10)] and the use of listening devices to "listen to another person's private conversation without his consent" or to "record the private conversation of another person".[11)]

(b) Publication of Private Facts: A person is entitled to prohibit publication of personal letters[12)] or other matters relating

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1) See above 55.

2) "Current Legal Developments" (1971) 20 ICLQ 152.

3) Cohn op cit 65; cf (1958) 27 BGHZ 284s. See above 74.

4) BGB, Art 102; cf Penal Code 81; International Commission of Jurists "The Legal Protection of Privacy: A Comparative Study of Ten Countries" (1972) 24 Int Soc Sci J 418, 465.

5) Penal Code, Art 81(a); cf (1972) 24 Int Soc Sci J 473.

6) Penal Code, Art 81(b); cf (1972) 24 Int Soc Sci J 473.

7) Penal Code, Art 81(c); cf (1972) 24 Int Soc Sci J 473.

8) Emergency Laws, 1968, Art 10(2); cf (1972) 24 Int Soc Sci J 492. An attempt to have Article 10(2) invalidated as unconstitutional failed (1971) 20 ICLQ 366f; (1972) 24 Int Soc Sci J 501.

9) Article 136(a); cf (1972) 24 Int Soc Sci J 474.

10) Article 299.

11) Article 298; cf B van D van Niekerk "Unplugging the Bug, or the Right to be Left Alone in Criminal Law - Some Reflections" (1971) 88 SALJ 171, 175; Ed AH Robertson Privacy and Human Rights (1973) 56. Cf "Current Legal Developments" (1966) 15 ICLQ 581.

12) Cohn op cit 65; cf (1954) 15 BGHZ 249.

to personal secrets,[1] including private photographs.[2] Furthermore, in addition to the matters referred to under "intrusions" above, the Penal Code also punishes breaches of confidence by professional persons[3] and public servants,[4] as well as the revelation of postal secrets,[5] the contents of telegrams and telephone conversations by post-office workers.[6] One writer has gone further and suggested that the penal provisions should be extended to include an offence of "public exposure" - where a person's intimate life, particularly his sexual life, or his past lapses are made public.[7]

(c) False light: Misleading press reports about personal and professional affairs are unlawful unless the public has a justifiable interest in their publication.[8]

(d) Appropriation: Unauthorized use of a person's name for advertising or other form of trade publicity or the furtherance of economic interests is actionable.[9]

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1) (1957) 24 BGHZ 72 (Spätheimkehrer). See above 86.

2) Cohn op cit 65; Cf (1957) 24 BGHZ 200. See above 87.

3) Article 300.

4) Article 353. Other protection against disclosures is provided by the Fiscal Code, Art 412; the German Unfair Competition Act, 1909, Art 17; and the Credit Act, Art 9; cf (1972) 24 Int Soc Sci J 568.

5) Article 354.

6) Article 355. See generally Justice Privacy op cit 24, para 102.

7) G Arzt Der Strafrechtliche Schutz der Intimsphäre, vom zivilrechtlichen Persönlichkeitsschutz aus betrachtet (1970); cf E Schwinge "Book Review" (1971) 4 Modern Law and Society 131, 134.

8) Cohn op cit 65; cf (1954) 13 BGHZ 334. See above 86.

9) Cohn op cit 65; cf (1956) 20 BGHZ 345, see above 86; (1958) 26 BGHZ 349, see above 87; (1961) 35 BGHZ 363 (Ginseng-Wurzel).

2. Wrongfulness

In an attempt to systematize the German law of privacy certain writers have adopted the "sphären" theory which at first blush seems to coincide with the psychologists' "territories of self"[1] and the United States Supreme Court's "zones of privacy".[2] On closer examination, however, the coincidence is more apparent than real as many of the characteristics of the different "sphären" overlap.[3] The most widely accepted "sphären" classification is that of Hubmann who recognizes the "Individualsphäre", the "Privatsphäre" and the "Geheimsphäre".[4]

(a) The "Individualsphäre": Each individual is distinguishable from another by his identity which is characterized by certain indicia, for instance, his name, likeness, voice, writing and character.[5] In public therefore he is entitled to protection against aggressions on his personality.[6] Identity is protected by the "false light"[7] and "publication"[8] privacy cases, but it has been suggested that the courts are moving towards recognizing identity as a separate right.[9] It can be argued, however, that the "individualsphäre" is also protected against "intrusions" (eg the recording of a person's voice)[10] and "appropriations"[11] by the general action for privacy, and that little is gained by its recognition.

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1) E Goffman Relations in Public (1972) 63. See above 3.

2) Griswold v Connecticut (1965) 381 US 479, 484. See above 61.

3) Despite the careful distinctions drawn between the "Intimsphäre", "Vertrauenssphäre", "Sozialsphäre", "Offentlichkeitsphäre", "Privatsphäre", "Geheimsphäre" and "Individualsphäre". Cf Neethling Privaatheid op cit 34 n 7.

4) Hubmann op cit 268f; cf Neethling Privaatheid op cit 34f.

5) Neethling Privaatheid op cit 42.

6) Neethling Privaatheid op cit 35.

7) See above 90. Cf Neethling Privaatheid op cit 43f.

8) See above 89f.

9) Neethling Privaatheid op cit 43.

10) See above 89.

11) See above 90. Cf Neethling Privaatheid op cit 45.

(b) The "Geheimsphäre": Here the individual is protected against publicity in respect of his personal behaviour, thoughts and life-style. He may or may not wish to make disclosures thereof to his immediate family or friends or even certain third parties, but such disclosures are made in confidence.[1] Some writers regard the "geheimsphäre" as synonymous with the "intimsphäre" which is the most secret form of privacy - ie that aspect of human behaviour furthest removed from the public eye.[2] The test for whether the relationship between the parties is confidential is objective, but whether or not the person making the disclosure wishes it to be confidential is tested subjectively.[3] An invasion of the "geheimsphäre" is actionable even though the disclosure was made to a small group of persons,[4] but otherwise such invasions may also overlap with "intrusions",[5] "false light"[6] and "appropriation"[7] privacy situations.

(c) The "Privatsphäre": This includes aspects of private behaviour which are accessible to a determined or undetermined but limited circle of people - but not to the public in general.[8] Even where certain activities are carried out in public they are still protected from dissemination by the mass-media[9] - unless they become matters of public interest.[10] Neethling distinguishes the "privatsphäre"

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1) Neethling Privaatheid op cit 36, 61.
2) Neethling Privaatheid op cit 36.
3) Neethling Privaatheid op cit 61f.
4) Neethling Privaatheid op cit 71
5) See above 89. Cf Neethling Privaatheid op cit 67.
6) See above 90.
7) See above 90.
8) Neethling Privaatheid op cit 37, 48.
9) Neethling Privaatheid op cit 37.
10) Neethling Privaatheid op cit 37f.

from the "geheimsphäre" on the basis that: (a) the former is much wider than the latter; (b) the latter contains an element of confidentiality; and (c) the former is only invaded by publicity whereas the latter is also infringed through intrusions.[1] No such distinctions are made by the courts[2] and in any event it seems that the "geheimsphäre" is protected against intrusions, publications, false light revelations and appropriation by the general action for privacy.[3] Not only do the "geheimsphäre" and "privatsphäre" overlap with each other, but they also overlap with the "individualsphäre".[4]

In short it seems that the above academic debate may have contributed little to the practical evolution of the right to privacy in West Germany. Nonetheless the suggestion that where the disclosures are made to a small group of persons such conduct should only be actionable where there is a "confidential" relationship may be of some assistance to the courts in determining whether or not the act is wrongful.[5]

3. Data Banks [6]

There is no common law protection against the misuse of data bank information in Germany unless the injured party can show that the information concerns his sex life,[7] or has been unlawfully obtained,[8] or affects his honour or business reputation.[9] One

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1) Neethling Privaatheid op cit 38.
2) Neethling Privaatheid op cit 39.
3) See above 89f.
4) Neethling Privaatheid op cit 50.
5) See below 282.
6) See generally Neethling Privaatheid op cit 106ff.
7) Neethling Privaatheid op cit 108.
8) Ibid.
9) Neethling Privaatheid op cit 112.

writer has suggested that the accessibility of data should be protected technologically (eg by the user identifying himself by voice or fingerprint) and that data banks should be controlled by an independent state organisation.[1] Another favours the registration of all data banks with the requirement that such banks must not only give a clear explanation of: (a) their goals; (b) the potential circle of users; and (c) the technical and organisational safeguards concerning accessibility; but also allow the subject of the information profile control over its use.[2]

Limited statutory protection against invasions of privacy by data banks has been introduced in West Germany. The Penal Code provides for the protection of privacy in automated information systems,[3] while the Land Hessen has enacted a comprehensive Data Protection Act.[4] The latter provides for: (a) a duty of protection of confidentiality in the operation of all data banks;[5] (b) a duty of secrecy by data bank operators with penalties for breaches thereof;[6] (c) the appointment of a Data Protection Commissioner, empowered to enforce the Act and investigate complaints;[7] and (d) enables an aggrieved person to demand rectification of errors in the data.[8] The Act is confined to data banks in the public sector[9] and does not compel them to notify an individual that they are in possession of his data profile. This omission considerably weakens the effectiveness of the Hessen legislation.[10]

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1) U Seidel Datenbanken und Persönlichkeitsrecht (1972) 177f; cf Neethling Privaatheid op cit 115f.

2) S Simitis "Chancen und Gefahren der elekfronischen Datenverarbeitung" (1971) 24 NJW 673, 681; cf Neethling Privaatheid op cit 116.

3) Article 268; cf (1972) 24 Int Soc Sci J 430.

4) Act of 7 October 1970. For English translation of full text see (1972) 24 Int Soc Sci J 580.

5) Sections 3 and 5.

6) Section 16.

7) Sections 10 and 11.

8) Section 4.

9) Section 1. (1972) 24 Int Soc Sci J 431.

10) Similar legislation exists in the Land Rhineland Palatinate, and in Lower Saxony administrative regulations have been introduced to control data banks in the public sector. The Federal Government's proposed Data Protection Bill covers both the public and the private sector. Cf HMSO Computers: Safeguards for Privacy (1975) Cmnd 6354) 43.

Conclusion: Apart from the question of data banks, it seems that the "court-made right to privacy" in Germany has caught up with, if not overtaken, the development of the right in the United States.[1] Furthermore the extended interpretation of Article 823(1) and the recognition of an action for intentional and negligent invasions of privacy[2] which allow for the recovery of both sentimental damages and pecuniary loss has led one commentator to sound a note of warning:

> "Intentional privacy invasions should be discouraged to a far greater extent than negligent invasions, with liability for the latter perhaps being limited to situations in which the plaintiff can show tangible damage. 'Gross negligence' or 'recklessness' might rank close to intent, as is the case in other areas of the law of torts. Compensation for non-pecuniary harm should largely be limited to intentional invasions".[3]

It is submitted that the above view accords with the present position in South African law. An action for sentimental damages in our law is confined to the actio injuriarum which requires intention (or at least a form of dolus eventualis),[4] while any action based on negligence necessitates proof of patrimonial loss.[5]

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1) Krause op cit 516.

2) On the question of fault in German law see Pauw op cit 113f.

3) Krause op cit 516.

4) See below 165f.

5) See below 362f.

E. FRANCE[1]

French law like South African law[2] is not restricted by the Anglo-American (and to a lesser extent German) concept of specific torts or civil wrongs.[3] The French courts distinguish between material damage ("le dommage materiel") affecting the injured party's right to property, and moral damage ("le dommage moral") which covers sentimental loss.[4] Invasions of privacy fall under the latter category[5] but it seems that initially such actions were based on an extension of property rather than personality rights.[6] This probably explains why the "droits maraux" of French copyright law is included under the "droit de la personnalite", the law relating to personality rights.[7]

Many of the early cases involved photographs and paintings: for instance, the attempted publication of a photograph of the actress Rachel on her death-bed;[8] the publication of photographs of well-known persons in an advertising album without the photographer's consent;[9] where one photographer had made copies of another photographer's work to illustrate a biography of the first photographer's subject;[10] and where a portrait of an artist's subject, whose husband had paid the artist in advance, was publicly exhibited without her husband's consent.[11]

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1) For a summary of the French Law see J Neethling Die Reg op Privaatheid (1976) 117ff.

2) See below

3) F P Walton "The Comparative Law of the Right to Privacy" (1931) 47 LQR 219.

4) F H Lawson, A E Anton and L Neville Brown Amos and Walton's Introduction to French Law 3 ed (1967) 209.

5) Ibid.

6) Walton op cit 221. Cf G Lyon-Caen "The Right to Privacy or New Scenes from Private Life" (1967) 14 Rev of Contemp Law 69, 70: "a subjective law of privacy or for the respect of private life, has been built up along the lines of property law". Cf the United States, see above 52.

7) Cf Justice Report Privacy and the Law (1970) 19, para 87.

8) [1858] Dalloz Pér 62; cf Lyon-Caen op cit 70f.

9) [1908] 2 Dalloz Pér 73; cf Walton op cit 221.

10) [1908] 2 Dalloz Pér 292; Walton op cit 221.

11) Whistler v Eden [1900] 1 Dalloz Pér 497; Walton op cit 224. The court held that a painter who refused to deliver a painting was not entitled to make "any use of it whatever before having changed it in such a way as to make it unrecognisable". Ed A H Robertson Privacy and Human Rights (1973) 48.

The right to privacy in France, as in the United States and Germany appears to have developed through the case law. The French courts have recognized the existence of "la vie privée", the right to a private life, which includes "le droit au respect de la vie privée", "la defense du secret de la vie privée"[1] ie the right to have one's private life respected, the protection of the secrets of one's private life.[2] It seems that the right to privacy in France is primarily based upon the general provision of the French Civil Code.[3]

> "Article 1382. Any act by which a person causes damage to another makes the person by whose fault the damage occurred liable to make reparation for such damage".[4]

Article 1382 is generally regarded as providing a claim for damages resulting from non-pecuniary injury and tc imply a protection in the civil law for the victim's honour.[5] It has been suggested that the right to respect for private life must be distinguished from the right to be protected against attacks on honour and reputation. The reason given is that such attacks: (a) may relate to public life, and (b) are generally dealt with by the criminal law which requires intention to harm - a factor which in France is not relevant to the question of privacy.[6] It is submitted, however, that the above explanation is unsatisfactory for two reasons: (a) even where the facts relate to a person's public life he may have an action for invasion of privacy eg where he is placed in a false light,[7] or his image is appropriated for gain;[8] and (b) it can be

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1) Justice Report Privacy and the Law (1970) 19, para 87: "There is, however, another term which is even more private: la vie intimé".

2) The writer's translation. The writer would like to record his thanks to M Pitot a 1976 final year law student, for his assistance in the translation of the various French passages.

3) Cf Justice Privacy op cit 19, para 88; Lyon-Caen op cit 69.

4) Cf H D Krause "The Right to Privacy in Germany - Pointers for American Legislation" 1965 Duke LJ 481, 518 n 156. For French text see Justice Privacy op cit 19, para 88.

5) A Lögdberg "The Right in a Person's Own Likeness" (1967) 11 Scandinavian Studies in Law 213, 215. Cf P C Pauw Persoonlikheidskrenking en Skuld in die Suid Afrikaanse Privaatreg -'n Regshistoriese en Regsvergelykende Ondersoek (1976) 140.

6) Cf Robertson op cit 42 n 126.

7) See below 290.

8) See below 300.

argued that the word "faute" (fault) in Article 1382 has a wider meaning than intention to harm.[1)]

The recognition of a right to privacy can also be inferred from Article 35 of the Press Law[2)] which states:

> "The truth of a defamatory statement can always be proved except:
> (a) when the imputation concerns the private life of a person;
> (b) when the imputation refers to facts which go back to more than 10 years;
> (c) when the imputation refers to a fact constituting a wrong which has been pardoned or prescribed, or which has given rise to a conviction which has been erased ('éfface') by rehabilitation or review".[3)]

It seems therefore that in matters relating to privacy truth alone is no defence.

In 1970 the Civil Code was amended by a new Article 9 which provides for the "protection of private life"[4)] and is based on Article 8 of the European Convention on Human Rights.[5)] The Article states that "everyone has the right to respect for his private life"[6)] and seems to be primarily aimed at infringements by publication.[7)] Wider protection, however, is given by the new Articles 368-372 of the Penal Code which were also introduced in 1970.[8)] These amendments together with the previously existing law provide the basis for

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1) The French word "faute" is translated as "lack, need, want ... fault, mistake .." Eds RPL Ledésert & M Ledésert Harrap's New Standard French and English Dictionary Part One (1972) F:9; similarly, the English word "fault" means "something wrongly done ... misdeed, transgression, offence ... a slip, error, mistake .." Ed CT Onions The Shorter Oxford English Dictionary (1939) 680.

2) Law of July 19, 1881 (amended May 6, 1944); cf Justice Privacy op cit 20, para 88. Lyon-Caen op cit 70, also refers to the Press Law of July 29, 1961, Article 35; the Criminal Procedure Code, Article 11; and the Law of December 6, 1954.

3) My translation. See above 97 n 2. For the French text see Justice Privacy op cit 20, para 88.

4) Part III Law of July 17, 1970; cf "Current Legal Developments" (1971) 20 ICLQ 365; cf Robertson op cit 53. Cf Pauw op cit 145f.

5) See below 108.

6) (1971) 20 ICLQ 365.

7) Ibid.

8) (1971) 20 ICLQ 365f; cf Robertson op cit 53, 58.

a well developed right to privacy. It is therefore possible in French law to identify Prosser's traditional categories of intrusions, publication of private facts, false light cases and appropriations.[1)]

1. Intrusions: In Civil law these include undressing an employee suspected of theft;[2)] taking a telephoto picture of an actress and her child in their home;[3)] searching a woman's handbag[4)] or a person's body;[5)] and subjecting a person to a medical examination.[6)] Furthermore the Penal Code provides protection against such intrusions as unlawfully entering another's home;[7)] wilful and unauthorized photographing of a person on private property;[8)] listening to, recording, or transmitting conversations of others without their consent;[9)] and illegal mail interception.[10)]

2. Publication of Private Facts: Protection against disclosures concerning a person's private life is now enshrined in the new Article 9 of the Civil Code to the extent that a court may on an ex parte application "order such measures as seizure of offending matter

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1) See above 55.

2) (1904) 5 Dalloz Pér 596; cf Neethling Privaatheid op cit 134.

3) Brigitte Bardot v Beaverbrook Newspapers Ltd (1966) 2 JCP 14521; cf "Current Legal Developments" (1966) 15 ICLQ 581.

4) Neethling Privaatheid op cit 133.

5) Ibid.

6) International Commission of Jurists "The Legal Protection of Privacy : A Comparative Study of Ten Countries" (1972) 24 Int Soc Sci J 470f.

7) Article 184; cf (1972) 24 Int Soc Sci J 482f; Justice Privacy op cit 20, para 88.

8) Article 368; cf (1972) 24 Int Soc Sci J 517; Robertson op cit 53.

9) Article 368; cf Robertson op cit 58. See also Articles 371, 372; cf (1972) 24 Int Soc Sci J 509.

10) Article 187; cf (1972) 24 Int Soc Sci J 489f. Interception of correspondence is allowed, however, for the detection of crime. Criminal Procedure Code, Articles 30 and 81(1); cf (1972) 24 Int Soc Sci J 493.

in order to prevent a threatened invasion of privacy".[1] Nonetheless for many years prior to 1970 the Courts recognized that a person has a right to prohibit any publication of his own image or likeness,[2] or the contents of his correspondence.[3] As in the United States[4] and South Africa,[5] however, it was accepted that there is a distinction between private persons ("anonymes") and persons in the public eye ("protoganistes de l'actualité"), and between private and public life.[6] Actors, politicians, sportsmen and other public figures are personnages mêlés à la vie publique and cannot complain about the publication of their portraits, provided such pictures do not disclose any feature of their private life.[7] "For the actor, family life and privacy comes into the domain of private life just as it does for the ordinary citizen".[8] Such persons are therefore protected against scandal or gossip concerning their love

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1) (1971) 20 ICLQ 365. This appears to be a codification of what was an increasing trend in the case law. Cf Lyon-Caen op cit 72, who stated in 1967: "More recently the courts have tended to take a road ... /of/ preliminary seizure of texts or images. This seizure may infringe upon the freedom of the press ... /but/ is, however, the only guarantee of true protection, since it keeps facts of private life from the public".

2) Lögdberg op cit 214. Cf Anne Philipe v Société 'France Editions et Publications' (1966) 2 Gaz Pal 187, Lyon-Caen op cit 84; Gall v 'Ici Paris' (1966) 1 Gaz Pal 40, Lyon-Caen op cit 84f. Both cases concerned photographs of minors and in each the court banned the proposed publication.

3) Lyon-Caen op cit 71: "Judgments concerning the right to one's image are also numerous, as are those protecting the secret of correspondence".

4) See below 315.

5) See below 318.

6) Justice Privacy op cit 20, para 89. Cf Brigitte Bardot v Société de Presse Marcel Dassault (1966)1 Gal Pal 37 which stated that a photograph reflecting "the likeness of a public personality such as an actress which, if taken with her knowledge and during her professional life, does not necessitate special consent for their reproduction, for such persons do not only accept but seek publicity" Lyon-Caen op cit 79.

7) Brigitte Bardot v Société de Presse Marcel Dassault supra: "this principle concerning public persons is however limited: special permission becomes once more necessary in relation to the publication of a photograph representing the public person during his private life". Cf Walton op cit 226f.

8) Lyon-Caen op cit 81; Bernard Blier v Société 'France Editions et Publications' (1966) 2 JCP 14875.

life;[1] family position;[2] physical, psychological or mental condition;[3] philosophical or religious convictions;[4] career;[5] or leisure activities.[6] This principle has been applied even where an actress has permitted indelicate photographs of herself to be published in the Press,[7] and where a public figure attends a public function in his private capacity (eg a wedding)[8] and forbids publication. In the latter case, however, if such a public figure does not object to the publication he is presumed to have consented.[9] Similarly if a writer creates a character based on an actual identifiable person he will be liable to such person;[10] but an historian may give a factual objective account of the life of a contemporary person;[11] and a person may produce a book or film about the life

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1) Trintignan v Société 'La France Continue' [1966] Dalloz 749, cf Robertson op cit 31; Segret v Chabral (1965) 2 JCP 14482, cf Lyon-Caen op cit 73f; Gall v 'Ici Paris' (1966) 1 Gaz Pal 39, cf Lyon-Caen op cit 85f; Sachs v 'Lui' (Jan 28-31, 1967) Gaz Pal, 4 Lyon-Caen op cit 87f.

2) Bernard Blier v Société 'France Editions et Publications' supra: "Whereas his private life is part of the moral patrimony of every person and constitutes, as his image, the prolongation of his personality; whereas anecdotes and stories about his private life cannot be published without the special and unquestionable authorisation of the person concerned; whereas this is particularly so in the case of conjugal privacy and all that is connected with sentimental or family life; these principles should be applied in the same way to actors who cannot be refused the protection due to their privacy upon the special pretext that they sought the publicity necessary for their fame". Lyon-Caen op cit 81.

3) Anne Philipe v Société 'France Editions et Publications' (1966) 2 JCP 14222; cf (1966) 15 ICLQ 581. Lyon-Caen op cit 84, mentions that this was a landmark case concerning seizures: "From now on, any interference in a person's private life justifies the seizure of the publication". Cf Article 9, Civil Code.

4) Brigitte Bardot v Société 'France Editions et Publications' (1968) JCP No 2136; cf Robertson op cit 31.

5) Marlene Dietrich v Société 'France Dimanche' (1955) 1 Gaz Pal 396; cf Lyon-Caen op cit 72f.

6) Brigitte Bardot v Beaverbrook Newspapers Ltd supra (1966) 15 ICLQ 581; Brigitte Bardot v Société de Presse Marcel Dassault [1967] Dalloz 450; cf Robertson op cit 31.

7) Ibid.

8) Cf Justice Privacy op cit 20, para 90.

9) Ibid; cf (1966) 15 ICLQ 581.

10) Justice Privacy op cit 20, para 91. cf Hulton v Jones [1910] All ER Rep 29 (CA) 47.

11) Justice Privacy op cit 20f, para 91; cf Lyon-Caen op cit 73.

of a criminal, provided the facts are true and widely known to the public.[1] It is submitted, however, that in respect of disclosures concerning the life of a criminal such disclosures must not exceed the limits of Article 35 of the Press Law.[2] In the case of private individuals the courts have recognized that:

> "Whereas the image of the person is for each person the prolongation of his personality ... it follows that every person has the right to forbid a third person to make a photographic representation of his image, for any exhibition or publication of this image".[3]

Where, however, a photograph of a private person is taken in a public place and published without his consent the publication will only be actionable if the photograph has been altered in such a manner as to place him in a false light[4] or expose him to ridicule.[5] Even those writers who maintain that an individual is protected against being photographed or filmed in a public place without his knowledge, suggest that there are exceptions, for instance: (a) when the likeness is not the intended subject of the photograph ie involuntary or incidental; and (b) when the picture is taken by professional photographers in the hope of later selling it to the person photographed.[6]

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1) (1957) 1 JCP No 1374 para 13; cf Robertson op cit 51.

2) See above 98.

3) Lyon-Caen op cit 78; cf Eynard v Doisneau (1966) 1 Gaz Pal 331, Lyon-Caen op cit 76f.

4) See below 103.

5) Villard v Roches (1965) 2 JCP 14305: "the right to reproduce a photograph in the press is admissible when it has been taken in a public place ... /I/n the scene in question the persons did not seek to hide themselves or were not, momentarily, as a result of the unforeseen and unsought circumstances, in a ridiculous or disagreeable situation ... /T/he original character of the photograph representing an outside scene had not been changed by publication ... /But/ this right should be exercised with care arising from the desire to do nothing which might expose one's neighbour to criticism or derision, even if justified by his attitude". Cf Lyon-Caen op cit 75 But cf H Patrick Glenn "Right to Privacy in Quebec" (1974) 52 Canadian Bar R 297, 302 n 27; cf (1971) 4 16734. See below 332.

6) Robertson op cit 54.

In addition the Penal Code imposes penalties for wilful publication of recordings or documents[1] and breaches of professional secrecy by medical practitioners, midwives and chemists[2] - the latter has been extended by case law to include magistrates, legal practitioners and ministers of religion.[3] Professional secrecy is also imposed on postal employees by the Posts and Telecommunications Code.[4]

3. False Light: Where a person's image or likeness is portrayed in a manner which conveys a false or misleading impression in the eyes of the public an action may lie for invasion of privacy.[5] This principle has been applied where disclosures concerning a well-known actress's life were published so as to give a false impression that she had written them herself;[6] where a photograph was published which was captioned to imply that the subject was intoxicated;[7] and where an incident in a woman barrister's life was portrayed in a film in which "certain episodes based on authentic facts and others on the imagination of the author follow/ēd/ one upon the other to form a whole /sō that/ certain insufficiently informed spectators might not be capable of distinguishing reality from fiction."[8] It has been said that it does not matter whether the disclosures made are true or false,[9] but it seems that in the case of photographs taken in public

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1) Article 369; Robertson op cit 58 n 186; (1971) 20 ICLQ 365.

2) Article 378; (1972) 24 Int Soc Sci J 570.

3) (1972) 24 Int Soc Sci J 571.

4) Articles 41, 42, 177; cf (1972) Int Soc Sci J 497.

5) See below 290.

6) Marlene Dietrich v Société de France-Dimanche (1955) 1 Gaz Pal 396; cf Lyon-Caen op cit 72f: "the souvenirs /memoirs/ were published without the authorisation of Marlene Dietrich and nothing but clever presentation made it seem that she had given her consent."

7) Eynard v Doisneau supra, cf Lyon-Caen op cit 77: "Th/ē/ caption constituted an abusive use of the photo for it suggested that the models were drunkards".

8) Szatan-Glaymann v Cavalier Paris 1re ch July 6, 1966, Lyon-Caen op cit 82.

9) Neethling Privaatheid op cit 136. Cf Bernard Blier v Société 'France Editions et Publications' supra, Lyon-Caen op cit 81: "Thus it was an offence to publish details, whether true or false, of Bernard Blier's family life".

places with the plaintiff's consent, the latter will only succeed if he shows that the publication placed him in a false light.[1)]

(d) Appropriation: Like in the United States,[2)] several of the early French privacy cases involved appropriation for commercial gain.[3)] A person's photograph cannot be published in the press or exhibited to the public for commercial reasons without his prior consent, for instance in a catalogue;[4)] on a gramophone record cover;[5)] in a fashion magazine;[6)] or in an advertisement.[7)] Furthermore an individual's image may not be used in a film without such authority,[8)] unless the events depicted are of historical interest[9)] or were "widely publicized in the press".[10)] The "appropriation" principle appears to have been extended to photographs of public figures taken in public places.[11)] Since 1970 the appropriation cases would also be covered by the new provisions of the Civil Code.[12)]

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1) See above 102.

2) See above 52f.

3) See above 96.

4) Liakoff v Société der Magasias du Printemps (1934) 2 Gaz Pal 238; cf Robertson op cit 48 n 154.

5) Soraya Esfandiary v Société Arteco and Richir (1961) 1 Gaz Pal 17; cf Robertson op cit 48f n 154.

6) (1963) 2 Gaz Pal 53; cf Robertson op cit 48f n 154.

7) Brialy case (1966) 2 JCP 14890, Lyon-Caen op cit 79f, where the plaintiff had agreed to be photographed, but did not consent to his photograph being used to advertise men's clothing.

8) /1905/ Dalloz Pér 389, Robertson op cit 48 n 155.

9) Cf Segret v Chabral supra, Lyon-Caen op cit 73f.

10) Lyon-Caen op cit 82; cf Szatan-Glaymann v Cavalier supra.

11) Cf Robertson op cit 49f n 159: "the French weekly l'Express published a photo of President Pompidou on holiday sitting on a motor boat next to a very conspicuous 'Mercury' motor car. The photo was illustrating a Mercury advertisement ... On an application by M Pompidou, the Paris Court of First Instance granted an interlocutary injunction forbidding l'Express to distribute the number in question because the President's picture had been used without his consent".

12) Article 9; cf (1971) 20 ICLQ 365.

Despite its recent inclusion in the Civil Code,[1] the right to privacy in France has never been clearly defined by either the courts or academics.[2] French legal writers have given a number of different definitions. Martin defines a person's private life as:

> "a person's family and personal life, his intimate, spiritual life, the life he lives at home with the door shut".[3]

Nerson on the other hand regards the 'right to privacy' (droit a l'intimite) as the right to:

> "a private preserve which enables an individual to make the essence of his personality inaccessible to the public without his consent. In this way a person can enjoy peace and remain alone with himself. He is entitled to the right kind of central redoubt where he can escape the grip of others".[4]

Carbonnier describes it as the individual's right to:

> "a private sphere of life from which he has the power to exclude others .. the right to respect for the private nature of his person .. the right to be left in peace".[5]

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1) Ibid.

2) Justice Privacy op cit 20, para 89; Neethling Privaatheid op cit 125. Cf Lyon-Caen op cit 71: "What are the circumstances constituting personal privacy that the individual can plead in order to avoid being pried upon? Among them are those of family life: birth, engagement, marriage, divorce, pregnancy, sickness, death; and also those of a person's sentimental life, professional life, and their counterparts, that is leisure time, holiday places, occupations, company. We should also include the features of one's face and behaviour in every-day life. Perhaps also the past and one's dreams. More questionable is the inclusion under the heading of privacy of the amount of a person's income, the level of one's standing, the state of one's income tax return".

3) Martin "Le secret de la vie privée" (1959) Rec tr dr civ 230; translated by Robertson op cit 28. Neethling Privaatheid op cit 127, suggests that Martin's approach has the widest support in France.

4) R Nerson (1959) Journal des Tribunaux 713; translated by Robertson op cit 28. Cf E Goffman Relations in Public (1972) 63, see above 3.

5) J Carbonnier Droit Civil (1965) I 239, translated by Robertson op cit 28. Neethling Privaatheid op cit 125, submits that Carbonnier's approach is similar to the German concept of "spharen". See above 91.

It has been suggested that French academics adopt similar theories to their German counterparts when discussing the "vie intime" and "vie privée"[1] although these concepts have not been clearly distinguished.[2]

(a) The "vie intime": This, like the German "geheimsphäre"[3] is said to refer to a person's intimate life behind closed doors ie. his thoughts, feelings, image and written or spoken words.[4] The "vie intime" recognizes the confidentiality of disclosures made to immediate family or friends,[5] as well as professional secrets[6] and the contents of letters.[7] It is usually infringed by "intrusions"[8] or as "publicity",[9] but may also be violated by disclosures which place a person in a "false light"[10] (harming his image or feelings), or the "appropriation"[11] of his thoughts or words for commercial gain.

(b) The "vie privée": This is difficult to define but is analogous to the German "privatsphare"[12] and includes the right to seclusion in one's life exploits, home, and image or likeness.[13] It clearly overlaps with the "vie intime" and is also infringed by intrusions, publication of private facts, false light disclosures and appropriations.[14] In publication cases, however, it seems that the disclosure will only be actionable if it was made to the public as a whole.[15]

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1) Neethling Privaatheid op cit 126, states that the "vie intime" coincides with the "geheimsphare", and the "vie privée" with the "privatsphare".

2) Neethling Privaatheid op cit 127.

3) See above 91.

4) Neethling Privaatheid op cit 138.

5) Ibid.

6) Neethling Privaatheid op cit 138f; cf (1972) 24 Int Soc Sci J 570f. See above 103.

7) Neethling Privaatheid op cit 140.

8) See above 99; cf Neethling Privaatheid op cit 141.

9) See above 99f; cf Neethling Privaatheid op cit 142.

10) See above 103f.

11) See above 104.

12) See above 92f.

13) Neethling Privaatheid op cit 131f.

14) See above 99f.

15) Neethling Privaatheid op cit 136, who seems to imply that unlike in German law where an invasion of the "Geheimsphare" is actionable even where the disclosure is made to a few people (see above 92), in France the plaintiff will only succeed if publication is made to the world at large. If this is the case there is little reason for distinguishing the "vie intime" from the "vie privée".

Conclusion: Prior to 1970 the French courts had long recognized a general right to privacy which was "among the strongest in the world".[1] The 1970 amendment to the Civil Code[2] has further supplemented the broad principles of Article 1382.[3] In some cases the right to privacy in French law goes beyond that of other jurisdictions, for instance where it extends after a person's death in that consent of the family is required when using the deceased's image and likeness;[4] and where it protects a person's right to use a particular Christian or surname.[5] As in Germany,[6] the French have also introduced a number of penal provisions to protect the individual's privacy,[7] and some steps have been taken to meet the threat of computerization and data banks. A Commission on Data Processing and Freedom was appointed in 1974, and has since recommended: (i) the creation of a new independent agency with certain powers of control over data processing; (ii) certain constraints in the public and private sector on the collection and storage of personal data; and (iii) recognition of the right of individuals or associations to know and criticize the data stored about them.[8]

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1) (1971) 20 ICLQ 365.

2) Article 9. See above 98.

3) See above 97.

4) [1858] 3 Dalloz Pér 62; Robertson op cit 49. Cf Pauw op cit 148.

5) Walton op cit 223; cf Justice Privacy op cit 21, para 92. Cf Neethling Privaatheid op cit 128ff, who regards the protection of a person's name as a separate personality right.

6) See above 89f.

7) See above 99f.

8) HMSO Computers: Safeguards for Privacy (1975, Cmnd 6354) 45.

F. OTHER EUROPEAN COUNTRIES

The right to privacy has been recognized in several other European countries. Apart from England, the Federal Republic of Germany and France, Austria, Belgium, Cyprus, Denmark, Iceland, Ireland, Italy, Luxembourg, Malta, Norway, Sweden and Turkey are all signaturies to the European Convention on Human Rights which states:

> "Article 8 (1) Everyone has the right to respect for his private and family life, his name and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".[1)]

The right is easily accommodated in those countries which recognize a general 'right of personality', and even where 'personality rights' are not recognized, aspects of privacy may be protected by certain provisions of the different Civil and Criminal Codes. Switzerland, for instance, has a general law of personality rights,[2)] and not only may invasions of privacy be interdicted without proof of fault,[3)] but in cases of wilful or negligent invasions the injured party can recover pecuniary loss (Schadenersatz) as well as moral damages (Genugfuung)in more serious cases.[4)] It has been suggested

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1) Ed AH Robertson Privacy and Human Rights (1973) 12 n 2, who states that Greece is also bound by the Convention. See also FG Jacobs The European Convention on Human Rights (1975) 126.

2) HC Gutteridge "Comparative Law of the Right to Privacy" (1931) 47 LQR 203, 211; A Lögdberg "The Right in a Person's Own Likeness" (1967) 11 Scandinavian Studies in Law 213, 219f.

3) Article 28, Swiss Civil Code (ZGB); cf Gutteridge op cit 212; Lögdberg op cit 219f; WA Joubert Grondslae van die Persoonlikheidsreg (1953) 39.

4) Article 49, Code of Obligations (OR); cf Gutteridge op cit 213, Joubert Persoonlikheidsreg op cit 39. Criminal penalties are imposed by the Federal Law for the Protection of Privacy, 20 December 1968, cf International Commission of Jurists "The Legal Protection of Privacy: A Comparative Study of Ten Countries" (1972) 24 Int Soc Sci J 418, 524. Generally on the law of personality rights in Switzerland see P C Pauw Persoonlikheidskrenking en Skuld in die Suid-Afrikaanse Privaatreg -'n Regshistoriese en Regsvergelykende Ondersoek (1976) 116, 118f. On the question of fault see Pauw op cit 122f.

that such a general personality right also exists in Liechtenstein,[1] and Austria.[2] Personality rights in general are not recognised in Sweden,[3] and it is uncertain whether they exist as a broad concept in Denmark[4] and Norway.[5] The civil law action for invasion of privacy in the Netherlands[6] is based on the French Civil Code[7] and has been supplemented by international, constitutional and criminal law provisions.[8] Poland[9] and the Soviet Union[10] also purport to protect the right to privacy.

In several Western European countries it is once again possible to discern the seminal threads of Prosser's categories: intrusions, publications of private facts, false light cases and appropriations.[11]

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1) Article 39; Liechtenstein Zivilgesetzbuch; cf Gutteridge op cit 214 n 7; Joubert Persoonlikheidsreg op cit 48f.

2) Article 16, Austrian Burgerlichesgesetzbuch (ABGB); cf Joubert Persoonlikheidsreg op cit 35.

3) Lögdberg op cit 229.

4) Lögdberg op cit 225.

5) Lögdberg op cit 224.

6) Article 1401, Civil Code (Burgerlijk Wetboek, BW); cf F De Graaf "The Protection of Privacy in Dutch Law" (1976) 5 Human Rights 177, 178. Cf Pauw op cit 124f.

7) Article 1382, see above 97; cf De Graaf op cit 181

8) De Graaf op cit 178.

9) Polish Civil Code, Law of April 23, 1964: "Article 23. A man's personal rights, notably his health, liberty, dignity, freedom of conscience, family name or psuedonym, image, privacy of correspondence, inviolability of home and scientific, artistic, inventive or rationalizing achievement, shall be protected by civil law independently of the legal protection contemplated by other provisions". Cf Ed D Lasok Polish Civil Law (1975) IV 6.

10) Brezhnev's New Constitution (1977).

11) See above 55.

1. Intrusions: Protection against eavesdropping, interception of correspondence or postal communications, harassment and intrusions in the home is given in various jurisdictions.

(a) Eavesdropping: The unauthorized recording of or eavesdropping on, another's private conversation is a punishable offence under the respective Criminal Codes of a number of countries. Under the Swiss Criminal Code, for instance, it is an offence to listen to or record non-public conversations, or to communicate the facts or sound of such conversations to third parties.[1] In the Netherlands the Penal Code makes it an offence to listen to conversations by means of technical devices,[2] and a similar draft Bill has been tabled in Belgium.[3] According to the Norwegian Criminal Code it is a crime to eavesdrop on conversations by means of a secret listening device, which includes listening to telephone conversations, conversations at meetings, and the surreptitious placing of listening devices on premises.[4] Similarly the Austrian Criminal Code has been amended to make misuse of recording devices punishable,[5] while the Danish provision concerning the unlawful interception of mail appears to have been extended to clandestine listening.[6] The Swedish Protection of Personal Privacy Committee has recommended that the unauthorized listening or recording of the private affairs of another should be a punishable offence analogous to housebreaking and that victims should be allowed a civil action similar to defamation.[7]

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1) Articles 179 bis - quater; Robertson op cit 57. (1972) 24 Int Soc Sci J 510, 518. In March 1969 a Bill was adopted protecting personality rights against small listening devices to supplement the Criminal Code, Robertson op cit 57 n 183. Cf Federal Law on Telegraphic & Telephonic Communications, Art 42, re telephone conversations (1972) 24 Int Soc Sci J 498.

2) Articles 139 (a) ff, Penal Code; Articles 125ff, Code of Criminal Procedure; cf De Graaf op cit 187.

3) Robertson op cit 57f.

4) Article 145 (a). Robertson op cit 55f.

5) Article 310(d), as amended; cf Articles 135(1), (2) of the proposed 1968 Bill for the new Austrian Criminal Code, Robertson op cit 56 n 180.

6) Robertson op cit 57.

7) Current Legal Developments (1971) 20 ICLQ 368, 369.

In any event it could be argued that in Sweden such activities are actionable if they constitute an "illegal" intrusion or trespass.[1)]

(b) Correspondence and Postal Communications: In Belgium the Draft Bill on the Protection of Private Life makes it punishable to open closed messages or to use a technical process to obtain knowledge of the contents of such a message,[2)] and similar provisions exist in the Austrian Draft Bill.[3)] The Danish Criminal Code makes it an offence to open closed correspondence or otherwise intercept communications,[4)] and likewise the Swedish Criminal Code punishes the unlawful interception of messages in the form of letters,[5)] telegrams or other telecommunications.[6)] In Switzerland not only is it an offence to breach the privacy of correspondence,[7)] or postal communications[8)] but under the broad provisions of the Civil Code[9)] the plaintiff may also have a civil remedy. The law relating to the privacy of letters in the Netherlands is governed by both the Constitution[10)] and the Penal Code,[11)] and it is submitted under the Civil Code.[12)]

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1) Article 8, Penal Code; cf (1972) 24 Int Soc Sci J 509.

2) Article 1(2); cf Robertson op cit 63 n 210.

3) Articles 133(1),(2); cf Robertson op cit 63 n 210.

4) Article 263(1); cf Robertson op cit 57.

5) Article 2, Penal Code; cf (1972) 24 Int Soc Sci J 489.

6) Article 8, Penal Code; cf (1972) 24 Int Soc Sci J 489.

7) Article 179, Penal Code; cf (1972) 24 Int Soc Sci J 490. Article 36(4), Federal Constitution of 29 May 1874, states: "The inviolability of the secrecy of letters and telegrams is guaranteed"; cf (1972) 24 Int Soc Sci J 490.

8) Articles 5(a), 57, Federal Law on Postal Services, 2 October 1924; cf (1972) 24 Int Soc Sci J 490.

9) Article 28; cf (1972) 24 Int Soc Sci J 490f.

10) Article 173.

11) Article 371; cf De Graaf op cit 183.

12) Article 1401. See above 109.

(c) Harassment and Intrusions in the Home: Sweden imposes criminal penalties for spying or causing annoyance to a person in public;[1] harassment by radio and television reporters;[2] and invasions of the home,[3] although no civil remedy is provided for the latter.[4] In Switzerland intrusions into the home,[5] harassment and spying[6] are punishable offences, all of which are likely to be actionable under the Civil Code,[7] while Dutch penal law protects the home against invasions by both the State[8] and private individuals[9] so that any violation thereof will also give rise to a civil remedy.[10]

Most European countries, however, seem to recognize that the police force may use listening and recording devices and intercept mail during the detection of crime,[11] or for the security of the State.[12]

2. Publication of Private Facts: In Sweden, Switzerland and the Netherlands such conduct may be actionable either under the laws

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1) Article 7, Penal Code; cf (1972) 24 Int Soc Sci J 523f.

2) Law on the Responsibility of the Radio, 30 December 1966; (1972) 24 Int Soc Sci J 524.

3) Article 16, Swedish Constitution, Article 6, Penal Code; (1972) 24 Int Soc Sci J 581, 582.

4) (1972) 24 Int Soc Sci J 482.

5) Article 186, Penal Code.

6) Article 179(7), Penal Code; cf (1972) 24 Int Soc Sci J 524; cf Article 179 quat, Penal Code, which makes it an offence to "record by means of a camera or other recording apparatus anything touching upon the private life of that person or anything concerning that person's private life which could not be perceived by anyone in the ordinary way", without their consent. (1972) 24 Int Soc Sci J 518.

7) Article 28; cf (1972) 24 Int Soc Sci J 524.

8) Article 172, Dutch Constitution; Article 370, Penal Code; cf De Graaf op cit 182.

9) Article 138, Penal Code; cf De Graaf op cit 183.

10) De Graaf op cit 183.

11) Cf Robertson op cit 75f.

12) Cf Article 8(2), European Convention on Human Rights. See above 108.

relating to defamation or those protecting professional confidentiality. Sweden[1] like Switzerland[2] imposes criminal liability for defamatory or insulting words or acts, but a Dutch writer has suggested that in the Netherlands defamation and privacy should be distinguished.[3] Professional and official secrecy, however, is respected in all three countries. In Sweden[4] and Switzerland[5] confidentiality is imposed on civil servants, postal workers, doctors, lawyers, bankers, accountants, clergymen, chemists, social workers, midwives and the like, and similar provisions exist in the Netherlands.[6] It is submitted that in Switzerland[7] and the Netherlands[8] such breaches of confidence and other disclosures concerning private life may also be actionable under the Civil Code. In Norway the Penal Code goes further and imposes criminal liability on anyone who infringes the right of privacy by publishing facts relating to another's personal or domestic sphere.[9] Furthermore a number of countries including Sweden,[10] Denmark, Norway,[11] and the Netherlands[12] have been considering legislation to control the operation of data banks.

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1) Articles 1, 3, Penal Code; cf (1972) 24 Int Soc Sci J 543f.

2) Articles 173, 176, 177, Penal Code; cf (1972) 24 Int Soc Sci J 548.

3) De Graaf op cit 184f: "In the case of publicized debts, the wrong is in the fact that someone's reputation is hurt, which places the conduct in the category of defamation. In the case of private letters, however, it is not reputation which is at stake - that may or may not be the case, but is irrelevant - but rather the protection of someone's personal thoughts and feelings from dissemination against his will". Cf Pauw op cit 125.

4) Cf (1972) 24 Int Soc Sci J 568f.

5) Cf (1972) 24 Int Soc Sci J 571f.

6) Cf De Graaf op cit 189f.

7) Article 28, Civil Code.

8) Article 1401. The Courts convicted a magazine which published a picture of a reformed prostitute to illustrate an article on prostitution. (1970) NJ 180; cf De Graaf op cit 188f. Cf Melvin v Reid (1931) 112 Cal App 285, 297 p 91. See below 174.

9) Article 390; cf Lögdberg op cit 224.

10) (1972) 24 Int Soc Sci J 447f.

11) (1972) 24 Int Soc Sci J 431.

12) De Graaf op cit 191.

3. False light: In many instances where a publication puts a person in a false light the latter will be able to sue for defamation or insult.[1] It could be argued however that some countries seem to regard such publications as an invasion of privacy. For instance in Belgium if a writer unjustifiably gives a fictitious character a real name to the detriment of the true owner he is liable in damages to the latter.[2] In the Netherlands the courts have held illegal the unauthorised release of an imperfect recording made by a singer four years previously,[3] and have enjoined the distribution of a film depicting a romantic caricature of the real life exploits of a member of the Dutch resistance during World War II.[4]

4. Appropriation: The appropriation of a person's image or likeness usually occurs where his name, photograph or portrait is used without his consent for commercial gain.[5]

(a) Names: In Italy it is a wrong to violate a person's right to his name, but this has been held not to apply where a film is made about a famous person whose name is actually used.[6] Similarly in Norway a representation of a murder scene in a film made a long time after the event was held to be actionable.[7] The same principles have been applied in Switzerland,[8] and in Sweden a person's name may be protected under the Copyright Act.[9]

(b) Photographs: In Italy the right to one's image and likeness is protected,[10] and a person may object to a likeness, which has

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1) See above.
2) Robertson op cit 46.
3) (1971) NJ 205; cf De Graaf op cit 189.
4) (1963) NJ 64; cf De Graaf op cit 64.
5) See below 131f.
6) Caruso v Tirrenia Film (1957) 1 Giuriprudenza Italiana 1 col 366; cf Robertson op cit 46.
7) Lögdberg op cit 224.
8) Article 29, Civil Code; Gutteridge op cit 214. Cf Pauw op cit 118.
9) (1972) 24 Int Soc Sci J 560.
10) Article 17, Copyright Act, cf Lögdberg op cit 219; Robertson op cit 50.

been obtained without consent, being published or otherwise made use of or exhibited.[1] A Swiss court has held it to be an invasion of a person's privacy (Geheimsphäre) where a picture was taken from a group photograph of a baptism and used to illustrate a book.[2] According to Belgian law reproduction of a person's photograph without his knowledge amounts to a kind of trespass to the person,[3] while in Norway the Copyright in Photographs Act of 1960 gives copyright to the person commissioning the photograph.[4] Such photograph, however, can only be reproduced, exhibited, or otherwise published with the consent of the subject.[5] The Swedish Act on Copyright in Photographs also provides that the person who orders a photograph has copyright in it, unless otherwise agreed upon,[6] but allows the photographer the right to use such photographs to advertise his business provided the buyer does not forbid it.[7] Provisions similar to those in the Swedish Act have been incorporated in the Finnish Act on Copyright in Photographs of 1960,[8] and the Danish Act of 1961.[9] In 1965 the Danish Supreme Court protected a person against the unauthorized use of the "goodwill" value of his picture.[10] The Dutch Penal Code provides that "the surreptitious photographing of a person on private premises is punishable if a reasonable interest of the 'victim' is injured .. /ānd/ the possession or publication of such a photograph is punishable.[11]

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1) Article 10, Civil Code. But it does not forbid the unauthorised taking of a person's picture; Robertson op cit 52. Such reproduction, however, seems to be limited to protection of honour, reputation or dignity; Lögdberg op cit 219. It is submitted that privacy could be covered by the latter. See below 185.

2) Obergericht, Zurich 1944; Lögdberg op cit 220.

3) (1958) Journal des Tribunaux 44; Robertson op cit 54f.

4) Lögdberg op cit 223.

5) Ibid.

6) Lögdberg op cit 224.

7) Section 14, Swedish Copyright in Photographs Act; cf Lögdberg op cit 226, who observes: "Since the person who commissions is usually identical with the subject or closely related to him, this rule actually works, in the majority of cases, as a protection for the subject".

8) Lögdberg op cit 224.

9) Ibid.

10) Lögdberg op cit 225.

11) Article 138f; cf De Graaf op cit 188.

There are, however, a number of exceptions concerning liability for the unauthorized publication of photographs. In Italy photographs may be used without permission where the person concerned holds a prominent or official position;[1] or where they are used in the law courts or by the police;[2] or for scientific, pedagogical or cultural reasons;[3] or if they are in the public interest.[4] The Swiss seem to regard persons who have a place in "contemporary history" or who take part in public events, as having forfeited their right to privacy in their public life,[5] but allow them protection concerning their private or intimate life (Privat oder Geheimsphäre).[6] Furthermore in Switzerland a person may not recover if his picture incidentally forms part of a group photograph,[7] and a similar view is adopted in Norway.[8] Generally it seems that where such photographs are taken in the interest of the nation or public safety such invasions will be tolerated.[9]

(c) Portraits: The Italian courts have held that although a painter's model impliedly consents to the pictures in which she (or he) appears being displayed in an exhibition or art gallery, such consent does not extend to the picture being used to decorate a night-club.[10] It has been suggested that in Switzerland an action for the unauthorized publication of a portrait need not be based on a specific provision but would be covered by the general concept of 'Persönlichkeitsrecht',[11] and that the same would probably apply in

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1) Lögdberg op cit 219.
2) Ibid.
3) Ibid.
4) Ibid.
5) Lögdberg op cit 220.
6) Ibid.
7) Joubert Persoonlikheidsreg op cit 46.
8) Lögdberg op cit 223.
9) Cf Article 15, European Convention on Human Rights; Robertson op cit 66f. See also Article 8(2). See above 108.
10) Pretura, Rome 28 March 1956, Il diritto di autore (1956) 385; Robertson op cit 49.
11) Gutteridge op cit 214. Cf Pauw op cit 119.

Liechtenstein.[1] In any event the Swiss Copyright Act of 1922, prohibits the selling or publication of commissioned portraits of another without his consent - and where the subject is dead the permission of the family is required.[2] The Norwegian Copyright Act of 1961, provides that the artists' right in a portrait can only be exercised with the permission of both the subject and the person who commissioned the portrait.[3] In Sweden the Copyright Act of 1960, like the Swiss Act, states that in the case of commissioned portraits the artist may not publish such a portrait without the permission of the person who gave the commission, or after his death, the consent of the surviving spouse or heirs.[4] Similar provisions apply in Finland.[5] The Dutch Copyright Act also protects a person's economic interests by prohibiting the unauthorized publication of portraits or photographs.[6] In Sweden the law also protects "works" of artists and presentations of such works by recording devices or film without the artists' consent.[7]

5. Data Banks: A number of other European countries,[8] apart from the United Kingdom,[9] the Federal Republic of Germany[10] and France,[11] have taken steps to control data banks. In Sweden data banks in both the private and public sector are controlled by a Data Inspection Board established under the Data Act of 1973.[12] The proposed Data Protection Law of Austria is similar to the draft German Bill,[13] and would impose obligations on data banks in the private

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1) Cf Article 39, Liechtenstein Zivilgesetzbuch; Gutteridge op cit 214, n 47; Joubert Persoonlikheidsreg op cit 48f.

2) Article 35. Lögdberg op cit 220.

3) Lögdberg op cit 223f.

4) Article 27. Lögdberg op cit 227.

5) Finnish Copyright Act of 1961. cf Lögdberg op cit 224.

6) Article 21; cf De Graaf op cit 188.

7) Lögdberg op cit 229. Such an artist retains the copyright for 25 years from the date of the recording - but is not protected if such recording does not relate to a "work".

8) For the position in the United States see above 64f.

9) See above 81f.

10) See above 93f.

11) See above 107.

12) HMSO Computers: Safeguards for Privacy (1975 Cmnd 6354) 44.

13) See above 94 n 10.

and public sector under the control of an independent Data Protection Commission.[1] Government committees to consider the question of data banks have been set up in Denmark and Norway,[2] and in the Netherlands,[3] while legislation is also being considered in Belgium, Finland, Eire and Spain.[4] The matter has received attention in the United Nations[5] and the Committee of Ministers for the Council of Europe has adopted resolutions dealing with computers in both the private[6] and public sectors.[7] [8]

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1) Computers: Safeguards for Privacy op cit 44.

2) Ibid.

3) De Graaf op cit 191.

4) Computers: Safeguards for Privacy op cit 45.

5) Robertson op cit 111.

6) Resolution (73) 22, 26 September 1973, which recommended that the information stored should be accurate, up to date, relevant, not obtained fraudulently or unfairly, only used for the purposes for which it was obtained, secure against misuse, only released to valid inquirers and if statistical, released in aggregate to make identification impossible. Furthermore the subject of the information should have the right to know about its purpose and use, while operating staff should be bound by rules of professional secrecy. Computers: Safeguards for Privacy op cit 43, 47.

7) Resolution (74) 29, 29 September 1974, which stated that the public should be kept informed about the establishment, operation and development of electronic data banks in the public sector. In addition information stored should be obtained by fair or lawful means, accurate and up to date, appropriate and relevant, used strictly in terms of clearly defined laws or regulations, confined to specified time limits (unless statistical, scientific or historical), made known to the subject, secure from misuse, only released to persons entitled thereto, and if for statistical purposes, individual identities should not be disclosed. Data bank operators should be bound by rules of secrecy and strict security should be observed. Computers: Safeguards for Privacy op cit 43, 48.

8) Proposals for the control of data banks have also been made in New Zealand (Preservation of Privacy Bill, 1972 (NZ), Computers: Safeguards for Privacy op cit 44) and Australia (cf Queensland Invasion of Privacy Act, 1971, J Swanton "Protection of Privacy" (1974) 48 Austr LJ 91, 101; Information Storages Bill, 1971 (Victoria), Swanton op cit 102 n 82).

G. CANADA

It has been said that the protection of privacy in Canada is as great as in the United States and more than in any other Commonwealth or European country.[1] This contention however, requires qualification because although there is a Federal Protection of Privacy Act[2] which criminalizes eavesdropping and surveillance, only three provinces have enacted Privacy Acts.[3] For the rest while Quebec applies a Civil law approach[4] the other provinces follow Anglo-Canadian Common law.[5] Nonetheless the combination of statute and common law seems to embrace most of the traditional categories of invasions.

1. Intrusions: The Federal Protection of Privacy Act amended the Criminal Code by providing that anyone who wilfully intercepts a private communication by electromagnetic, mechanical or other device is guilty of an offence,[6] and in addition to any other sentence may be ordered to pay the victim punitive damages.[7] Eavesdropping and surveillance are statutory torts under the Privacy Acts of British Columbia[8] and Saskatchewan,[9] while the Manitoba Act[10] goes further and also includes the interception of telephone conversations.[11] In Quebec the right is protected under the general provisions of the Civil Code,[12] for instance a plaintiff could recover where he was

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1) P Burns "The Law and Privacy: The Canadian Experience" (1976) 54 Canadian Bar Rev 1, 89.

2) Protection of Privacy Act, SC, 1973-74 c 50; M Manning The Protection of Privacy Act (1974)

3) British Columbia, Manitoba and Saskatchewan; cf Burns op cit 32.

4) H Patrick Glenn "Civil Responsibility - Right to Privacy in Quebec - Recent Cases" (1974) 52 Canadian Bar Rev 297.

5) Burns op cit 12ff.

6) Section 178.11, Criminal Code; cf Burns op cit 50.

7) Section 178.21(1), Criminal Code; cf Burns op cit 58.

8) British Columbia Privacy Act, SBC 1968 c 39; Manning op cit 175. But cf Davis v McArthur (1971) 17 DLR 3d 760, the only reported case on the Act where the plaintiff failed to recover for a "Bumper-Beeper" homing device attached to his car by a private detective.

9) Saskatchewan Privacy Act, SS, 1974 c80; Manning op cit 184.

10) Manitoba Privacy Act, SM, 1970 c74; cf Manning op cit 179.

11) Cf H Storey "Infringement of Privacy and its Remedies" (1973) 47 Aust LJ 498, 507. Manitoba Telephone Act, SM, 1970; Manning op cit163.

12) Article 1053: "Every person capable of discerning right from wrong is responsible for the damage by his fault of another, whether by positive act, impudence, neglect or want of care". Cf Burns op cit 38.

inundated with a barrage of offensive telephone calls and letters after a television announcer had invited viewers to harass him.[1] In the other provinces the plaintiff will have to rely, in civil matters, on the Anglo-Canadian common law torts of trespass to land,[2] chattels[3] and person,[4] nuisance,[5] and intentional infliction of emotional distress.[6] A number of provinces do, however, impose criminal penalties for intercepting telephone communications.[7]

2. Publication of Private Facts: This form of invasion of privacy is covered by the general provisions of the three provincial statutes[8] and the Quebec Civil Code.[9] In the other common law provinces remedies may be available under such nominate torts as defamation,[10] copyright,[11] breach of contract[12] and breach of confidence.[13] Furthermore legislation governing the use of personal information stored by credit and personal data reporting agencies has been introduced in Manitoba,[14] British Columbia,[15] Ontario,[16] Nova Scotia,[17]

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1) Robbins v Canadian Broadcasting Corp (1957) 12 DLR 2d 37; cf Patrick Glenn op cit 297; Burns op cit 39.

2) Parkes v Howard Johnson Restaurants Ltd (1970) 74 WWR 255 (BCSC), Burns op cit 15. See above 73.

3) Burns op cit 16.

4) Burns op cit 17. See above 73.

5) Ibid. Cf Poole v Ragen [1958] OWN 77 (HC), Burns op cit 17f.

6) Burns op cit 20. See above 74.

7) Cf Nova Scotia Rural Telephone Act SNS, 1967, c 273; Quebec Telegraph and Telephone Companies Act SQ, 1964, c 286; Alberta Government Telephone Act SA, 1970, c 12; Ontario Telephone Act 1970, c 457. Cf Manning op cit 166ff.

8) British Columbia Privacy Act, SBC, 1968, c 39, s 2(1); Manitoba Privacy Act, SM, 1970, c 74, s 2; Saskatchewan Privacy Act, SS, 1974, c 80, s 2.

9) Article 1053.

10) Burns op cit 19. See above 74.

11) See above 77.

12) Burns op cit 20f.

13) Burns op cit 23. Cf Slavutych v Baker (1975) 55 DLR 3d 224; cf Burns op cit 24 n 133.

14) Personal Investigations Act, SM, 1971, c23; cf Burns op cit 42.

15) Personal Information Reporting Act, SBC, 1973, c139; cf Burns op cit 44.

16) Consumer Reporting Act, SO, 1973, c97; cf Burns op cit 44f.

17) Consumer Reporting Act, SNS, 1973, c4; cf Burns op cit 44f.

Saskatchewan,[1] and to a limited extent in Newfoundland[2] and Quebec.[3]

3. False light: Where a person is publicly placed in a false light an action may lie under the provisions of the Privacy Acts in British Columbia,[4] Manitoba[5] and Saskatchewan,[6] as well as the Quebec Civil Code.[7] In the common law jurisdictions the plaintiff will have to prove that the statement amounted to passing-off[8] or was defamatory[9] or an injurious falsehood.[10]

4. Appropriation: The privacy statutes in British Columbia,[11] Manitoba[12] and Saskatchewan[13] all specifically provide for a statutory tort where a person uses the name or portrait of another for advertising or promotional purposes without his consent.[14] Under the Civil Code of Quebec the courts have enjoined the use of a photograph of a well-known entertainer to advertise a motor car,[15] and awarded damages to a schoolteacher whose picture was used for industrial publicity purposes;[16] but have refused to enjoin the screening of a documentary film on the 1969 Woodstock Festival in which the

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1) Credit Reporting Agencies Act, SS, 1972, c23; cf Burns op cit 44f.
2) Collection Agencies Act, SN, 1973, c14; cf Burns op cit 46f.
3) Consumer Protection Act, SQ, 1971, c74; cf Burns op cit 47.
4) British Columbia Privacy Act, s2(1).
5) Manitoba Privacy Act, s2.
6) Saskatchewan Privacy Act, s2.
7) Article 1053.
8) Burns op cit 21. See above 76.
9) Burns op cit 19. See above 76.
10) Burns op cit 19f.
11) British Columbia Privacy Act, s4(1).
12) Manitoba Privacy Act, s3.
13) Saskatchewan Privacy Act, s3.
14) Burns op cit 32.
15) Deschamps v Automobiles Renault Canada Ltée [1972] SC Mtl, unreported; cf Patrick Glenn op cit 298.
16) Rebeiro v Shawinigan Chemicals (1969) Ltd [1973] SC 389; cf Patrick Glenn 298.

plaintiff and a young lady gambolled naked in the rain.[1] It seems that in the other provinces the plaintiff will only succeed if he can show that the appropriation amounted to defamation,[2] breach of contract,[3] breach of (commercial) confidence,[4] or some similar nominate wrong.

5. Data Banks: In Canada as a result of investigations into the activities of credit reporting[5] and investigative agencies[6] legislation has been introduced in several provinces.[7] Manitoba does not require licensing of personal information systems[8] but attempts to safeguard the privacy of subjects by providing that: (i) no investigation may take place without the written consent of the subject or unless he has been given notice in writing that a personal investigation has been conducted;[9] (ii) certain information may not be recorded, inter alia references to race and religion, and adverse factual or investigative information more than 7 years old;[10] (iii) access

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1) Field v United Amusement Corporation [1971] SC 283; cf Patrick Glenn op cit 297. It is submitted that this decision is correct in view of the fact that the plaintiff's antics were conducted in full view of the public and in any event the film was a documentary account of a very newsworthy event.

2) Burns op cit 19. See above 76.

3) See above 77.

4) Ibid.

5) Cf Burns op cit 40: "This type of operation is primarily concerned with credit information on a continuing basis".

6) Cf Burns op cit 40: "When a request for information is received by this form of agency, one of its employees investigates usually by telephone or by interviewing ... The sources of information include employers, neighbours, bankers and so on". Cf EF Ryan "Privacy, Orthodoxy and Democracy" (1973) 51 Canadian Bar R 84: "These character reports are not just a record of whether a person pays his bills - rather, they are complete profiles on where and how he lives, whether he is in 'a peace movement or other subversive group', whether his neighbours think he drinks too much, whether he is mentally ill, his relationship with his wife and family, his drug habits, his sexual eccentricities ..."

7) Cf Burns op cit 42f.

8) Personal Investigations Act, SM 1971, c23; Burns op cit 43f.

9) Section 3(1), such notice must be given within 10 days of the granting or denial of the benefit. The Act exempts inter alia provincial or municipal governments, and the police acting in their official capacity (s2).

10) Section 4. It also excludes records of bankruptancies more than 14 years previously, statute barred debts or writs, writs issued more than 12 months previously where the status of the action is unknown, and information about judgments unless the name and address of the judgment creditor is included. Cf Burns op cit 43.

to personal reports is limited and a subject must be advised in writing by the user if he has been denied a benefit as a result of such reports;[1] (iv) any person may inquire of any reporting agency whether they hold a file on him and information contained therein must be disclosed to him;[2] (v) the subject may protest any information in his file and procedures are set out for the verification of the information;[3] (vi) the user and reporting agency cannot agree not to disclose the information to the subject;[4] and (vii) penalties are imposed on both the user and the agency for failing to comply with the Act.[5] Similar legislation exists in British Columbia,[6] Ontario,[7] Nova Scotia[8] and Saskatchewan,[9] although the latter is only confined to credit reporting agencies.[10] All four Acts require reporting agencies to be licensed and to adopt reasonable procedures to ensure that records are accurate and fair and do not include certain types of information.[11] As in the United States[12] the Acts in these provinces and Manitoba also provide for the correction of

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1) Section 5, which provides that if a subject is denied a benefit as a result of a report, he may within 30 days apply to the user to ascertain the name and address of the agency, and the user must inform the subject of his right to protest the information. The agency must supply the subject, within 24 hours, with the source of all information, the nature of the information and inform him of his right to protest. Burns op cit 43.

2) Section 8.

3) Ibid.

4) Section 6.

5) Sections 16, 19. Cf Burns op cit 44: "but both are exempt from civil liability unless they knew or ought to have known that any of the information was false, misleading or negligently obtained."

6) Personal Information Reporting Act, SBC, 1973, c139.

7) Consumer Reporting Act, SO, 1973, c97.

8) Consumer Reporting Act, SNS, 1973, c4.

9) Credit Reporting Agencies Act, SS, 1972, c23.

10) Burns op cit 44.

11) Burns op cit 45.

12) See above 66.

errors[1] and the appointment of an official to control their administration. The Newfoundland Act[2] is mainly concerned with regulating agencies rather than granting consumers rights,[3] while the Quebec Act[4] provides very limited protection.[5]

H. OTHER COUNTRIES

For purposes of this study it was considered unnecessary to examine the law relating to privacy in the above countries in any depth, and it is not intended to discuss the position in any other jurisdictions.[6] The law in Scotland has not been mentioned because there seems to be little discussion of the principles involved and the matter has not fallen for consideration by the courts - in

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1) British Columbia Personal Information Reporting Act, s 16; Ontario Consumer Reporting Act, s 12; Nova Scotia Consumer Reporting Act, s 13; Saskatchewan Credit Reporting Agencies Act, s 25; Manitoba Personal Investigations Act, ss 10, 11. Cf Burns op cit 46.

2) Collection Agencies Act, SN, 1973 c14.

3) Burns op cit 46f.

4) Quebec Consumer Protection Act, SQ, 1971 c74.

5) Burns op cit 47.

6) Australia like England does not recognise a common law right to privacy and injured parties have to frame their action within the existing nominate torts; cf H Storey "Infringement of Privacy and its Remedies" (1973) 47 Aust LJ 498, 503; J Swanton "Protection of Privacy" (1974) 48 Aust LJ 91. It has been suggested that Anglo-Australian law could provide a remedy for invasion of privacy by developing the torts of negligence and intentional infliction of emotional distress (G Dworkin "The Common Law Protection of Privacy" (1967) 2 Tas L R 418, 442ff; cf Storey op cit 505), but this view has been doubted; Storey op cit 505; Swanton op cit 97. The Queensland Invasion of Privacy Act, 1971, however, provides some control over credit bureaux; Swanton op cit 101. A constitutional right to privacy is provided for in Mexico (Articles 14 and 16, Constitution of the United States of Mexico, 5th February 1917; cf (1972) 24 Int Soc Sci J 432); Venezuela (Article 59, Constitution; cf (1972) 24 Int Soc Sci J 435); and Argentine (Article 19, 1953 Constitution of the Republic of Argentina; cf (1972) 24 Int Soc Sci J 437f), while limited protection is available under the Penal Code of Brazil (Articles 150, 151, 159 and 162; cf (1972) 24 Int Soc Sci J 440f). In Israel it has been held that there is no common law right of privacy (Rabinowitz v Merlin (1957) 11 PD 1225; cf R Gavison "Should we have a General Right to Privacy in Israel?" (1977) 12 Israel LR 155, 170) and it seems that the proposed Protection of Privacy Law Bill contemplates a general right of privacy (P Elman "Comment on the Kahn Committee Report on the Protection of Privacy" (1977) 12 Israel LR 172, 174f).

any event the action would be based on the actio injuriarum.[1] Similarly, the Ceylonese law on privacy is governed by Roman-Dutch law principles and the most definitive examination of the problem in modern law relies heavily on South African cases and authorities.[2]

I. SOUTH AFRICAN LAW

It is intended to give a brief conspectus of the right to privacy in South Africa before attempting a detailed analysis thereof.

The modern action for invasion of privacy in South Africa was born unheralded and without the difficulties which attended its nativity in Anglo-American and Continental legal systems. There was no need to discover a "new tort" or to interpret a particular section of a Code. The recognition of the action in South Africa is a logical development under the actio injuriarum which affords a general remedy for wrongs to interests of personality.[3] The South African cases can also be accommodated under Prosser's four categories.[4]

1. Intrusions: The first oblique reference to a right of privacy seems to occur in an early Cape case, de Fourd v Cape Town Council[5] where de Villiers CJ in commenting upon the conduct of certain policemen who had entered premises suspected of being a brothel without a proper warrant, said:

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1) See generally DM Walker The Law of Delict in Scotland (1966) II 708ff. It has been suggested that the concept of convicium may also cover privacy in Scotland; Ed AH Robertson Privacy and Human Rights (1973) 97.

2) CF Amerasinghe The Actio Injuriarum in Roman-Dutch Law (1966) 174ff.

3) Cf WA Joubert "Die Persoonlikheidsreg: 'n Belangwekkende Ontwikkeling in die Jongste Regspraak in Duitsland" (1960) 23 THR-HR 23; cf Amerasinghe Actio Injuriarum op cit 174ff; Walker op cit 798ff.

4) WL Prosser Law of Torts 4 ed (1971) 804. See above 55.

5) (1898) 15 SC 399.

> "Even these abandoned women have their rights, and without their permission or a legal warrant no policeman is justified in interfering with their privacy".[1)]

In any event South African criminal law has recognized certain forms of invasion of privacy as amounting to criminal injuriae for many years. Thus it has been held to be an injuria to accost and follow a woman in a street for an immoral purpose,[2)] to spy upon a woman while she is undressing[3)] or while she is bathing;[4)] to enter another's home without his consent;[5)] to place an electronic listening device in a person's home without his consent.[6)]

An early civil case directly concerned with privacy was Epstein v Epstein[7)] where the defendant employed private detectives to keep a watch on the plaintiff (his wife) for the purpose of obtaining evidence of adultery by her. Wessels J held:

> "The fact of being constantly followed about and spied on is to my mind a most vexatious nuisance and I think it would be monstrous if there were no right of complaint".[8)]

It is submitted that although the learned judge referred to "nuisance" such conduct was clearly an invasion of privacy.[9)]

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1) At 402.

2) R v Jungman 1914 TPD 8, ; cf R v Van Meer 1923 OPD 77, 82; R v Ellis 1944 SR 195; cf R v Ferreira 1943 NPD 19, 21.

3) R v Holliday 1927 CPD 395, ; cf R v Rail 1939 SR 239; R v Woods 1940 SR 58, .

4) Cf R v Schoonberg 1926 OPD 247, .

5) R v Schonken 1929 AD 36, ; cf S v I 1976 (1) SA 781 (RAD) 786.

6) S v A 1971 (2) SA 293 (T) 297.

7) 1906 TH 87.

8) At 88.

9) See below 224f. The privacy of one's house was obliquely referred to in R v S 1955 (3) SA 313 (SWA) 316: "In the interest of society young girls should be protected from being molested in the privacy of their homes by strange men." It is submitted that the complainant's age was merely an aggrevating factor and that the same principle applies to anyone who is so molested.

?. Publication of Private Facts: In Mhlongo v Bailey[1] the plaintiff was a retired schoolmaster who had formerly associated with a popular African artiste before she had become a celebrity. The defendant's employee had published two photographs of the plaintiff (with full knowledge of the plaintiff's having refused to part with them). The photographs had been used to illustrate an article in Drum magazine entitled "Dolly and her Men". One picture had been captioned "Allison Mhlongo in the days when he admired young Dolly Rathebe secretly", and the other "Allison Mhlongo, now a science master at St Peter's School, Rosettenville". As the plaintiff had never sought publicity in the past (and indeed at the time that the photograph had been taken Dolly had not yet attained stardom), the court held that he had suffered an aggression upon his dignitas, and awarded him damages for invasion of privacy.[2]

Unfortunately in Mhlongo's case the court stressed the need for "insult" if the injuria was to be actionable. Kuper J commented as follows:

> "The remedy should be given only when the words or conduct complained of involve an element of degradation, insult or contumelia".[3]

It is submitted, however, that this restrictive interpretation is not applicable to invasions of privacy. For instance, De Villiers mentions that:

> "every man has, as a matter of natural right ... the possession of an unimpaired person, dignity and reputation".[4]

Such unimpaired person or dignity is afforded protection under the action for invasion of privacy, and our courts have recognized that "an impairment of a person's privacy prima facie constitutes an impairment of his dignitas".[5]

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1) 1958 (1) SA 370 (W).
2) At 372. Cf Joubert op cit (1960) 23 THR-HR 40f.
3) Ibid.
4) M de Villiers The Roman and Roman-Dutch Law of Injuries (1899) 24.
5) S v A supra 297. See below 185.

The South African courts may have been faced with another privacy case had the plaintiffs in Prinsloo v South African Associated Newspapers Ltd[1] (a defamation action) given notice to the defendants that they intended to rely in the alternative on injuria or invasion of privacy.[2] Defendants had published a photograph and article about a young woman student at the University of the Witwatersrand who was alleged to have been employed by the South African Police in espionage work on the campus. The plaintiffs sought an order preventing such publication on the grounds that it was defamatory. The court, however, held that to publish that someone was an alleged police informer was not per se defamatory and refused the application.[3] Furthermore the plaintiffs could not proceed in the alternative for invasion of privacy as they had not given defendants the requisite notice.[4]

A more recent civil case in Roman-Dutch law on privacy, Rhodesian Printing & Publishing Co Ltd v Duggan[5] also concerned publication of private facts. In this case the respondents had both been previously married, but the custody of the minor children born of those marriages had been awarded to their respective ex-spouses. In 1972, three years after respondents had married each other and contrary to the custody orders, they unlawfully abducted the minor children and settled with them in Rhodesia. In 1976 an American private detective succeeded in tracing the family to Rhodesia, and when the respondents learnt that the appellants were about to publish this fact in a local newspaper, they successfully applied for an order restraining such publication. Beadle CJ upheld the decision of the court a quo[6] that although the respondents personally had forfeited

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1) 1959 (2) SA 693 (W).
2) At 695f.
3) At 696.
4) At 695f.
5) 1975 (1) SA 590 (RAD).
6) Mr & Mrs 'X' v Rhodesian Printing & Publishing Co Ltd 1974 (4) SA 508 (R) 513f.

their right to privacy because of their conduct, their children were entitled to protection from publicity.[1] In his judgment Beadle CJ specifically approved[2] Davies J's application in the court a quo,[3] not only of the dicta in O'Keeffe v Argus Printing & Publishing Co Ltd,[4] Gosschalk v Rossouw[5] and S v A[6] in holding that the appellant's conduct would have constituted an injuria, but also his use of the American Restatement of Torts.[7] The former dicta had been relied upon as authority for the view that invasion of privacy constitutes an impairment of dignitas,[8] while the latter comment was used as a guide for determining the wrongfulness aspect of such invasions.[9]

3. False Light: In Kidson v SA Associated Newspapers Ltd[10] the plaintiffs were nurses, one of whom was married and two of whom were engaged. They had consented to their photograph being taken to illustrate a nursing journal. To their dismay they subsequently discovered that the photograph had been captioned "Off duty : lonely and nowhere to go", and had been used to illustrate a report in a Sunday newspaper headed "97 Lonely Nurses Want Boyfriends". The

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1) Rhodesian Printing & Publishing Co Ltd v Duggan supra 593f.
2) Ibid.
3) Mr & Mrs 'X' v Rhodesian Printing & Publishing Co Ltd supra.
4) 1954 (3) SA 244 (C) 247, 249. See below 304.
5) 1966 (2) SA 476 (C) 490.
6) 1971 (2) SA 293 (T) 297.
7) Restatement of Torts (1939), § 867 Comment C.
8) Mr & Mrs 'X' v Rhodesian Printing & Publishing Co Ltd supra 511f. See below 185.
9) Mr & Mrs 'X' v Rhodesian Printing & Publishing Co Ltd supra 512f; Rhodesian Printing & Publishing Co Ltd v Duggan supra 592f; cf DJ McQuoid-Mason "Public Interest and Privacy" (1975) 92 SALJ 252, 259f. See below 178.
10) 1957 (3) SA 461 (W).

article was published as part of an appeal for money to be used in the construction of a recreation centre for nurses. Unfortunately the court did not squarely consider the problem of privacy and allowed only the married plaintiff to recover on the basis of contumelia. The other plaintiffs failed because they had omitted to allege that they were engaged to be married at the time.[1] It is submitted that the other two plaintiffs should also have recovered, irrespective of whether or not they were engaged, as the case could have been decided simply on the basis of invasion of privacy without reference to insult of contumelia.[2] The plaintiff's private lives had been falsely exposed to the public eye,[3] and the fact that the publication was, or was not, insulting, or made the plaintiffs feel ashamed, was irrelevant[4] - the mere infringement of the plaintiff's privacy constituted an impairment of their dignitas.[5]

It is submitted that the two unsuccessful plaintiffs in Kidson's case, whose alleged desires for the opposite sex were wrongfully published in a national Sunday newspaper, suffered no less an aggression upon their dignitas than did the plaintiff in Mhlongo's case.[6] It may be that in Mhlongo's case the defendants' conduct was more reprehensible because he was motivated solely by pecuniary gain whereas in Kidson's case the motive was partly a charitable one, but traditionally motive has been regarded as irrelevant in our law.[7]

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1) At 469.

2) Cf DJ McQuoid-Mason "Invasion of Potency" (1973) 90 SALJ 23, 27f.

3) See below 296.

4) Cf Foulds v Smith 1950 (1) SA 1 (AD) 11; O'Keeffe v Argus Printing & Publishing Co Ltd supra 248; S v A supra 298; cf Joubert (1960) 23 THR-HR 39.

5) Cf S v A supra 297. See below 185.

6) Mhlongo v Bailey 1958 (1) SA 370 (W). See above 127.

7) Cf Basner v Trigger 1946 AD 83, 95; Moaki v Reckitt & Colman (Africa) Ltd 1968 (3) SA 98 (A) 104; Smith NO & Lardner-Burke NO v Wonesayi 1972 (3) SA 289 (RAD) 301ff. See below 151f.

4. Appropriation: The first case in South African law[1] which appears to have recognized the modern concept of invasion of privacy was one dealing with the appropriation of the plaintiff's image for advertising purposes. In O'Keeffe v Argus Printing & Publishing Co Ltd[2] the plaintiff was a well-known radio announcer employed by the SABC who allowed herself to be photographed at a pistol range to illustrate a news story. The photograph was subsequently published as an advertisement for firearms without her consent - indeed the reporter employed to write the news article knew that it was against the policy of the SABC to allow this form of publicity concerning its employees. The court held that the publication was an aggression upon the plaintiff's dignitas actionable under the actio injuriarum. Watermeyer AJ (as he then was) said:

> "the case must be judged in the light of modern conditions and thought, and the fact that the identical situation is not covered by Roman and Roman-Dutch authority is not conclusive of the matter".[3]

The court then discussed the position in England and the United States and concluded that "under our law similar considerations must apply".[4] As mentioned above this approach was subsequently adopted in Rhodesia Printing & Publishing Co Ltd v Duggan.[5]

It seems clear, therefore, that an action for sentimental damages arising from an invasion of privacy falls squarely under the actio injuriarum. The question of whether negligent invasions are actionable in South Africa[6] and the problems associated with data banks[7] will be considered later. In the meantime it is necessary to define the concept of "privacy" and to discuss its essential elements under the actio injuriarum in South African law.

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1) Cf RG McKerron 1954 Annual Survey 125f; RG McKerron The Law of Delict 7 ed (1971) 54.
2) 1954 (3) SA 244 (C).
3) At 248.
4) Ibid.
5) 1975 (3) SA 590 (RAD) 593f. See above 128f.
6) See below 362f.
7) See below 283f.

CHAPTER FOUR

DEFINITION AND ESSENTIAL ELEMENTS

A. DEFINITION

According to the dictionary "privacy" may be defined as:

> "The state or condition of being withdrawn from the society of others or from public interest; seclusion .. Absence or avoidance of publicity or display .. A private matter, a secret .. private or personal matters or relations".[1)]

Similarly the word "privaatheid" in the Afrikaans language means:

> "die toestand van privaat wees, persoonlike afgesonderdheid".[2)]

The above definitions seem to conform with the socio-psychological concepts of the "core self"[3)] and "zero-relationships",[4)] as well as the philosopher's "inner" and "outer" man.[5)] Furthermore, it is submitted that the dictionary definition can be reconciled with the legal interpretations of "privacy" which have been used in different jurisdictions.

1. The United States. As has been previously pointed out the Restatement defines privacy as a person's

> "interest in not having his affairs known to others or his likeness exhibited to the public".[6)]

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1) Ed CT Onions The Shorter Oxford English Dictionary (1933) 1586.

2) MSB Kritzinger, FJ Labuschagne & P De V Pienaar Verklarende Afrikaanse Woordeboek (1969) 651.

3) AF Westin Privacy and Freedom (1967) 33f. See above 3.

4) E Shils "Privacy: Its Constitution and Vicissitudes" (1966) 31 Law and Contemp Problems 281. See above 4.

5) MR Konvitz "Privacy and the Law: A Philosophical Prelude" (1966) 31 Law and Contemp Problems 272, 279. See above 5.

6) Restatement of Torts, First (1939) § 867. See above 55.

In Kerby v Hal Roach Studios[1] the court referred to

> "the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity .. 'the right to be let alone'",[2]

while according to the American Jurisprudence

> "it is the right to be free from the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities".[3]

None of the above definitions, however, define the concept sufficiently narrowly to enable the courts to distil its essential elements. For instance, there is no reference to whether or not the wrongdoer's liability is based on fault. Must he have acted intentionally or negligently or is liability strict? The case law is confused with the growing overlap between defamation and the false light privacy cases.[4] Where the publication concerns "a matter of public interest", the plaintiff in a false light privacy action as is the case of defamation,[5] must prove "actual malice" by the defendant.[6] On the other hand in a defamation suit a plaintiff may sometimes recover by merely proving negligence on the part of the defendant.[7] It has been pointed out that this would have an unfortunate effect on freedom of speech if it was extended to the law of privacy, and that it should only be applied in privacy cases where the plaintiff can prove actual damages.[8] The question of damages is also confused. In the past it was accepted that the doctrine of presumed damages applied to defamation,[9] and the same

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1) (1942) 53 Cal App 2d 207, 127 P 2d 577.

2) At 579. Cf TL Yang "Privacy: A Comparative Study of English and American Law" (1966) 15 ICLQ 175, 190f.

3) American Jurisprudence, Second (1972) v 62 677f.

4) Cf DE Brown "The Invasion of Defamation by Privacy" (1971) 23 Stanford LR 547f; A Hill "Defamation and Privacy under the First Amendment" (1976) 76 Columbia LR 1206, 1211; Note "Defamation, Privacy and the First Amendment" 1976 Duke LJ 1016, 1017f.

5) New York Times v Sullivan (1964) 376 US 254; cf Hill op cit 1211.

6) Time Inc v Hill (1967) 385 US 374; cf Note op cit 1976 Duke LJ 1017f.

7) WL Prosser Law of Torts 4ed (1971) 771.

8) Note op cit 1976 Duke LJ 1046.

9) Prosser Torts op cit 754f, 762; cf Note op cit 1976 Duke LJ 1042 n 131.

principle held good for the false light privacy cases.[1] In Gertz v Robert Welch Inc[2] the court held that all damages had to be alleged and proved if they are to be recovered.[3] If the principle in Gertz's case is applied to the false light privacy cases the plaintiff will be faced with the task of proving "harm to mental comfort" which, it has been suggested, is more difficult to prove than harm to reputation.[4] It is submitted that the correct interpretation of Gertz's case is that the plaintiff need not prove the "actual dollar value" of the injury,[5] but merely that he has subjectively suffered mental harm.[6] The Restatement gives the courts limited guidance on the question of wrongfulness by stating that an invasion is actionable if it constitutes an "unreasonable and serious" interference with a person's right to privacy.[7] It is therefore left to the courts to make a value judgment as to what is "unreasonable" or "serious".[8]

Prosser takes a pragmatic "functional approach" without attempting to find a comprehensive definition of the concept.[9] He maintains that invasion of privacy is not one tort but "four distinct kinds of invasion of four different interests of the plaintiff".[10]

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1) Prosser Torts op cit 815; HD Krause "The Right to Privacy in Germany - Pointers for American Legislation?" 1965 Duke LJ 481, 515; MG Hill, HM Rossen & WS Sogg Smith's Review: Torts (1975) 226. Contra Note op cit 1976 Duke LJ 1042: "In privacy actions, however, as in most other tort actions, the plaintiff has always been required to show actual injury".

2) (1974) 418 US 323.

3) At 349f; cf Note op cit 1976 Duke LJ 1030.

4) Note op cit 1976 Duke LJ 1035 n 85: "This reputation is a considerably more concrete interest than the interest in mental comfort because it is susceptible to more objective proof and measurement. Damage to reputation can be ascertained with far more sophistication and accuracy than the wholly subjective injury of mental suffering".

5) Cf Gertz v Robert Welch Inc supra 350; Note op cit 1976 Duke LJ 1030 n 57.

6) See below 189.

7) Restatement of Torts, First op cit. §867.

8) See below 172f.

9) P Burns "The Law and Privacy: The Canadian Experience" (1976) 54 Canadian Bar Rev 1, 10.

10) Prosser Torts op cit 804.

Prosser's categories of intrusions, disclosures, false light and appropriation,[1] however, have been described as inadequate, because they do not accommodate certain situations where the private individual's life is regulated by legislation.[2] It is submitted, however, that this criticism is unfounded because the examples given, viz state laws governing contraception, abortion and the "regulation of sexual and ingestive activities",[3] could all be regarded as intrusions.[4] A more valid criticism seems to be that Prosser's analysis concentrates on the wrongfulness aspect in the light of the reported cases without attempting to define clearly the question of fault.[5] Westin's descriptionsof "four basic states of individual privacy"[6] viz solitude,[7] intimacy,[8] anonymity[9] and reserve,[10] embrace most of Prosser's categories, although he goes further by also including psychological surveillance[11] and data surveillance.[12]

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1) See above 55. See below 198ff for a discussion of these categories in the context of South African law.

2) GL Bostwick "A Taxonomy of Privacy: Repose, Sanctuary and Intimate Decision" (1976) 64 Cal LR 1447, 1450. See above 61.

3) Ibid.

4) See below 198f.

5) Cf H Kalven "Privacy and Tort Law - Were Warren & Brandeis Wrong?" (1966) 31 Law & Contemp Problems 326, 333.

6) Westin op cit 31.

7) Ibid: solitude "here the individual is separated from the group and freed from the observation of other persons ... solitude is the most complete state of privacy that individuals can achieve".

8) Westin op cit 31: intimacy where "the individual is acting as part of a small unit that claims and is allowed to exercise corporate seclusion so that it may achieve a close, relaxed, and frank relationship between two or more individuals".

9) Westin op cit 31: anonymity "occurs when the individual is in public places or performing public acts but still seeks, and finds, freedom from identification and surveillance".

10) Westin op cit 32: reserve "is the creation of a psychological barrier against unwanted intrusion; this occurs when the individual's need to limit communication about himself is protected by the willing discretion of those surrounding him".

11) Westin op cit 133ff.

12) Westin op cit 158ff; cf Burns op cit 10.

Prior to his detailed analysis Westin gives a sociological definition which is very wide and of little practical value to a court seeking to extract the elements of the action:

> "Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others".[1)]

Westin's definition has also been criticized for using "value-loaded" terms like "right" or "claim",[2)] but it is submitted that alternative suggestions which regard privacy as "a condition"[3)] or "control over who can sense us"[4)] are just as unworkable in practice.

Bloustein attempts to define the concept more narrowly by arguing that it is a dignitary tort:

> "An intrusion upon our privacy threatens our liberty as individuals to do as we will, just as an assault, a battery, or imprisonment of the person does. Just as we may regard these latter torts as offences to our concept of individualism and the liberty it entails, so too should we regard privacy as a dignitary tort".[5)]

Bloustein, however, fails because although he appears to envisage an action similar to the actio injuriarum he too overlooks the fault element. It is submitted that it is primarily the failure by the American courts and legal writers to consider the fault element in

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1) Westin op cit 7. On "institutions" see below 277f.

2) L Lusky "Invasion of Privacy: A Clarification of Concepts" (1972) 72 Columbia LR 693.

3) Lusky op cit; cf Burns op cit 7: "Privacy in his /Lusky's/ view is not a claim, and, if it is a moral right it is too vague and, if a legal right, of little normative value because it leaves too many unanswered questions. Instead, privacy should be regarded as a condition /whereby an individual is free from certain types of interference by others/."

4) R B Parker "A Definition of Privacy" (1974) 27 Rutgers LR 275, 281: "Privacy is control over whom and by whom the various parts of us can be sensed by others". Cf Burns op cit 8: This definition, however, is physically-oriented in that it is linked to the seeing, hearing, touching, smelling or tasting of another's body, voice, bodily products or objects closely associated with him.

5) EJ Bloustein "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39 NYULR 962, 1003.

actions for invasion of privacy which has led to conflicting decisions in the different states,[1] and the danger that the action will eventually swallow up certain other torts.[2]

2. England. Although invasion of privacy has been described as a "doubtful"[3] or "emergent"[4] tort by English jurists it has been defined in several instances. Winfield states that the wrong constitutes:

> "interference with another's seclusion of himself, his family or his property from the public".[5]

Fleming contends that:

> "the interest involved is that of 'being left alone', to maintain one's intellectual and emotional personality, free from offensive intrusion by conduct calculated to annoy and induce emotional distress".[6]

Winfield's definition is similar to those found in American law,[7] but Fleming seems to go further in that he refers to "conduct calculated to annoy and induce emotional distress". The learned writer does not elaborate on this aspect, but it is submitted that such a requirement coincides with the South African element of animus injuriandi.[8] Fleming classifies privacy as an invasion of a person's: (a) interest in seclusion; (b) interest in name, likeness and life history; and, (c) interest in personal dignity and self-respect.[9]

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1) See below 174.
2) Cf Prosser Torts op cit 813.
3) PH Winfield & JA Jolowicz Winfield and Jolowicz on Torts 9 ed (1971) 501.
4) RFV Heuston Salmond on Torts 16 ed (1973) 34.
5) Winfield & Jolowicz op cit 501.
6) JG Fleming The Law of Torts 4 ed (1971) 526. My italics.
7) See above 132f.
8) See below 147.
9) Fleming op cit 526ff.

The Justice Report[1] on the other hand preferred not to define the concept of privacy narrowly, but to simply regard it as:

> "that area of a man's life which, in any given circumstances, a reasonable man with an understanding of the legitimate needs of the community would think it wrong to invade".[2]

Such a wide definition, however, is likely to result in difficulties similar to those experienced in the United States, arising from the lack of sufficient guidelines and the need to rely solely on policy considerations.[3] Justice gave two reasons for failing to define the concept more precisely:

(a) "The notion of privacy has a substantial emotive content in that many of the things which we feel the need to preserve from the curiosity of our fellows are feelings, beliefs or matters of conduct which are themselves irrational".[4]

(b) "The scope of privacy is governed to a considerable extent by the standards, fashions and mores of the society of which we form part, and these are subject to constant change".[5]

It is submitted that both reasons are untenable: the first because the courts are unlikely to set standards according to "irrational" criteria;[6] the second because the courts have to adjust continually to the changing mores of society.[7] In any event the Draft Right of Privacy Bill which appears in the Report itself limits the action to any "substantial and unreasonable infringement"[8] of the right to privacy - a clear recognition of the objective factors which influence the courts when making value judgments.

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1) Justice Report Privacy and the Law (1970)
2) Justice Privacy op cit 5 para 19.
3) See below 174.
4) Justice Privacy op cit 5 para 18.
5) Ibid.
6) See below 172f.
7) Ibid.
8) Section 1, Justice Privacy op cit Appendix "J" 59.

Attempts were made to define privacy in the proposed Right of Privacy Bills introduced by Lord Mancroft (1961),[1] Mr Alexander Lyon (1967)[2] and Mr Brian Walden (1971),[3] although the Younger Committee on Privacy (1972) decided not to recommend a general right of privacy.[4] Lord Mancroft's definition was similar to that used by Fleming[5] in that it refers to publications "calculated to cause .. distress or embarassment".[6] It is submitted that again it can be argued that this requirement is analogous to the concept of animus injuriandi.[7] Mr Lyon's Bill, however, referred to any "serious and unreasonable" interference with the right to privacy,[8] while Mr Walden's was based on the Draft Bill in the Justice Report.[9] Neither of the latter Bills, however, mentioned whether such interference had to be intentional or negligent and it is submitted that this is a weakness in both proposals.[10]

It has been pointed out that the Canadian statutes[11] make no attempt to define privacy,[12] and that the "right to be let alone" should be regarded as a principle rather than a rule.[13]

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1) See above 79.
2) Ibid.
3) See above 79f.
4) See above 80.
5) Fleming op cit 526.
6) See above 79.
7) See below 147.
8) See above 79.
9) See above 79f; cf the Bill proposed by Yang op cit 190f.
10) See below 168.
11) See above 119f.
12) P Burns "The Law and Privacy: The Canadian Experience" (1976) 54 Canadian Bar Rev 1, 11.
13) Ibid. P Stein & J Shand Legal Values in Western Society (1974) 187, point out, however, that: "even a broad description left as a guide to the courts would in due course be reduced to a set of precise rules".

> "The rules will be articulated by statutes, case law and constitution, whereas the principle will be derived from moral and psychological imperatives".[1)]

Such an "open-textured" legislative approach would not differ much from the judicial development of the law of negligence.[2)] It is submitted that this approach is similar to that adopted by civil law jurisdictions which apply broad principles of delictual liability rather than the common law's closed categories of nominate torts.

3. Europe. It seems that there are very few judicial pronouncements on the definition of privacy in Continental systems, and that in those jurisdictions where the concept has been recognized such recognition is based on a broad interpretation of certain general provisions of their respective Codes.[3)] In West Germany, for instance, such interpretation varied from recognition under Article 826, requiring an intentional act,[4)] to Articles 1 and 2 of the Federal Constitution (Grundgesetz) which made no reference to intention,[5)] to Article 823(1) which refers to either intentional or negligent conduct.[6)] In France, on the other hand, Article 1382 of the Code merely mentions the term "fault", which can mean either intention or negligence,[7)] while the new Article 369 of the Criminal Code only refers to intentional violations of privacy.[8)] In addition it seems that academic theories which seek to differentiate between the different "sphären" in Germany,[9)] and the "vie intime" in France[10)] are of limited practical assistance to the courts.

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1) Ibid.
2) Ibid. For a description of the development of the law of negligence see MA Millner Negligence in Modern Law (1967).
3) See above 108f.
4) See above 85.
5) Ibid.
6) See above 86.
7) See above 97f; cf Ed AH Robertson Privacy and Human Rights (1973) 28f.
8) Cf "Current Legal Developments" (1971) 20 ICLQ 365. See above 99, 103.
9) See above 91f.
10) See above 106f.

At the Nordic Conference on the Right to Privacy[1] the collective attempt by a number of countries to define the concept concisely was also unsuccessful.[2] Privacy was simply defined as:

> "the right to be let alone to live one's own life with the minimum degree of interference".[3]

The Conference did, however, find it necessary to expand on the meaning of the proposed definition:

> "This means the right of the individual to lead his own life protected against: (a) interference with his private, family and home life; (b) interference with his physical or mental integrity or his moral or intellectual freedom; (c) attacks on his honour and reputation; (d) being placed in a false light; (e) disclosure of irrelevant embarassing facts relating to his private life; (f) the use of his name, identity or likeness; (g) spying, prying, watching and besetting; (h) interference with his correspondence; (i) misuse of his private communications, written or oral; (j) disclosure of information given or received by him in circumstances of professional confidence".[4]

Many of these wrongs can be accommodated under Prosser's categories[5] of intrusions,[6] publications of private facts,[7] being placed in a false light[8] and appropriations.[9] Furthermore most are also covered by the broad provisions of the Universal Declaration of Human

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1) International Commission of Jurists Conclusions of the Nordic Conference on the Right to Privacy (1967).

2) Cf Robertson op cit 28.

3) International Commission of Jurists Conclusions of the Nordic Conference op cit 2f; cf International Commission of Jurists "The Legal Protection of Privacy: A Comparative Study of Ten Countries" (1972) 24 Int Soc Sci J 418, 420.

4) Ibid.

5) WL Prosser Law of Torts 4 ed (1971) 804. See above 55.

6) See below 198f.

7) See below 247f.

8) See below 290f.

9) See below 300f.

Rights[1] and the European Convention on Human Rights.[2] Nonetheless although the right to privacy is defined in wide terms there is no indication as to when an interference therewith will be actionable. In short the focus of attention has been on defining "the right to privacy" and not the corresponding wrong of "invasion of privacy".[3] Generally, however, for practical purposes it is with the latter that the courts are primarily concerned.

4. South Africa. The courts in South Africa, without specifically defining the concept, have experienced little difficulty in recognizing the right to privacy as one of the rights of personality which they are prepared to protect:

> "[T]here can be no doubt that a person's right to privacy is one of .. 'those real rights, those rights in rem related to personality, which every free man is entitled to enjoy'".[4]

They have gone further, however, and seem to regard invasion of privacy as an aspect of impairment of dignitas under the actio injuriarum.[5]

Academic writers in South Africa have also defined privacy in general terms. Joubert refers to it as:

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1) Robertson op cit 14: "Article 12. 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".

2) Article 8; cf Robertson op cit 13. See above 95.

3) Cf DN MacCormick "A Note upon Privacy" (1973) 89 LQR 23, 24: "to have a right of privacy in some respect is to have a right against relevant intrusion, and that one has only if and to the extent that others have a duty not to intrude in the relevant way".

4) S v A 1971 (2) SA 293 (T) 297.

5) Cf O'Keeffe v Argus Printing & Publishing Co Ltd 1954 (3) SA 244 (C) 249; Kidson v SA Associated Newspapers Ltd 1957 (3) SA 461 (W) 467f; Mhlongo v Bailey 1958 (1) SA 370 (W) 373; Rhodesian Printing & Publishing Co Ltd v Duggan 1975 (1) SA 590 (RAD) 594. See below 185

> "die krenking wat 'n persoon toegebring word deur onbevoegde inbreukmaking op die afsondering waarop hy in sy private lewe geregtig is".[1]

He divides the wrong into three categories: (a) intrusion into a person's private life; (b) public disclosures concerning a person's private life; and, (c) disruption of a person's quiet or peaceful life.[2]

Van der Merwe and Olivier[3] and Neethling[4] appear to accept that the action lies under the actio injuriarum but argue that it should be recognized as a "selfstandige persoonlikheidsreg". Neethling defines privacy as follows:

> "Privaatheid is 'n individuele lewenstoestand van afsondering van openbaarheid. Hierdie lewenstoestand omsluit al daardie persoonlike feite wat die belanghebbende self bestem om van kennismaking deur buitestaanders uitgesluit te wees en ten opsigte waarvan hy 'n privaathoudingswil het".[5]

The above writers, however, give no indication as to what its limits should be, but support Joubert's view[6] that privacy should be divorced from the concept of dignitas.[7] But none of the writers

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1) WA Joubert Grondslae van die Persoonlikheidsreg (1953) 136. Cf SA Strauss, MJ Strydom & JC van der Walt Die Suid-Afrikaanse Persreg (1976) 289; "Elke mens het 'n reg op privaatheid. Dit beteken dat iedereen aanspraak kan maak op 'n mate van afsondering van die openbaarheid in sy private lewe".

2) Joubert Persoonlikheidsreg op cit 136; cf NJ van der Merwe & PJ Olivier Die Onregmatige Daad in die Suid-Afrikaanse Reg 2 ed (1970) 395.

3) Op cit 393.

4) J Neethling "Grondslag vir die Erkenning van 'n Selfstandige Persoonlikheidsreg op Privaatheid in die Suid-Afrikaanse Reg" (1976) 39 THR-HR 120, 128.

5) J Neethling Die Reg op Privaatheid (1976) (LL.D. Thesis) 287.

6) WA Joubert Grondslae van die Persoonlikheidsreg (1953) 140f.

7) NJ van der Merwe & PJ Olivier Die Onregmatige Daad in die Suid-Afrikaanse Reg 2 ed (1970) 394f; Neethling op cit (1976) 39 THR-HR 128.

have gone so far as to suggest that such a "selfstandige" action should include invasions arising from negligence, and it is submitted that an action for negligent invasion of privacy could only lie where the plaintiff proves patrimonial loss.[1] Amerasinghe, without defining the concept,[2] prefers to deal with it from two aspects: (a) the right not to be interfered with in certain basic interests relating to the privacy of life, excluding the right to freedom from publication; and (b) the specific right to freedom from publication.[3] In short the right to privacy includes the right to be free from: (a) intrusions and (b) publicity.

5. Conclusion. Freedom from intrusions or publicity implies that the individual has control not only over who communicates with him, but also who has access to the flow of information about him.[4] In South Africa most delicts are actionable under either the actio injuriarum for sentimental damages or the lex Aquilia for patrimonial loss.[5] Therefore an invasion of privacy which falls within one or other of these actions will have to satisfy its essential element. In some instances the actions may overlap in which case the plaintiff may bring a "rolled-up" action for both sentimental damages and patrimonial loss.[6] The reported cases on privacy in South Africa were all decided under the actio injuriarum,[7] in terms of which it is necessary to prove intention,[8] wrongfulness,[9] and impairment of

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1) See below, cf Gelb v Hawkins 1959 (2) PH J20(W).

2) CF Amerasinghe Aspects of the Actio Injuriarum in Roman-Dutch Law (1966) 179f.

3) Amerasinghe Actio Injuriarum op cit 180ff.

4) P Burns "The Law and Privacy: The Canadian Experience" (1976) 54 Canadian Bar Rev 1, 9 n 42. Cf AF Westin Privacy and Freedom (1967) 33. See also E Goffman Relations in Public (1972) 63. See above 3 n 3.

5) RG McKerron The Law of Delict 7 ed (1971) 10; van der Merwe & Olivier op cit 16f.

6) Mathews v Young 1922 AD 412, 505. Such a "rolled-up" action has been applied in cases of assault (cf Stoffberg v Elliott 1923 CPD 148, 152; Prinsloo v Du Plooy 1952 (4) SA 219 (O) 221) and defamation (cf Salzmann v Holmes 1914 AD 471, 480; Die Spoorbond v SAR & H 1946 AD 999, 1011).

7) See above 125ff.

8) See below 165ff.

9) See below 170ff.

plaintiff's personality.[1] In most cases the courts seemed to regard the invasion as an impairment of dignitas,[2] although it has been argued that the concept is much wider.[3] As has been pointed out above many of the definitions are synonymous with the word "privacy" itself: "withdrawn",[4] "seclusion",[5] "being let alone",[6] "solitude, intimacy, anonymity and reserve",[7] "minimum interference with one's own life"[8] and "afsondering".[9] These definitions, however, merely seek to define the right to privacy, they give no guidance as to the circumstances in which the courts will consider a breach of that right as an actionable invasion of privacy. Without the latter the wrong will lack any definite profile as seems to have happened in the United States.[10]

It is submitted that a possible definition for invasion of privacy under the actio injuriarum in South African law is: any intentional and wrongful interference with another's right to seclusion in his private life.[11] The definition includes the elements of intention and wrongfulness and attempts to give some indication of the nature of the impairment of personality which occurs in privacy cases. The word "seclusion" has been used because it seems to be one of the few words which expresses the essence of privacy. According to Webster's Dictionary "seclude" means:

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1) See below 191ff.

2) See below 185

3) Cf Joubert Persoonlikheidsreg op cit 140f; Neethling op cit (1976) 39 THR-HR 127f.

4) See above 132.

5) See above 133, 137.

6) See above 137.

7) See above 135.

8) See above 141.

9) See above 142.

10) Cf HD Kalven "Privacy and Tort Law - Were Warren and Brandeis Wrong?" (1966) 31 Law & Contemp Problems 326, 333. See above 16.

11) Cf PH Winfield "Privacy" (1931) 47 LQR 23, 24; Joubert Persoonlikheidsreg op cit 136.

> "To remove or separate (oneself or another) in order to avoid or prevent intercourse or outside influence; to withdraw into solitude; to isolate ... To screen; to protect by shutting off or being shut off; .. To separate as or as by a barrier".[1)]

The Shorter Oxford Dictionary likewise defines "seclude" as:

> "To remove or guard from public view; to withdraw from opportunities of social intercourse ... To shut off or screen from external influence".[2)]

Before discussing different aspects of the law of privacy in South Africa it is necessary to consider briefly the essential requirements of the actio injuriarum:[3)] (a) intention; (b) wrongfulness; and (c) impairment of personality.

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1) Ed WA Neilson, TA Knott & PW Carhart Webster's New International Dictionary of the English Language 2 ed (1939) 2260: "Seclusion ... Act of keeping out; exclusion".

2) CT Onions The Shorter Oxford English Dictionary (1933) 1825: "Seclusion ... the act of secluding; excluding".

3) For the position where the injured party wishes to sue for a negligent invasion of privacy see below 362ff.

B. ESSENTIAL ELEMENTS

As has been pointed out above, where the plaintiff sues for sentimental damages his remedy lies under the actio injuriarum, in which case he must prove: (i) that the act was intentional; (ii) that it was wrongful; and (iii) that it impaired his personality.[1)]

1. INTENTION (ANIMUS INJURIANDI)

Intention is concerned with fault and must be distinguished from wrongfulness which deals with the invasion of another's right.[2)]

In Roman and Roman-Dutch law animus injuriandi (intention to injure) was the gist of an action for injuria.[3)] The test for such intention was subjective[4)] and it was considered to be present:

> "(a) when an act is done by a person with the definite object of hurting another in regard to his person, dignity or reputation;
>
> "(b) when an unlawful act is done as a means of effecting another object the consequence of which act such a person is aware will be to hurt another in regard to his person, dignity or reputation."[5)]

In short animus injuriandi in Roman and Roman-Dutch law required: (a) intention to injure; and, (b) consciousness of wrongfulness. If either of these elements were absent the action would

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1) See above 49.

2) Cf Wentzel v SA Yster & Staalbedryfsvereniging 1967 (3) SA 91 (T) 98; PQR Boberg "Animus Injuriandi and Mistake" (1971) 88 SALJ 57, 63f.

3) See above 28, 39. Cf WA Joubert "Die Persoonlikheidsreg: 'n Belangwerkende Ontwikkeling in die Jongste Regspraak in Duitsland" (1960) 23 THR-HR 23, 41, who points out that contumelia meant conduct with the intention to injure.

4) RG McKerron The Law of Delict 7ed (1971) 56; B Ranchod Foundations of the South African Law of Defamation (1972) 133.

5) M De Villiers The Roman and Roman Dutch Law of Injuries (1899) 27; cf M Bliss Belediging in die Suid-Afrikaanse Reg (1933) 48f.

fail.[1] Therefore, although a defendant intended to injure the plaintiff it would be a good defence if he was not aware that his act was wrongful.[2] The motive behind the defendant's act, however, was irrelevant:

> "Thus to give a man a bad character which he does not deserve in order to excite commisseration for his children in whom a person is interesting himself by collecting money on their behalf is directly injurious, however praiseworthy or meritorious the object ultimately sought to be attained may be."[3]

Where the plaintiff established that the defendant had committed an injuria there was a presumption that the latter had acted wrongfully and with animus injuriandi.[4]

Before considering animus injuriandi in relation to privacy[5] it is intended to discuss the development of the concept in defamation actions as it is in the latter where most of the controversy has occurred. Similar principles, however, apply to other claims under the actio injuriarum.[6]

(a) Defamation.

In Maisel v Van Naeren[7] it was suggested that until about 1915, the courts in South Africa generally applied the Roman-Dutch law approach to animus injuriandi.[8] At an early stage, however, the

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1) Ranchod op cit 75; cf Digest 47.10.3.2: "No-one can commit an injury unless he is aware that he is doing so" (De Villiers' translation); Voet 47.10.20: "One the side of one who could appear to have inflicted a wrong there exists an obstacle to his being liable in the action on wrongs if the purpose to do a wrong is lacking" (Gane's translation).

2) Digest 47.10.3.4; De Villiers op cit 28f; McKerron Delict op cit 57.

3) De Villiers op cit 28; cf Ranchod op cit 75; RW Parsons "The Bases of the South African Law of Defamation" (1951) 14 THR-HR 192, 193.

4) Bliss op cit 57f; Ranchod op cit 75.

5) See below 165ff.

6) Cf Smith NO & Lardner-Burke NO v Wonesayi 1972 (3) SA 289 (RAD) 299.

7) 1960 (4) SA 836 (C).

8) At 843. Cf Mackay v Philip (1830) 1 Menzies 455, 463; Botha v Brink (1878) 8 Buch 118, 122f; Bennett v Morris (1893) 10 SC 223, 226; Taute v Odendaal (1906) 23 SC 691, 693.

English law concept of "malice"[1] began to be used interchangeably with animus injuriandi.[2] Simultaneously the English terms "justification",[3] "privilege" and "fair comment" were used to describe similar defences applied in South Africa which had their origins in Roman-Dutch law.[4] In English law the defences of privilege[5] and fair comment[6] justified the defendants' conduct, but if he acted with "malice" his otherwise lawful act became unlawful.[7] Fault was irrelevant and the defences available to the defendant were limited to those which excluded the wrongfulness of his conduct. This English law approach of a closed list of defences for excluding wrongfulness was increasingly adopted by the South African courts[8] at the expense of the defences which rebutted fault or animus injuriandi. Eventually it was suggested that in defamation cases animus injuriandi had become a 'hollow fiction'.[9]

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1) Ed RFV Heuston Salmond on Torts 16 ed (1973) 176: "Malice means presence of an improper motive; it does not necessarily mean personal spite or ill-will". But cf Ed JA Jolowicz Winfield and Jolowicz on Tort 9 ed (1971) 267, 302, who refer to "express malice". See also Bliss op cit 166f; Ranchod op cit 134: "Express malice means spite, ill-will or male fides and is not the same as animus injuriandi".

2) Cf White v Pilkington (1850-52) 1 Searle 107. 119; Botha v Brink supra 123f; Dippenaar v Hauman (1878) 8 Buch 135, 139, 143; cf Bliss op cit 144ff. cf. SAUK v O'Malley 1977 (3) SA 394 (AD) 402.

3) In English law the defence of justification will succeed if the statement is true. Winfield and Jolowicz op cit 373; Salmond op cit 159. In Roman-Dutch law truth alone is no defence and the defendant has to go further and prove public benefit. Voet 47. 10.9; Van Leeuwen Censura Forensis 5.25.3; Huber 6.8.7; cf Botha v Brink supra 122; Ranchod op cit 86f. The English law approach appears to have been adopted in Mackay v Philip supra 463.

4) Cf SA Strauss, MJ Strydom & JC van der Walt Die Suid-Afrikaanse Persreg 3ed (1976) 232ff, who give a most useful analysis of animus injuriandi.

5) Winfield & Jolowicz op cit 389f; Salmond op cit 167f.

6) Winfield & Jolowicz op cit 275f; Salmond op cit 182f.

7) Winfield & Jolowicz op cit 302 (privilege), 282 (fair comment); Salmond op cit 176 (privilege), 190 (fair comment).

8) Cf Jooste v Claassens 1916 TPD 723, 735; Laloe Janoe v Bronkhorst 1918 TPD 165; Tothill v Foster 1925 TPD 857; Mankowitz v Geyser 1928 OPD 138, 139f; Kleinhans v Usmar 1929 AD 121, 126. The matter was left open in Basner v Trigger 1946 AD 83, 94f. See generally Strauss, Strydom & Van der Walt op cit 236ff.

9) RG McKerron "Fact and Fiction in the Law of Defamation" (1931) 48 SALJ 154; Contra M De Villiers "Animus Injuriandi: An Essential in the Law of Defamation" (1931) 48 SALJ 308.

The courts appeared to have lost sight of the fact that in Roman-Dutch law animus injuriandi was the gist of the action.[1] If the defendant could show that he did not have the intention to injure or that he was not conscious of the wrongfulness of his act the presumption of animus injuriandi was rebutted.[2] Furthermore even if he did possess animus injuriandi he would still escape liability if he could show that his act was justified by one of the objective defences, for instance, truth and public benefit, or fair comment.[3] The objective defences did not rebut animus injuriandi, but excluded the wrongfulness of the defendant's act,[4] and could only ~~de~~ defeated by the plaintiff proving that the defendant had abused his rights by acting from improper motive or malice.[5] In other words proof of such improper motive or malice on the part of the defendant rebutted the lawfulness of his conduct. Therefore once animus injuriandi was equated to malice[6] it was said that the objective defences could be defeated by the plaintiff proving that the defendant acted with:

> "animus injuriandi, or to use the terms which Schreiner JA in Basner v Trigger[7] ... considered more apt in this connection - what the English law calls 'malice' in the sense of improper or indirect motive".[8]

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1) See above147.

2) Ibid.

3) Cf Strauss, Strydom & Van der Walt op cit 264.

4) Wentzel v SA Yster en Staalbedryfsvereniging 1967 (3) SA 91 (T) 98.

5) Cf Strauss, Strydom & Van der Walt op cit 264; cf Basner v Trigger supra 83. See below.

6) Cf Tromp v McDonald 1920 AD 1, 2; Monckten v BSA Co Ltd 1920 AD 324, 332; Kleinhans v Usmar supra 126; Gluckman v Schneider 1936 AD 151, 160f; Young v Kemsley 1940 AD 258, 278. Cf Bliss op cit 144f; TW Price "Animus Injuriandi in Defamation" (1949) 66 SALJ 4, 7; PR MacMillan "Animus Injuriandi and Privilege" (1975) 92 SALJ 145f.

7) Supra.

8) Naude v Whittle 1958 (1) SA 594 (AD) 606.

Thus motive which is generally only relevant to the question of lawfulness finally became confused with animus injuriandi which is an essential requirement for fault under the actio injuriarum. This confusion had occurred notwithstanding attempts by the courts to distinguish motive from intention:[1]

"Motive ... is the activating impulse preceding intention".[2]

The turning point came in 1960 when in Maisel v Van Naeren[3] it was held that in defamation actions: (i) English law principles had not replaced the Roman-Dutch law;[4] (ii) animus injuriandi was an essential element;[5] (iii) animus injuriandi included intention to injure and consciousness of wrongfulness by the wrongdoer;[6] and (iv) there was no closed list of defences.[7] Therefore as in Roman and Roman-Dutch law,[8] if the defendant was unaware of the defamatory nature of the statement he did not intend to injure the reputation of the plaintiff; and if the defendant genuinely believed that his defamatory statement was made on a lawful occasion he was not conscious of the wrongfulness of his act.[10] The approach in Maisel's case was subsequently adopted by the Appellate Division in Jordaan v Van Biljon,[11] Craig v Voortrekkopers Bpk[12] and Nydoo v Vengtas,[13]

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1) Cf Whittaker v Roos 1912 AD 92, 125, 131; Findlay v Knight 1935AD 58, 69f; Basner v Trigger supra 93, 96; Maskowitz v Pienaar 1957 (4) SA 195 (AD) 203.

2) Gluckman v Schneider 1936 AD 151, 159. Intention on the other hand is: "the conscious mind willing to injure". De Villiers op cit 29.

3) 1960 (4) SA 836 (C). Cf Strauss, Strydom & van der Walt op cit 246, who state that the decision "/kan/ nie hoog genoeg aangeprys word nie".

4) At 850, Cf Young v Kemsley 1940 AD 258, 277f: "For the sake of convenience of expression we make use of the terminology used in the English decisions. But that does not mean that we do not apply the principles of our own law".

5) At 842.

6) At 840.

7) At 845.

8) See above 147.

9) Cf De Villiers op cit 28: "Since the law in such a case takes into account the /defendants'/ frame of mind and not the effects of his action" - referring to Digest 47.2.53; 47.10.3.1; 47.10.18.14.

10) Maisel v Van Naeren supra 850f.

11) 1962 (1) SA 286 (AD) 296.

12) 1963 (1) SA 149 (AD) 156f.

13) 1965 (1) SA 1 (AD) 14f.

although it has been strongly argued that such approval was obiter.[1] Apart from criticisms by Boberg,[2] the return to Roman-Dutch law principles seems to have been generally welcomed by academic writers[3] and the present position of the law appears to be as follows:

(a) Animus injuriandi is an essential element in the wrong of defamation.[4]

(b) There is a presumption of animus injuriandi (ie "die oogmerk om te krenk") where the words or conduct constitute an injuria.[5]

(c) Failure to allege such animus injuriandi is fatal to the plaintiff's claim.[6]

(d) Animus injuriandi must be distinguished from motive or malice.[7]

(e) Animus injuriandi includes not only the actual intention to injure but also consciousness of wrongfulness.[8]

(f) There is no closed list of defences,[9] but those which negate wrongfulness should be distinguished from those which rebut fault.[10]

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1) Hassen v Post Newspapers (Pty) Ltd 1965 (3) SA 562 (W) 571f; Smith NO & Lardner-Burke NO v Wonesayi 1972 (3) SA 289 (RAD) 306, 307f, 309f, 311f. But see now SAUK v O'Malley 1977(3)SA 394(AD)403.

2) PQR Boberg "The Mental Element in Defamation" (1961) 78 SALJ 181; "Animus Injuriandi without Tears" (1965) 82 SALJ 437; "Animus Injuriandi and Mistake" (1971) 88 SALJ 57.

3) NJ van der Merwe and PJJ Olivier Die Onregmatige Daad in die Suid-Afrikaanse Reg 2 ed (1970) 378; NJ van der Merwe "Vonnisbespreking" (1966) 29 THR-HR 76; JD van der Vyver "Animus Injuriandi en die Afwesigheid van Wederregtelikheidsbewussyn" (1966) 29 THR-HR 336; WA Joubert & JC van der Walt "Vonnisbespreking" (1967) 30 THR-HR 375; cf MacMillan op cit 163.

4) Maisel v Van Naeren supra 842; Jordaan v Van Biljon supra 294; Hassen v Post Newspapers (Pty) Ltd supra 569; Coetzee v Nel 1972 (1) SA 353 (AD) 370. Negligence is not a ground. SAUK v O'Malley Supra 407.

5) Jordaan v Van Biljon supra 294; Craig v Voortrekkerpers Bpk supra 156f; Nydoo v Vengtas supra 13; Jackson v NICRO 1976 (3) SA1(AD)..

6) Moaki v Reckitt & Colman (Africa) Ltd 1968 (3) SA 98 (AD) 105; Taljaard v S & VA Rosendorf & Venter 1970 (4) SA 48 (O) 53; Jackson v NICRO supra 12. Cf Coetzee v Nel 1972 (1) SA 353 (AD) 374.

7) Basner v Trigger supra 95; Hassen v Post Newspapers (Pty) Ltd supra 569; Moaki v Reckitt & Colman (Africa) Ltd supra 104.

8) SAUK v O'Malley Supra 405. See above 151. Maisel v Van Naeren supra 840, 850f; cf Smit v Meyerton Outfitters 1971 (1) SA 137 (T) 139; Muller v SA Associated Newspapers Ltd 1972 (2) SA 589 (C) 593. SAUK v O'Malley supra 403; Van der Merwe op cit 76; Joubert & van der Walt op cit 375.

9) Maisel v Van Naeren supra 845; Jordaan v Van Biljon supra 296; Hassen v Post Newspapers (Pty) Ltd supra 569.

10) Wentzel v SA Yster en Staalbedryfsvereniging 1967 (3) SA 91 (T) 98; Geyser v Pont 1968 (4) SA 67 (W) 72f.

Confusion has remained, however, because despite the application of the subjective approach to animus injuriandi, the courts have retained the traditional terminology when considering the objective defences, ie that such defences rebut animus injuriandi. For instance, in Jordaan v Van Biljon[1] Rumpff JA said:

> "As die appellant daarin slaag om /die/ bevoorregte geleentheid te bewys word die vermoede van animus injuriandi weerlê en kan die appellant alleen dan slaag indien bewys gelewer word dat respondent inderdaad die animus injuriandi gehad het."[2]

Similar views were expressed by the same learned judge in Craig v Voortrekkerpers Bpk[3], Nydoo v Vengtas[4] and Benson v Robinson & Co (Pty) Ltd[5], by Trollip J in Geyserv Pont[6], and Hiemstra J in Waring v Mervis[7].

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1) 1962 (1) SA 286 (AD).

2) At 294.

3) 1963 (1) SA 149 (AD) 156f: "Indien 'n verweerder bewys dat die gewraakte woorde gebesig is met 'n ander oogmerk as om die beledigde te krenk ... en daardie oogmerk deur die reg geoorloof word, word dit geag dat die lasterlike woorde nie animus injuriandi gebesig is nie, en is die vermoede wat enkel uit die gebruik van lasterlike woorde ontstaan, weerlê."

4) 1965 (1) SA 1 (AD) 13: "Slaag die verweerder daarin om te bewys dat die publikasie van die laster inderdaad geskied het in omstandighede wat regtens die publikasie veroorloof, en is daar geen ander bewys dat die verweerder wel die doel gehad het om te beledig nie, ontstaan daar 'n vermoede dat die verweerder nie animo injuriandi gepubliseer het nie, en word die oorspronklike vermoede van die oogmerk om te beledig weerlê".

5) 1967 (1) SA 420 (AD) 426: "Whenever defamatory words are proved to have been published in the discharge of duty or in the exercise of a right ie on a so-called privileged occasion, the presumption of animus injuriandi has been rebutted, and the plaintiff will not succeed unless he can prove the animus injuriandi by evidence other than the defamatory words". Holmes JA appears to have made the same error in Benson's case at 432f: "Upon proof of a privileged occasion on a balance of probabilities which is an objective matter, the law presumes the absence of animus injuriandi".

6) Supra 74: "Nou die doel van die verweer van privilegie is om die vermoede van animus injuriandi te weerlê.

7) 1969 (4) SA 542 (W) 549: "The plea of fair comment involves an admission of defamation, but if the defamation lies in comment and the comment is in the circumstances fair, the presumption of animus injuriandi is negatived".

The above references to the objective defences excluding animus injuriandi (rather than wrongfulness)[1] seems to justify Boberg's contention that the courts are confusing wrongfulness with fault.[2] Strauss, Strydom and Van der Walt[3] point out that in Benson v Robinson & Co (Pty) Ltd[4] Rumpff JA, after stating that privilege rebuts the presumption of animus injuriandi,[5] immediately went on to imply that such privilege is concerned with the lawfulness of the defendant's act:

> "A defendant who pleads circumstances from which a duty or a right to use defamatory words emerges, relies on the lawfulness of his act and pleads the investitive facts".[6]

The learned writers therefore conclude that despite the use of the traditional phrase "the presumption of animus injuriandi has been rebutted" the learned judge intended to indicate that privilege excluded wrongfulness.[7] In SAUK v O'Malley[8] Rumpff CJ clarified the distinction between wrongfulness and fault:

> "Die vermoede van onregmatigheid kan in ons reg weerlê word deur getuienis wat aantoon dat die lasterlike woorde gebesig is in omstandighede wat onregmatigheid uitsluit ... Die vermoede van opset om te belaster, wat weens die publikasie van die lasterlike woorde ontstaan, plaas 'n weerleggingslas op die verweerder, wat die vermoede kan weerlê deur getuienis voor te lê dat hy nie so 'n opset gehad het nie".[9]

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1) See above 153.
2) Boberg op cit (1971) 88 SALJ 62f.
3) Op cit 252.
4) Supra.
5) Benson v Robinson & Co (Pty) Ltd supra 426.
6) Ibid.
7) Strauss, Strydom & Van der Walt op cit 252.
8) 1977 (3) SA 394 (AD).
9) At 402f.

It seems that Rumpff CJ's observations in O'Malley's case[1] were influenced by the unequivocal dictum of Jansen J in Wentzel v SA Yster and Staalbedryfsvereniging:[2]

> "Ondanks die konvensionele en geykte benadering dat 'n geprivilegieerde geleentheid (of feit wat op 'n geoorloofde oogmerk dui) die vermoede van animus injuriandi weerlê, skyn daar weinig twyfel te wees dat, regswetenskaplik beskou, dit 'n regverdigingsgrond is wat die onregmatigheid uitsluit en nie opset of animus injuriandi nie".[3]

Jansen J's view was subsequently adopted by Trollip J in Geyser v Pont,[4] and Watermeyer J in Muller v SA Associated Newspapers Ltd[5] where the latter stated:

> "From recent decisions it would appear that the Courts have begun to recognize that jurisprudentially it is more correct to regard a defence of qualified privilege, as also the defences of absolute privilege, justification and fair comment, as raising the lawfulness of the publication rather than the absence of animus injuriandi".[6]

Lawfulness refers to the recognition by the Courts that the invasion of a particular right is justified.[7] This is a matter of policy. Fault, on the other hand, is concerned with blameworthiness,[8] which under the actio injuriarum takes the form of animus injuriandi.

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1) SAUK v O'Malley 1977 (3) SA 394 (AD) 402f.
2) 1967 (3) SA 91 (T).
3) At 98.
4) 1968 (4) SA 67 (W) 72f. Unfortunately Trollip J then went on to say that privilege rebutted animus injuriandi (at 74). See above 153 n 5. Cf Strauss, Strydom and Van der Walt op cit.
5) 1972 (2) SA 589 (C).
6) At 592, referring to Wentzel's case and Geyser's case.
7) See below 170f.
8) Cf Maisel v Van Naeren 1960 (4) SA 836 (C) 846.

The latter is a subjective concept,[1] and it seems illogical to say that a person subjectively intends to commit a wrongful act if he is not conscious of the wrongfulness of his act. /Dolus in the sense of animus injuriandi would seem to include dolus eventualis i.e. where the wrongdoer appreciates the consequences of his act but is reckless as to whether or not they occur.[2]/ But if he does not act recklessly and he is not aware of the possibility that he might injure another he does not possess the necessary intention to injure.[3]

Thus the distinction between wrongfulness and fault can be illustrated as follows: If the plaintiff proves that the defendant has published a defamatory statement which impairs his reputation there is a presumption that the latter has acted wrongfully and with animus injuriandi (fault).[4] The defendant may rebut the presumption of wrongfulness by showing that his act was justified in the eyes of the law (i.e. that his act was not wrongful), for instance, that it was privileged.[5] But if the plaintiff can prove that the defendant abused his rights by acting with an improper motive,[6] such conduct would be regarded as wrongful, and in the case of privilege the defence would be lost.[7] If the defendant establishes the lawfulness of his act the fact that he acted with animus injuriandi does not vitiate the defence. Thus where defamatory words are spoken wilfully on a privileged occasion and in the knowledge that they are defamatory (i.e. animus injuriandi), if the privilege holds the defendant is not liable.[8] Therefore the defence of privilege rebuts the

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1) Cf Maisel v Van Naeren supra 840; cf Smit v Meyerton Outfitters 1971 (1) SA 137 (T) 139.

2) Cf Wessels v Bosman 1918 TPD 431, 437; Nasionale Pers v Long 1930 AD 87, 100; van Zyl v African Theatres Ltd 1931 CPD 61, 66; Hassen v Post Newspapers (Pty) Ltd 1965 (3) SA 562 (W) 576; Muller v SA Associated Newspapers (Pty) Ltd 1972 SA 589 (C) 594; Vorster v Strydpers Bpk 1973 (2) SA 482 (T) 487. It has been suggested that the criminal law concept of dolus directus, dolus indirectus and dolus eventualis should be used for animus injuriandi. MacMillan op cit 157f. Cf EM Burchell & PMA Hunt South African Criminal Law and Procedure (1970) I 116.4 Sauk v O'Malley Supra 402.

3) Strauss, Strydom & Van der Walt op cit 238.

4) Sauk v O'Malley Supra 402.

5) Sauk v O'Malley Supra 403. See below 323f.

6) Cf Millward v Glazer 1949 (4) SA 931 (AD) 942: "There is authority for the proposition that where a person does something, which would otherwise not be illegal, out of malice towards another, the other may invoke the actio doli".

7) See below 329f.

8) Cf Van der Merwe & Olivier op cit 350.

element of wrongfulness not animus injuriandi. Where, however, the wrongfulness of the defendant's act has been established he may still prove the absence of fault in the form of animus injuriandi by showing that he was not conscious of the wrongfulness of his act.[1] Here the defendant rebuts the presumption of animus injuriandi.

Defamation by the Press: The liability of the Press[2] for defamation seems to have been influenced by English law,[3] with the emphasis on lawfulness rather than fault. It is submitted that it is probable that some of the controversy concerning animus injuriandi could have been avoided if both the courts and academics had clearly distinguished defamation by the press from other forms of defamation.[4] At an early stage the courts seemed to have ignored the fault element on the basis that it would be too easy for newspapers proprietors to rebut the presumption of animus injuriandi.[5]

> "Die uitsondering sou wesenlik gegrond kon wees op beskerming van die gewone burger teen 'n klas van persone wat by 'n medium betrokke is, wat van so 'n aard is, dat in geval van laster gepleeg in die medium, dit moeilik is om die opset by 'n bepaalde persoon tuis te bring."[6]

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1) Maisel v Van Naeren 1960 (4) SA 836 (C) 850f; cf Nydoo v Vengtas 1965 (1) SA 1 (AD) 15.

2) It has been accepted that for the purposes of defamation a radio and television corporation can be placed mutatis mutandis on the same footing as the owner or publisher of a newspaper. SAUK v O'Malley 1977 (3) SA 394 (AD) 403.

3) Cf SAUK v O'Malley supra 404; Strauss, Strydom & van der Walt op cit 257.

4) For instance, in Craig v Voortrekkerpers Bpk 1963 (1) SA 149 (AD), where the court applied the subjective approach to animus injuriandi, the question of the liability of the press was not raised, even though the case concerned publication in a newspaper. Cf SAUK v OMalley supra 405. Conversely while Strauss, Strydom & Van der Walt op cit 254f criticize Colman J's analysis of animus injuriandi in Hassen v Post Newspapers (Pty) Ltd supra 576, they agree with his decision as it applies to defamatory publications by the press (at 263). Cf SAUK v O'Malley supra 407. Van der Merwe & Olivier op cit 382, appear to overlook the question of defamation by the press in their criticism of Hassen's case. Cf Van der Merwe op cit (1966) 29 THR-HR 76, 78f where the author suggests that the solution in Hassen's case would have been to recognize an action for negligent invasion of interests of personality. But the plaintiff would then have to prove patrimonial loss in terms of the lex Aquilia. See below 362f.

5) Cf Hill v Curlewis (1844) 3 Menzies 520, 523. Cf Strauss, Strydom & Van der Walt op cit 257f.

6) SAUK v O'Malley supra 4o4f; cf Wilson v Halle 1903 TH 178, 201; cf Strauss, Strydom & Van der Walt op cit 258.

It has been suggested that strict liability of the press exists in our law,[1] and that it is no defence for the publisher, printer, editor or owner of the newspaper to show that he was not aware, or could not reasonably have known of the defamatory statements in the publication.[2] This approach appears to have been applied consistently by the courts,[3] although it has been queried whether strict liability should be applied to editors or printers who are mere 'cogs' in a wheel controlled by the owner or publisher.[4] It has been pointed out, for instance, that the courts have considered the fact that the defendant was merely a printer to be a mitigating factor when assessing damages.[5]

Nevertheless despite the implication in some judgments that it is necessary to prove animus injuriandi on the part of the editor or publisher in defamation cases,[6] it seems that the rule may be relaxed on the basis that there is a duty on such persons to be acquainted with the contents of their publications.[7] It could also be argued that the liability of the persons is based on vicarious responsibility.[8] In SAUK v O'Malley[9] it was suggested, but not decided, that

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1) SAUK v O'Malley supra 407.

2) Strauss, Strydom & Van der Walt op cit 258.

3) Cf Hart v Robinson (1897) 12 EDC 24, 28; Wilson v Halle supra 200f; Dunning v Thomson & Co 1905 TH 313, 316; Philpott v Whittal 1907 EDC 193, 211; Maisel v Van Naeren supra 849; Hassen v Post Newspapers (Pty) Ltd supra 577; Potter v Badenhorst 1968 (4) SA 446 (E) 449; Taljaard v Rosendorff & Venter 1970 (4) SA 48 (O) 52; Muller v SA Associated Newspapers Ltd 1972 (2) SA 589 (C); SAUK v O'Malley supra 403f. But cf Robinson v Kingswell 1913 (AD) 513, 526.

4) Strauss, Strydom & Van der Walt op cit 260; cf De Villiers AJ in Maisel v Van Naeren supra 849: "as far as I know, it has never been suggested that an editor or publisher who is in fact unaware of the defamatory character of an article, could be liable even if there should be no animus injuriandi on the part of the author". Cf Taljaard v Rosendorff and Venter supra 52. Contra Robinson v Kingswell supra 526. But see now SAUK v O'Malley supra 404.

5) Strauss, Strydom & Van der Walt op cit 260; cf Dunning v Cape Times Ltd 1905 TH 231, 233: "the fact that they are merely the printers may be taken into account in determining the damages".

6) Maisel v Van Naeren supra 849; cf Craig v Voortrekkerpers Bpk supra 156f. See above n

7) Cf Dunning v Thomson & Co supra 316; Carbonel v Robinson & Co (Pty) Ltd 1965 (1) SA 134 (D) 151; Hassen v Post Newspapers (Pty) Ltd 1965 (3) SA 562 (W) 576; Taljaard v Rosendorff & Venter supra 52.

8) Maisel v Van Naeren supra 849; cf Hassen v Post Newspapers (Pty) Ltd supra 576; Boberg op cit (1961) 78 SALJ 181f.

9) 1977 (3) SA 394 (AD).

the liability of the press was strict:

> "Dat weens die besondere posisie van die pers en die radio, wat matige media is, 'n weerlose burger in 'n moeilike posisie geplaas kan word, is nie te betwyfel nie, en die opvatting dat skuldelose aanspreeklikheid van die pers in ons reg bestaan, sou myns insiens aanvaarbaar wees."[1]

In any event as Strauss, Strydom & Van der Walt point out, the production of newspapers consists of "a daily race against time"[2] which exposes individuals to the possibility of being defamed irrespective of any intention or negligence on the part of the publishers.[3] The confusion concerning the application of the subjective approach to animus injuriandi to defamation by the press,[4] has probably led to the proposed liability for the Publication of Libel in Newspapers Act,[5] which limits the defences available to the press to justification, fair comment and privilege.[6] It is submitted, however, that such legislation is unnecessary, and that provided the courts distinguish defamation by the press from other forms of defamation, as was done in SAUK v O'Malley,[7] no difficulties should arise. In cases of defamation by the press the defences are limited to those which rebut unlawfulness, in all other cases the defendant may also use defences rebutting animus injuriandi.

(b) Other Injuries

It is clear that as a general rule animus injuriandi is an essential requirement in an action for injuria.[8] Furthermore, apart from defamation by the press,[9] it seems that the subjective approach to animus injuriandi in defamation cases[10] will usually apply

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1) SAUK v O'Malley supra 407.

2) Cf Rhodesian Printing and Publishing Co Ltd v Howman 1967 (4) SA 1 (R) 10: "all the work of producing a newspaper, and especially of producing the news columns, is carried out under pressure as a daily race against time to ensure that the latest possible news appears where it should appear, having regard to its importance". Cf De Villiers op cit 134.

3) Strauss, Strydom & Van der Walt op cit 259.

4) See above 157 n 3.

5) South African Law Commission The Liability of the Press for the Publication of Defamatory Matter in Newspapers (1975)

6) Section 2(2), Draft Bill.

7) 1977 (3) SA 394 (AD) 407; cf Strauss, Strydom & Van der Walt op cit 258 n 43: "'n Studie van die relevante regspraak laat duidelik blyk dat animus injuriandi of nalatigheid nie aanspreeklikheidsvereistes is nie." But cf Robinson v Kingswell supra 526.

8) Moaki v Reckett & Colman (Africa) Ltd 1968 (3) SA 98 (AD) 103f; cf Nakharia v Mia 1918 TPD 56, 58 (assault); Matiwane v Cecil Nathan, Beattie & Co 1972 (1) SA 222 (N) 228 (assault).

9) See above 157f.

10) See above 152.

to other *injuriae*.[1] Thus in *Whittaker* v *Roos*[2] where the plaintiff was a prisoner who had been subjected to unlawful punishment, Innes JA said:

> "When an unlawful aggression of this nature has been proved the law presumes that the agressor had in view the necessary consequences of his act; that is that he had the intention to injure, the *animus injuriandi*. This does not mean that he was actuated by malice or ill-will, but that he had deliberately intended that the operation of his unlawful act should have effect upon the plaintiff".[3]

Similarly in *Foulds* v *Smith*,[4] which concerned adultery, van der Heever JA stated that the

> "aantyging van 'n injurie reeds 'n bewering van *animus injuriandi* inhou, 'n bewering van werklike en subjektiewe *animus injuriandi*".[5]

In false arrest or imprisonment cases, although it has been suggested that "the plaintiff need not allege or prove fault, either in the form of *dolus* or *culpa*"[6] it is clear that the action lies under the *actio injuriarum* and *animus injuriandi* is a requirement,[7] even though it is presumed to be present in such cases.[8] *Animus injuriandi* must still be alleged,[9] but once the plaintiff proves the

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1) But intention must be distinguished from motive. For instance, even if the motive for an assault is laudable it does not negative the fact that the intention to assault or the assault itself might be wrongful. *Esterhuizen* v *Administrator, Transvaal* 1957 (3) SA 710 (T) 722.

2) 1912 AD 92.

3) At 124; cf Solomon JA at 141.

4) 1950 (1) SA 1 (AD).

5) At 11.

6) Per van Winsen J in *Donono* v *Minister of Prisons* 1973 (4) SA 259 (C) 262.

7) Cf *Thompson* v *Minister of Police* 1971 (1) SA 371 (E): "In the case of wrongful arrest the intention may be said to be direct - *dolus directus* - as it is done with the definite object of hurting the plaintiff in his person, dignity or reputation". Contra *Smit* v *Meyerton Outfitters* 1971 (1) SA 137 (T) 139.

8) Cf *Foulds* v *Smith* supra 11; *Ingram* v *Minister of Justice* 1962 (3) SA 225 (W) 227; *Thompson* v *Minister of Police* supra 374; *Groenewald* v *Minister van Justisie* 1972 (3) SA 596 (O) 599; 1973 (2) SA 480 (O) 482f; *Newman* v *Prinsloo* 1973 (1) SA 125 (T) 127; *Minister of Prisons* v *Donono* 1974 (1) SA 323 (C) 325.

9) Cf *Moaki* v *Reckitt & Colman (Africa) Ltd* supra 103f.

fact of his arrest or imprisonment and that it was wrongful,[1] the onus is on the defendant to justify his conduct.[2] If the defendant establishes that his act was justified (i.e. that the arrest or imprisonment was effected or procured under a valid writ or warrant,[3] or in the case of a person authorized to arrest another under the Criminal Procedure Act,[4] that he acted in good faith and on reasonable grounds[5] the lawfulness of the defendant's conduct may be rebutted by the plaintiff proving an improper motive on the part of the defendant. For instance, if the object of the arrest was to frighten or harrass the arrested person rather than to bring him before a court such an arrest is unlawful.[6] It has been held that mistake is no defence at common law,[7] but if bona fide may be a mitigating factor in the assessment of damages.[8] It is submitted, however, that such a mistake may be a good defence,[9] unless the court infers dolus eventualis from the defendant's conduct.[10] Furthermore, certain statutory protection is given to persons authorised to execute or assist in executing warrants of arrest.[11]

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1) Cf Donono v Minister of Prisons supra 262.

2) May v Union Government 1954 (3) SA 120 (N) 128.

3) Shaskolsky v Haupt (1906) 23 SC 230, 232; Lefdahl v Dredge 1910 CPD 452, 455; Ingram v Minister of Justice supra 226; cf May v Union Govt supra 128; Edwards v Beneke 1970 (2) SA 437 (T) 440; Minister van Polisie v Kraatz 1973 (3) SA 490 (AD) 511f.

4) Act 51 of 1977; Cf Act 56 of 1955.

5) Section 46, Act 51 of 1977; cf s31, Act 56 of 1955.

6) Cf Tsose v Minister of Justice 1951 (3) SA 10 (AD) 17; Minister van Polisie v Krantz supra 508.

7) Birch v Ring 1914 TPD 106, 109; Smit v Meyerton Outfitters 1971 (1) SA 137 (T) 140; cf Smith NO and Lardner-Burke NO v Wonesayi 1972 (3) SA 289 (RAD) 305. But see below 339f.

8) Cf Bhika v Minister of Justice 1965 (4) SA 399 (W) 401.

9) Cf Van der Merwe & Olivier op cit 476ff. Provided it is reasonable; if not, the arrest will be unlawful.

10) Cf Ingram v Minister of Justice supra 229f. See above 156.

11) Peace Officers and other authorized persons are protected: (a) if they arrest the wrong person in good faith and on reasonable grounds that such person is the person named in the warrant (s 31(1) (2) Criminal Procedure Act 56 of 1955, cf Ingram v Minister of Justice supra 227, cf s46 (1)(2) Criminal Procedure Act, 51 of 1977; cf arrest under s 65(5), Magistrates Courts Act, 32 of 1944, Edwards v Beneke supra 440); or (b) if they arrest a person under a defective warrant or writ (s 32 of Act 56 of 1955, Act 51 of 1977 has no such provision); or (c) if the warrant has been irregularly issued (s 31, Police Act, 7 of 1958). Where an arrest without warrant is made (cf ss 22 - 27, Act 56 of 1955; ss 39 - 42, 50, Act 51 of 1977) the onus of proving the lawfulness of such arrest rests upon the defendant. Union Govt v Bolstridge 1929 AD 240, 244; Tsose v Minister of Justice supra 18; Brand v Minister of Justice 1959 (4) SA 712 (AD) 714. The Common law rights of persons falsely or maliciously arrested are however preserved, s 41, Act 56 of 1955; cf s 53, Act 51 of 1977.

In cases of abuse of legal procedures (for instance malicious prosecution, arrest or execution) the South African courts under the influence of English law,[1] have confused malice with animus injuriandi. This is illustrated by the use of "malice" in the sense of animus injuriandi,[2] and the expression "absence of reasonable and probable cause"[3] to denote unlawfulness in malicious prosecution cases.[4] Thus it has been held that where there is proof of reasonable and probable cause, even though there is "malice" on the part of the defendant, the plaintiff is not entitled to succeed in an action for malicious prosecution.[5] However, as has been pointed out above,[6] where the defendant establishes the lawfulness of his act, the presence of animus injuriandi does not make it unlawful. Nonetheless the plaintiff may still succeed if he can show that the defendant abused his rights,[7] in that he was activated by some improper

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1) Moaki v Reckitt & Colman (Africa) Ltd supra 103. Cf RW Lee "Malicious Prosecution in the Roman-Dutch Law" (1912) 29 SALJ 22; RG McKerron "Abuse of Legal Procedure: Animus Injuriandi in Relation Thereto and to the Wrong of Defamation" (1968) 85 SALJ 421, 424.

2) Hotz v Shapiro (1902) 12 CTR 988, 992; Pearse v Fleischer (1884) 4 EDC 297; Lemue v Zwartbooi (1896) 13 SC 403, 406. But cf Collins v Minnaar 1931 CPD 12, 14: "Now whatever the English law may be about malicious prosecution, we must be guided by the principles of the Roman-Dutch law, and in Roman-Dutch law what is complained of as an injury, and it seems to me that it is an injury maliciously and without reasonable cause to give information to the police that a crime has been committed". See also ARB Amerasinghe "Actions for Malicious Abuse of Judicial Proceedings in South African and Ceylon Law" 1965/1966 Acta Juridica 177, 201ff.

3) Cf McKerron op cit (1968) 85 SALJ 424.

4) Traditionally to succeed in an action for malicious prosecution the plaintiff has to prove: (a) that defendant set the law in motion; (b) that defendant acted without reasonable and probable cause; and (c) that defendant was activated by an improper motive (malice). Beckenstrater v Rottcher 1955 (1) SA 129 (AD) 134; Van der Merwe v Strydom 1967 (3) SA 460 (AD) 467. But cf Lederman v Moharal Investments (Pty) Ltd 1969 (1) SA 190(AD)196. In Burkett v Smith 1920 AD 106, 108 the court stated that plaintiff "could only succeed by showing a want of real and probable cause, and the existence of animus injuriandi". It is submitted that it should have gone further to include also the requirement of an improper motive.

5) Hotz v Shapiro supra 992; Pearse v Fleischer supra.

6) See above 156.

7) Cf McKerron op cit (1968) 85 SALJ 424: "the juristic basis of liability in actions of this kind is the abuse by the defendant of the right which he, in common with all other persons, possessed to set the law in motion".

or indirect motive.[1] Once such a motive (e.g. malice) has been proved, the plaintiff must succeed as there is no longer any reasonable and probable cause for the prosecution. The lawfulness of the defendant's conduct (i.e. that there was reasonable and probable cause) is defeated by proof of malice on his part.[2] Therefore to institute criminal proceedings in order to further some object other than a conviction, for instance to further a civil remedy, is to act from an improper motive.[3] It is clear, however, that animus injuriandi is also a requirement,[4] although it is submitted that the reference to such animus as dolus indirectus in malicious

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1) Cf AJEJ "Abuse of Legal Procedure and Malicious Prosecution" (1969) 9 Rhod LJ 7, 8: "for abuse of legal procedure ... an improper motive is a requirement for liability".

2) Conversely improper motive or malice may, but need not necessarily, be inferred from want of reasonable and probable cause Spiegel v Miller (1881) 1 SC 264, 273f; Van Litzenberg v Louw (1899) 16 SC 283, 286; Hart v Cohen (1899) 16 SC 363, 367; Maserowitz v Richmond 1905 TS 342, 343; Fyne v African Realty Trust 1906 EDC 248, 257; Banbury v Watson 1911 CPD 449, 461; Nel v Wernick 1934 SR 71, 77; Thompson v Minister of Police 1971 (1) SA 371 (E) 373f.

3) Cf Carne v Howe (1898) 15 SC 232, 236; Waterhouse v Shields 1924 CPD 155, 169; May v Union Govt supra 129; Minister van Polisie v Kraatz supra 508, cf Tsose v Minister of Justice supra 17.

4) Cf Moaki v Reckitt & Colman (Africa) Ltd 1968 (3) SA 98 (AD) 106; Groenewald v Minister van Justisie 1973 (2) SA 480 (O) 483; Prinsloo v Newman 1975 (1) SA 481 (AD) 492. Cf Lederman v Moharal Investments (Pty) Ltd supra 196: "There seems little doubt that this is the actio injuriarum and, conceivably the need may well arise, in appropriate circumstances, to recast the above requisites ((a) that the respondent set the law in motion; (b) that it acted without reasonable and probable cause; and (c) that it was activated by an indirect or improper motive) into a mould more consistent with the terminology of the actio". Contra McKerron Delict op cit 263 n 32; McKerron op cit (1968) 85 SALJ 424.

prosecution cases is confusing.[1] Furthermore it follows that even if objectively there was no reasonable and probable cause for the defendant's conduct, he may still escape liability by showing that he did not have the necessary (subjective) animus injuriandi.[2]

Similar principles apply in the case of malicious arrest or imprisonment[3] and malicious execution.[4] In short in actions concerning abuse of legal procedures there is a presumption that the proceedings were instituted lawfully and the plaintiff will only recover if rebuts its presumption by showing that the defendant acted from an improper motive and that he had animus injuriandi. In cases

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1) Thompson v Minister of Police supra 375: "In the case of malicious arrest the intention to injure is indirect - dolus indirectus as the action of the defendant in instigating the arrest or setting the wheels of the criminal law in motion is done as a means of effecting another object viz the arrest of the plaintiff, the consequences of which act the defendant is aware will necessarily be to hurt the plaintiff in regard to his person, dignity or reputation". But dolus indirectus in the criminal law occurs "where, although not the accused's aim and object, he foresaw the unlawful act or consequence as certain, or as 'substantially certain'." EM Burchell & PMA Hunt South African Criminal Law and Procedure (1970) I 116. Dolus directus, on the other hand, applies "where the accused's aim and object was to do the unlawful act or to cause the consequence". Burchell & Hunt op cit 116. It is conceded that in actions for malicious prosecution the decision of the prosecutor interposes between the act of the defendant and the prosecution itself, but the object of the defendant is to bring about the prosecution of the plaintiff. It is submitted that such an object is better described as dolus directus. In any event both forms of dolus would seem to constitute animus injuriandi. Cf MacMillan op cit 157.

2) See above 157.

3) Cf Spiegel v Miller supra 273f; Hiscock v Mullinson 1923 NPD 105, 109; Thompson v Minister of Police supra 374f; Prinsloo v Newman supra 495. In false imprisonment the imprisonment is the act of the defendant, in malicious imprisonment a judicial act interposes between the act of the defendant and the imprisonment. Groenewald v Minister van Justisie 1972 (3) SA 596 (O) 603; cf Newman v Prinsloo 1973 (1) SA 125 (W) 127.

4) Cf Hart v Cohen supra 368; Cole's Estate v Oliver 1938 CPD 464, 468; Lee v Van Riebeeck Ladies Hairdressers (Pty) Ltd 1962 (4) SA 181 (T) 183; RL Weir & Co v De Lange 1970 (4) SA 25 (E) 28. Such cases should be distinguished from actions for wrongful attachment, where it is unnecessary to allege malice or want of reasonable cause. Cohen Lazar & Co v Gibbs 1922 TPD 142, 144; cf Smit v Meyerton Outfitters 1971 (1) SA 137 (T) 139f; but cf Wade & Co v Union Govt 1938 CPD 84, 86: "an action for injuria will now lie in such circumstances even where there has been no malice, dolus or animus injuriandi in the sense in which it was understood by the older authorities". But Wade's case relied on Whittaker v Roos 1912 AD 92, as authority, and the latter clearly recognized the traditional approach to animus injuriandi. See above 160.

of wrongful arrest and the like there is a presumption of unlawfulness and that the defendant acted with animus injuriandi and the onus is on the defendant to show either that his conduct was legally justified or that he did not have animus injuriandi.[1)]

(c) Invasion of Privacy

It is submitted that the above principles concerning animus injuriandi will in general apply to invasions of privacy.[2)]

(i) Intrusions: In criminal matters involving intrusions the courts seem to adopt a subjective approach to animus injuriandi[3)] which has been extended to include dolus eventualis. Thus in S v A[4)] the court rejected the contention that the appellant's only interest was to obtain evidence of infidelity for their client and that they did not have animus injuriandi:

> "The evidence ... set out amply justifies the inference of dolus eventualis on the part of the appellants. They must have foreseen the possibility that the complainant could or would be hurt and insulted by their conduct, but they acted in reckless disregard of his feelings".[5)]

In the Rhodesian case of S v I,[6)] however, the court seems to favour a more objective approach,[7)] when it was suggested that in cases of mistake[8)] the courts should apply a rule analogous to that used for the wrongful arrest of another in terms of a statute.[9)] To escape

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1) See above 161.

2) Cf J Neethling "Grondslag vir die Erkenning van 'n Selfstandige Persoonlikheidsreg op Privaatheid in die Suid-Afrikaanse Reg" (1976) 39 THR-HR 120, 127; CF Amerasinghe Aspects of the Actio Injuriarum in Roman-Dutch Law (1966) 185.

3) PMA Hunt South African Criminal Law and Procedure (1970) II 493.

4) 1971 (2) SA 293 (T).

5) At 299, my italics.

6) 1976 (1) SA 781 (RAD).

7) Cf JM Burchell "Is the Adulterers' Home their Castle? A Case of Criminal Injuria" (1976) 93 SALJ, 265, 270.

8) See below 339f.

9) S v I supra 789, Beadle ACJ also favoured an objective approach for animus injuriandi in Smith NO and Lardner-Burke NO v Wonesayi 1972 (3) SA 289 (RAD) 315f.

liability for the latter the defendant has to show not only that his belief was bona fide, but also that he had reasonable grounds for such belief.[1] For instance, it may be a good defence for the defendant to show that she bona fide believed that her husband was in bed with his paramour, and that she had reasonable grounds for such belief when she entered the bedroom of an innocent third party.[2] But:

> "if the injured spouse knows that she already has, or that she clearly has the means of getting, other adequate evidence of adultery and her motive for invading the privacy of the guilty spouse is as much to embarrass them as for the purpose of obtaining evidence, the invasion of privacy will not be justified".[3]

It is submitted, however, that the intention of the defendant should be tested subjectively,[4] and that the question of the reasonableness of the defendant's conduct concerns lawfulness which is tested objectively,[5] but may be defeated by an improper motive on the part of the defendant.[6] Furthermore, just as "wrongful arrest of an innocent person is an injuria not widely different in character from an invasion of his privacy",[7] it is submitted that a malicious invasion of privacy may be similar to malicious prosecution.[8] Consequently if a person maliciously makes a false report to the police that another possesses banned literature or drugs in his home, or is conducting illegal meetings at his house, it is submitted that the injured party may bring an action against the informer for malicious invasion of privacy, and that the same principles will apply as for other abuses of legal procedures.9)

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1) Section 33(2), Criminal Procedure and Evidence Act, Ch 31 (R); cf s 32, Act 56 of 1955; s 46, Act 51 of 1977.
2) See below 341.
3) S v I supra 787.
4) See above 159f.
5) See above Burchell op cit (1976) 93 SALJ 270.
6) See above 150.
7) S v I supra 789.
8) See above 162f.
9) Ibid.

(ii) Publicity: It is submitted that the publicity cases should be treated on a similar basis to defamation: Where the disclosure does not appear in the news media the courts should apply the subjective criteria for animus injuriandi.[1] Where the invasion is by the press, however, the courts should emphasize the lawfulness aspect rather than that relating to fault.[2] The reported civil cases on privacy all concern the press, but none have squarely considered the basis of the liability of the press in such matters. In O'Keeffe v Argus Printing and Publishing Co Ltd,[3] a case involving appropriation of the plaintiff's likeness for advertising purposes, the court seemed to assume that animus injuriandi was a requirement,[4] although it referred to the question of insult rather than intention.[5] In Kidson v SA Associated Newspapers Ltd,[6] a false light case, the court recognized that animus injuriandi was a requirement but stated that it could be inferred from the plaintiff's conduct:

> "I think that it can certainly be accepted that the defendant had no wish to harm the plaintiff, but the reference to her in the article was intentional and in my view the existence of animus injuriandi must be presumed, the other elements of the injuria being proved".[7]

Here the court clearly distinguished motive from intention.[8] Mhlongo v Bailey[9] concerned the unauthorized publication of a photograph and embarrassing private facts, and the court appeared to adopt a subjective approach to animus injuriandi by an editor:

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1) See above 156.
2) See above 159.
3) 1954 (3) SA 244 (C).
4) At 247.
5) At 248; but cf Amerasinghe Actio Injuriarum op cit 186; "in the context of the defence raised, the statement must be taken to refer to the animus" Watermeyer AJ in O'Keeffe's case relied on Foulds v Smith 1950 (1) 1 (AD) 11, for the proposition that too much emphasis has been placed on the element of insult. In Fould's case, van der Heever JA refers to contumelia which came to mean "a deliberate insult". See above 28.
6) 1957 (3) SA 461 (W).
7) At 468, my italics.
8) See above 152.
9) 1958 (1) SA 370 (W).

> "Although therefore the editor ... knew the whole position he deliberately elected to trample roughshod over the feelings of the plaintiff and intentionally committed an act of aggression against the plaintiff's dignitas and peace of mind".[1]

It could be argued, however, that Kuper J made the comments to emphasize the seriousness of the invasion for the purposes of assessing damages.[2] The Rhodesian courts, however, favour an objective approach for animus injuriandi,[3] and in Rhodesian Printing and Publishing Co Ltd v Duggan,[4] which also concerned publication of private facts, it was not necessary for the Court to discuss animus injuriandi as the plaintiff's dependants had applied for an interdict.[5]

(d) Conclusion

A subjective approach to animus injuriandi for invasions of privacy by the press may seem desirable in order to preserve freedom of speech,[6] and it could be argued that there is some authority for such an approach in Mhlongo v Bailey.[7] On the other hand freedom

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1) Per Kuper J at 372, my italics.

2) Cf Kuper J at 373.

3) Smith NO and Lardner-Burke NO v Wonesayi 1972 (3) SA 289 (RAD) 315f.

4) 1975 (1) SA 590 (RAD).

5) At 592f.

6) Cf Note "Defamation, Privacy and the First Amendment" 1976 Duke LJ 1016, 1018, where it was suggested that the 'actual malice' requirement in the United States should not be watered down. See above 63. The fear of suppressing freedom of speech was one of the reasons for rejecting Lord Mancroft's Bill in England. L Brittan "The Right to Privacy in England and the United States" (1963) 37 Tulane LR 233, 265. See above79 . This fear may also have influenced the policy behind the Privacy Acts in the Canadian provinces of British Columbia and Saskatchewan which exclude negligence as a basis for liability. Cf P Burns "The Law and Privacy: The Canadian Experience" (1976) 54 Canadian Bar Rev 1, 37. See above 119f. It is interesting to note that the requirement of intention for actions involving sentimental damages has been advocated by some Anglo-American writers; cf HD Krause "The Right to Privacy in Germany - Pointers for American Legislation?" 1965 Duke LJ 481, 516. See above 95; JG Fleming The Law of Torts 4 ed (1971) 526. See above 137. As has been pointed out above several of the Continental Codes also include a fault element in actions for invasion of privacy. Cf Federal Republic of Germany, Article 823(1) BGB, see above 88; France Article 1382 Code Civil, see above 97. See also the Quebec Civil Code, Article 1053. See above 119 n 12.

7) Supra.

of speech must be weighed against the right of the individual to seclusion in his private life.[1] The role of the press as a powerful medium of publicity[2] also cannot be ignored, and there is merit in adopting a procedure like that for defamation by the press.[3] Such a practice would limit the defendant's defences to those rebutting wrongfulness,[4] and seems to have been used by the court in Rhodesia Printing and Publishing Co Ltd v Duggan.[5] For all other invasions of privacy actionable under the actio injuriarum the subjective approach to animus injuriandi should be used, which would enable the defendant to lead evidence to rebut either fault or wrongfulness.[6]

The weighing of the interests which must be considered by the courts is a matter of policy and concern the question of wrongfulness.

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1) See below 170.

2) It was the threat posed by popular journalism and the proliferation of 'gossip columns' in the press which led to the publication of Warren and Brandeis' celebrated article in the United States. SD Warren and LD Brandeis 'The Right to Privacy" (1890) 4 Harvard LR 193, 196. See above 7 n 3.

3) See above 157f. Cf J Neethling Die Reg op Privaatheid (1976) 356. "Myns insiens behoort die pers skuldloos aanspreeklik gehou te word vir genoegdoening op grond van skending van die reg op privaatheid."

4) See above 159: Cf South African Law Commission The Liability of the Press for the Publication of Defamatory Matter in Newspapers (1975), Draft Bill, s 2(2). For the defences which rebut lawfulness, see below 313f. But cf Amerasinghe Actio Injuriarum op cit 197f.

5) Supra.

6) See above 156f. But cf PC Pauw Persoonlikheidskrenking en Skuld in die Suid-Afrikaanse Privaatreg - 'n Regshistoriese en Regsvergelykende Ondersoek (1976, LLD thesis) 189: "Dit kan dalk lei tot onbillikhede in geval van privaatheidskending, indien dit as onderafdeling van eerkrenking behandel word /ās/ die vereistes vir aanspreeklikheid /sal/ strenger word." This would not, however, be true in respect of invasions of privacy by the press. The question of liability for negligent invasions of privacy will be dealth with later. See below 362f.

2. WRONGFUL ACT

Generally whether or not the law will recognize a particular act or omission as wrongful is a policy consideration. In the words of Pound -

> "Undoubtedly the progress of society and the development of government increase the demands which individuals may make and so increase the number and variety of these interests. But they arise, apart from the law, through the competition of individuals with each other, the competition of groups or societies with each other, and the competition of individuals with such groups or societies. The law does not create them, it only recognizes them. Yet it does not have for its sole function to recognize interests which arise independently. It must determine which it will recognize." 1)

As has been pointed out above[2] South African courts appear to experience little difficulty in recognizing invasion of privacy as a wrongful act under the broad principles of the actio injuriarum. The difficulty arises, however, when the law is required to determine which forms of invasions should be recognized. In the case of privacy the courts must balance the rights of the individual to freedom from interference in his private life, against the rights of the society in which he lives to be informed concerning the affairs of its individual members.[3] Fleming puts the position as follows:-

"Free/...

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1) R Pound "Interests of Personality" (1915) 28 Harvard L R 343.

2) See above 125.

3) Cf P H Winfield "Privacy" (1931) 47 LQR 23, 41; H C Gutteridge "Comparative Law of the Right to Privacy" (1931) 47 LQR 203 217f; B Neill "The Protection of Privacy" (1962) 25 Modern L R 393, 397; T L Yang "Privacy: A Comparative Study of English and American Law" (1966) 15 ICLQ 175, 187; cf M A Franklin Injuries and Remedies : Cases and Materials on Tort Law and Alternatives (1971) 817f.

> "Free speech and dissemination of news are important competing values, and it is only when friction becomes unreasonable and offensive by prevailing standards of taste and propriety that legal intervention would become warranted." 1)

In discussing the policy conditions behind the recognition of a right to privacy our courts have been influenced by developments in Anglo-American law, particularly the latter.[2] It is intended to adopt a similar approach although reference will also be made to other jurisdictions.

The American courts have experienced considerable difficulty in determining where to draw the line between "the individual's interest in privacy and the public need for freedom of speech."[3] Similarly in England the fear of "imposing a new and severe restriction on the freedom of the press"[4] was apparently one of the main reasons for the rejection of Lord Mancroft's Bill.[5] The threat to freedom of speech in the Federal Republic of Germany was one of the factors which led to the shelving of the proposed Draft Law for the Reform of the Protection of Personality and Honour in Private Law.[6] In France on the other hand the 1970 amendments to the Civil Code[7] and the Penal Code[8] were introduced despite the fact that the right to privacy was already comprehensively protected.[9] Apart from

the/....

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1. J.G. Fleming The Law of Torts 4 ed (1971) 527; Cf P Stein and J Shand Legal Values in Western Society (1974) 196; J Stone Social Dimensions of Law and Justice (1966) 214: "Moreover, some degree of anxiety is necessarily involved in life in society and also some degree of publicity."
2) O'Keeffe v Argus Printing and Publishing Co. Ltd. 1954(3) SA 244 (C) 249; Rhodesian Printing and Publishing Co Ltd 1975(1) SA 590 (RAD) 593f.
3) Yang op cit 187; cf Note "Defamation, Privacy and the First Amendment" 1976 Duke L J 1016, 1018. See also Pound op cit (1915) 18 Harvard L R 343, 362.
4) Cf L Brittan "The Right to Privacy in England and the United States" (1963) 27 Tulane L R 233, 265.
5) See above 79.
6) See above 88.
7) Article 9. See above 98.
8) Articles 368-372. See above 98.
9) Cf "Current Legal Developments" (1971) 20 ICLQ 365. See above 107.

the problem of the "freedom of the press"[1] the question arises as to what standard should be adopted by the courts in determining whether or not to recognize a particular invasion as actionable.[2] It is submitted that the concept of contra bonos mores may provide a useful guideline for establishing whether the defendant's conduct was wrongful.

The contra bonos mores approach was used in Roman Law (termed adversus bonos mores) particularly in respect of convicium[3] and by the Roman-Dutch jurists.[4] The phrase has been translated by De Villiers to mean "offensive to good morals"[5] or "offensive to public morality /or/ public policy or order",[6] and it seems that this is also its modern meaning.[7] Joubert points out that the contra bonos mores concept has been applied in certain Continental systems, for instance, in Article 826 of the German Civil Code (BGB) which refers to "gute Sitten"[8] and Article 1401 of the Dutch Civil Code, which, as judicially interpreted, incorporates the test of "de goede zeden".[9]

The contra bonos mores test is useful in that it allows for changes in the current thinking and values of the community,

so/...

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1) Cf E F Ryan "Privacy, Orthodoxy and Democracy" (1973) 51 Canadian Bar Rev 84.

2) Cf Stein & Shand op cit 196f: "(A) survey of public attitudes to privacy commissioned by the Younger Committee ... revealed that although many think that privacy is in general being eroded, most individuals feel able to take steps to protect themselves from the general decline."

3) Digest 47.10.15.2,5,6; Cf W A Joubert Grondslae van die Persoonlikheidsreg (1953) 102; B Ranchod Foundations of the South African Law of Defamation (1972) 7f.

4) Voet 47.10.8; cf M de Villiers The Roman and Roman-Dutch Law of Injuries (1899) 22, 85; Joubert Persoonlikheidsreg op cit 109.

5) De Villiers op cit 22.

6) De Villiers op cit 22 n 7.

7) S v I 1976(1) SA 781 (RAD) 785; cf Joubert Persoonlikheidsreg op cit 109; P M A Hunt South African Criminal Law and Procedure (1970) II 490.

8) Justice Report Privacy and the Law (1970) 21f, para. 97. See above 85. Cf J Neethling Die Reg op Privaatheid (1976) 95f.

9) Cf Joubert Persoonlikheidsreg op cit 113 n 239; F de Graaf "The Protection of Privacy in Dutch Law" (1976) 5 Human Rights 177, 189 n 30.

so that what would be regarded as an injuria in Roman or Roman-Dutch law may not constitute a wrong today:

> "Indien ons vandag beweer dat 'n onbesproke jong dame 'n vooraanstaande toneelspeelster is, dan sal sy ongetwyfeld gevlei wees. In die tyd van Justinius daarteen (ondanks die herkoms van die Keiserin), of selfs tydens die regering van Koningin Elizabeth (the First) van Engeland sou so'n bewering 'n ernstige belediging gewees het."[1]

It is conceded that it has been doubted that "our law has reached the stage of recognizing every duty flowing from boni mores as a legal duty",[2] but it is submitted that, in the case of invasions of privacy the concept allows for a flexibility which enables the court to take into account the current values and thinking of the community when deciding whether or not to recognize such conduct as wrongful.[3]

> "/It/ seems ... that the present case must be judged in the light of modern conditions and thought, and the fact that the identical situation is not covered by Roman or Roman-Dutch law is not conclusive of the matter."[4]

In any event, it seems that to a certain extent the courts do set themselves up as custodes morum, whereby they "only give effect to mores which they consider boni",[5] or as Prosser puts it, the courts exercise "a species of censorship" when determining which wrongs are actionable.[6]

In the/...

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1) Per van den Heever JA in Foulds v Smith 1950 (1) SA 1 (AD) 10.

2) Meskin v Anglo-American Corporation of SA Ltd 1968 (4) SA 793 (W) 807. But cf Minister van Polisie v Ewels 1975 (3) SA 590 (AD) 597; PQR Boberg "The Wrongfulness of an Omission" (1975) 92 SALJ 361, 364; contra Amicus Curiae "The Actionable Omission - Another View of Ewels' Case" 93 SALJ 85. See also JC Van der Walt "Vonnisse: Minister van Polisie v Ewels" (1976) 1 TSAR 101, 103.

3) Universiteit van Pretoria v Tommie Meyer Films 1977 (4) SA 376 (T) 387.

4) O'Keeffe v Argus Printing and Publishing Co Ltd 1954 (3) SA 244. (C) 248; J Neethling "'n Geval van Privaatheidskending?" (1972) 35 THR-HR 370, 374.

5) Hunt op cit 490; cf WA Joubert "Die Persoonlikheidsreg: 'n Belangwekkende Ontwikkeling in die Jongste Regspraak in Duitsland" (1960) 23 THR-HR 23, 38; Yng op cit 184.

6) Prosser Torts op cit 825.

In the United States the courts appear to test whether an invasion is contra bonos mores objectively, using the standard of conduct which is "offensive to persons of ordinary sensibility" or which goes "beyond the limits of decency".[1] But many of the American cases are so conflicting that one writer has suggested that the courts appear to indulge in "naked creative choices which result in decision-making without signposts".[2] For instance, in Melvin v Reid[3] a reformed prostitute was able to recover for disclosures concerning her previous immoral life made seven years after her reformation, while in Sidis v F-R Publishing Corp[4] a mathematical prodigy, who had managed to live in obscurity since his childhood for thirty years and was then exposed to a "merciless ... dissection of intimate details of ... /his/ personal life",[5] was denied an action on the basis that he had once been a public figure.[6] Similarly, in Mau v Rio Grande Oil Co[7] the victim of a bank hold-up, who had been shot and wounded, was able to recover for an unauthorized radio dramatization of the incident which mentioned him by name and was made some eighteen months after the event, whereas in Stryker v Republic Pictures[8] a shy, retiring marine could not recover for the exhibition, several years later, of a film showing actual traumatic events encountered by him during World War II.[9] It is submitted that it could be

argued/...

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1) Restatement of Torts (1939) § 867, Comment C; cf Rhodesian Printing & Publishing Co Ltd v Duggan 1975(1) SA 590 (RAD) 593.

2) Brittan op cit 249; cf G D S Taylor "Privacy and the Public" (1971) 34 Modern L R 288, 289. Cf Franklin op cit 820.

3) (1931) 112 Cal App 285, 297 Pac 91. Cf Franklin op cit 809f.

4) (1940) 113 F 2d 806 (2 Cir). Cf Franklin op cit 817f.

5) Sidis v F-R Publishing Corp supra 807.

6) Sidis v F-R Publishing Corp supra 809; cf Brittan op cit 248; cf Stone op cit 214 "The most confirmed recluse invites public comment by that peculiarity." The decision in Sidis' case disturbed R Pound The Task of Law (1963) 76, who observed: "But it is difficult to see what the law could do about it."

7) (1939) 28 F Supp. 845 (ND Cal).

8) (1951) 108 Cal App 2d 191, 238 P 2d 670.

9) Brittan op cit 249.

argued that the disclosures concerning the plaintiff's past behaviour in Melvin's case were more "offensive" than those relating to the infant prodigy in Sidis' case, although, subjectively, the hurt suffered by the latter may have been more traumatic. Furthermore, while in Mau's case the court may have been influenced by the fact that the radio programme was commercially sponsored, and in Stryker's case it felt that the public was entitled to know about the exploits of its fighting men,[1] the effect on a plaintiff in the latter case may have been even more devastating, particularly if such a person had attempted to forget his unfortunate war experiences. Prosser suggests that the conflicting decisions in Melvin and Sidis demonstrate that the American courts apply a "mores" test[2] which is explained by Yang[3] as follows:-

> "In applying this test the court takes into consideration the status of the plaintiff in society, the prevailing customs, tastes and moral standards of society, the public benefit to be gained by the invasion of privacy complained of, the interest shown by the public, the lapse of time between the incident publicized and the publication, and the ordinary notions of decency."[4]

Beadle A C J in Rhodesian Printing and Publishing Co Ltd v Duggan,[5] a case involving the protection of the privacy of minor children,[6] suggested a useful guide to assist the courts in determining objectively whether or not such an invasion was contra bonos mores:

"The modes/...

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1) Cf Brittan op cit 249.
2) Prosser Torts op cit 812.
3) Yang op cit (1966) 15 ICLQ 184.
4) Op cit 184.
5) 1975(1) SA 590 (RAD).
6) For the facts of the case see above 128.

> "The modes of thought in any community must, in the long term, be influenced by that community's statute law. The statute law of this country /Rhodesia/ is clear beyond question, that children must at all times be protected from any publicity which might be harmful to them."[1)]

In the court a quo[2)] Davies J had mentioned that Rule 277 of the Rhodesian High Court Rules of Court provided for the protection from publicity of minors in custody suits.[3)] Beadle ACJ, however, went further[4)] and mentioned Rule 266, as well as several Rhodesian statutes: the Criminal Procedure and Evidence Act[5)] concerning juvenile offenders;[6)] the Children's Protection and Adoption Act[7)] safeguarding minors appearing before juvenile courts[8)] and the identity of adopted children;[9)] and the Federal Births and Deaths Registration Act[10)] shielding illegitimate children from undue publicity.[11)] It is interesting to note that in England[12)] and Canada,[13)] in negligence cases the courts have found it useful to refer to statutory provisions in determining, as a matter of policy, whether or not they should recognize a common-law duty in situations analogous to those for which a statutory duty has been imposed.[14)]

It is/...

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1) At 595.

2) See Mr & Mrs "X" v Rhodesian Printing and Publishing Co Ltd 1974(4) SA 508 (R).

3) At 513f.

4) Rhodesian Printing & Publishing Co Ltd v Duggan supra 595.

5) Chap 31 (R).

6) Sections 66, 75, 232(9), 237.

7) Act 22 of 1972 (R).

8) Section 4(5).

9) Section 69.

10) Act 35 of 1962 (R).

11) Section 15.

12) Scott v Green & Sons /1969/ 1 All ER 849 (CA) 850.

13) cf Horsley v MacLaren (1972) 22 DLR 3d 545.

14) C R Symmons "The Duty of Care in Negligence: Recently Expressed Policy Elements - Part II" (1971) 34 Modern L R 528, 536.

It is submitted that, on the basis of Beadle ACJ's reasoning in Duggan's case,[1] a South African court could find that in this country there is a tendency to afford minors statutory protection from publicity, for instance the Criminal Procedure Act[2] and the Children's Act.[3] Furthermore, there are a number of other South African statutes touching upon broader aspects of privacy,[4] (the Anatomical Donations and Post-Mortem Examinations Act,[5] the Telegraph Messages Protection Act,[6] the Prisons Act,[7] the Electoral Consolidation Act,[8] the Rent Act,[9] the Medical Schemes Act,[10] and Rule 17 of the Uniform Rules of Court) which the courts might find useful in determining the prevailing 'mores' of South African society in this regard. On the other hand, there are certain statutes that clearly allow a person's privacy to be invaded (for example the Internal Security Act[11] as regards disclosures concerning "listed" or professed communists,[12] and Rule 36 of the Uniform Rules of Court, providing for compulsory medical examinations in personal injury claims)[13] but generally such statutes have built-in safeguards against unjustified invasions (for example, the Statistics Act,[14] and the Criminal Procedure Act.[15]

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1) Supra.

2) Act 51 of 1977, s 154(3); cf repealed Act 56 of 1955, 564(6).

3) Act 33 of 1960, s 8(2).

4) See below 230ff.

5) Act 24 of 1970, s 14.

6) Act 44 of 1963, s 2. (iii), (iv).

7) Act 8 of 1959,ss 44(e)(ii). Cf S v SA Associated Newspapers Ltd 1962 (3) SA 396 (T) 397. Cf Police Act 7 of 1958, s 27 A.

8) Act 46 of 1946, s 95.

9) Act 80 of 1976, s 44.

10) Act 72 of 1967, s 39.

11) Act 44 of 1950, s 17 bis.

12) Cf Huyser v Die Voortrekkerpers Bpk 1954 (3) SA 75 (W) 77.

13) Durban City Council v Mondovu 1966 (2) SA 319 (D) 324; Mgudlwa v Mutual Insurance Association Ltd 1967 (4) SA 721 (E) 723. See below 238.

14) Act 66 of 1976, s 8. See below 230f.

15) Act 51 of 1977, s 37(5); cf repealed Act 56 of 1955, s 289(5).

In addition because of the State's policy of separate development there are several Acts which prescribe how a person may live his private life in relation to persons of another race group.[1)]

But even though certain statutory provisions may assist the courts in discovering objectively "the modes of thought of the community", the courts must go further if they are to avoid the problems experienced by Anglo-American jurisdictions.[2)] The root of the difficulties encountered by American jurists and English law-givers seems to originate in their apparent reliance upon a purely objective assessment of what invasions go "beyond the bounds of decency" (for instance, objectively it is offensive to say that a person was once a prostitute but not that a person was once a childhood genius), without any examination of the effect of such an invasion on the personality of the plaintiff [3)] (the hurt suffered by a hardened ex-prostitute may be much less than that suffered by a sensitive and shy genius who has lived as a recluse all his life). Therefore, although in the past our courts have been influenced by the approach of the American Restatement,[4)] it is submitted that they should not rely too

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1) For instance the Liquor Act 30 of 1928, s 94 (which controls the sale and supply of liquor to blacks); the Prohibition of Mixed Marriages Act 55 of 1949, s 1 (which prohibits marriages between whites and "non-Europeans" and even applies to South African male citizens domiciled outside the Republic); the Population Registration Act 30 of 1950, s 5 (which provides for the classification of persons according to their race); the Immorality Act 23 of 1957, s 16 (which prohibits sexual intercourse between whites and persons of other coloured race groups); the Extension of University Education Act 45 of 1959, s 17 (which prohibits registration of white students at black universities) and s 31 (which regulates the registration of blacks at other universities); the Group Areas Act 36 of 1966, s 13 (which prevents "disqualified persons" living in "controlled areas"); the Prohibition of Political Interference Act 51 of 1968, s 2 (which prevents persons of one race group from belonging to political parties organized by another race group). See generally HR Hahlo and E Kahn South Africa: The Development of Its Laws and Constitution (1960) 795ff; cf JD van der Vyver Die Beskerming van Menseregte in Suid-Afrika (1975) 84ff.

2) For the difficulty experienced by English legislators see above 78f.

3) See below 189f.

4) Cf O'Keeffe v Argus Printing & Publishing Co Ltd 1954 (3) SA 244 (c) 248; Rhodesian Printing & Publishing Co Ltd v Duggan 1975 (1) SA 590 (RAD) 592f.

heavily upon the American authorities which appear to focus on wrongfulness and ignore impairment of personality.[1] The better approach seems to be that adopted in O'Keeffe v Argus Printing and Publishing Co Ltd[2] where it was said that whether a plaintiff will succeed in an action for invasion of privacy will depend:

> "upon the circumstances of each particular case, the nature of the /invasion/ the personality of the plaintiff, his station in life, his previous habits with reference to publicity and the like".[3]

These factors clearly influenced Davies J in Mr & Mrs "X" v Rhodesian Printing & Publishing Co Ltd[4] when he took into account "the detrimental effect on the children",[5] and Beadle ACJ in Duggan's case[6] who was satisfied that the publication would have "upset the children's 'tranquility and enjoyment of their peace of mind', more particularly in their relationship with other children".[7] Therefore once the court is satisfied that the invasion is wrongful, it must consider whether the plaintiff's personality has been, or is likely to be, impaired.[8]

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1) See below 189f.
2) O'Keeffe v Argus Printing & Publishing Co Ltd supra 249.
3) Ibid. Cf S v I 1976 (1) SA 781 (RAD) 785f; cf G Feltoe "Private Lives and Public Sins" (1976) 16 Rhod LJ 21, 30.
4) 1974 (4) SA 508 (R).
5) At 514.
6) Rhodesian Printing & Publishing Co Ltd v Duggan supra.
7) At 595.
8) See below 189f.

CONCLUSION: It is submitted that generally the test for wrongfulness is objective, based on the prevailing mores of society,[1] and that when determining wrongfulness the courts must have regard to the particular circumstances of a person in the plaintiff's position, and the nature of the invasion.[2] For instance is it reasonable for someone to make public disclosures about the present life of an introvert former child prodigy,[3] or a shy war hero[4] where the disclosures are likely to cause hurt and embarrassment? It is submitted that such an approach would have enabled the American courts to find for the plaintiffs in Sidis' case and Stryker's[5] case and would eliminate the danger of our courts giving similar conflicting decisions. Conversely, the activities of neighbours or acquaintances prying or circulating gossip are virtually impossible to prevent and are usually tolerated as the price paid for living in a

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1) When considering whether or not the invasion or privacy was contra bonos mores Beadle ACJ in Duggan's case (at 785) referred to the British Columbia Privacy Act, SBC 1968, c 39, s 2(2) of which states: "The nature and degree of privacy to which a person is entitled in any situation or in relation to any matter is that which is reasonable in the circumstances, due regard being given to the lawful interests of others; and in determining whether the act or conduct of a person constitutes a violation of the privacy of another, regard shall be given to the nature, incidence and occasion of the act or conduct and to the relationship, whether domestic or other, between the parties". Cf B Burns "The Law and Privacy: The Canadian Experience" (1976) 54 Canadian Bar Rev 1 32 n 176. Cf Saskatchewan Privacy Act, SS 1976, c 80, 56; Manitoba Privacy Act, S M 1970, c 74, s 4(2); Burns op cit 37. See also Neethling Privaatheid op cit 406. Cf R v S 1955 (3) SA 313 (SWA) 316.

2) It could be argued that wrongfulness and impairment of personality have been distinguished in the Federal Republic of Germany concerning breaches of confidence relevant to the "Geheimsphäre". Here the test for whether the relationship of the parties is confidential is objective, but whether or not the person making the disclosure to the confidant wishes it to be confidential is subjective. Neethling Privaatheid op cit 61f. See above 92. On confidential disclosures see below 275f, 280f.

3) Cf Sidis v F-R Publishing Corp (1940) 113 F 2d 806 (2 Cir).

4) Cf Stryker v Republic Pictures (1951) 108 Col App 2d 191, 238 P 2d 670.

5) See above 174f.

social community.[1] Where such prying or gossip becomes offensive to the prevailing mores and is likely to adversely affect the individuals concerned, the conduct should be regarded as an invasion of privacy.[2] To bring a successful action, however, the plaintiff will have to show that his personality has been, or is about to be impaired.[3] In privacy cases the impairment usually takes the form of an interference with the plaintiff's right to seclusion in his private life.[4]

3. IMPAIRMENT OF PERSONALITY

There is no doubt that invasion of privacy constitutes an impairment of personality, but there is some controversy over whether privacy is an independent personality right or whether it is an aspect of dignitas.[5] The South African courts, however, seem to regard invasion of privacy primarily as an impairment of dignitas.[6]

a) Meaning of Dignitas: Lewis and Short define dignitas as "being worthy, worthiness, merit ... dignity"[7] whereas De Villiers describes it as:

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1) Cf Stein & Shrand op cit 196: "The General Council of the Bar, in its memorandum to the Younger Committee, said ... such activities as neighbour's or acquaintance's prying or circulating gossip, '... have existed for hundreds of years, and are by any normal test objectionable; however, people have come to live with and accept them as part of the problems of living in a social community, to such an extent that there is not today any great demand for the introduction of legal sanctions against such activities'."

2) Neethling Privaatheid op cit 323, suggests that where disclosures are made to a small group they should not be wrongful unless there is a confidential relationship. See below 282. This approach seems to be favoured by supporters of the German "Geheimsphäre" theory. See above 92. In the United States gossip published in the media, is actionable. Cf A Hill "Defamation and Privacy under the First Amendment" (1976) 76 Columbia LR 1205, 1221f; cf Warren and Brandeis op cit 196. See above 7 n 3. Vicious back fence gossip "between individuals may also be actionable"; cf Hill op cit 1289: "(t)he degree of publicity given to the private fact ought to weigh in the determination of liability vel non, but ... the absence of publicity should not always constitute a bar to liability."

3) See above 147.

4) See above 145.

5) See below 184. Cf S v I 1976 (1) SA 781 (RAD) 783f.

6) See below 185.

7) CT Lewis & C Short A Latin Dictionary (1900) 577f; cf "dignatio ... a deeming worth, respect, esteem, regard".

> "that valued and serene condition in his social or individual life which is violated when a person is, either publicly or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt".[1]

De Villiers' definition has been accepted by the courts on several occasions,[2] and seems to have also influenced academic writers. For instance, Bliss speaks of the "eergevoel ... die inwendige eer, die gevoelens van die beledigde self wat gekrenk word",[3] and Joubert refers to dignitas as "die eer" and gives a philosophical definition:

> "Die eer is die erkenning van die geestelike-sedelike waarde van die mens as kroon van die skepping, as wese wat uitstyg bo die bloot fisies-psigiese van die stoflike natuur en die dierelewe".[4]

Van der Merwe and Olivier describe dignitas as "die waardigheidsgevoel, kuisheidsgevoel, pieteitsgevoel en selfrespek van 'n persoon",[5] while de Wet and Swanepoel have referred to it in the past as "waardigheid, respek en geestelike onverstoorheid".[6]

It is submitted, however, that it is wrong to translate dignitas as "die eer",[7] or as "dignity".[8] The concept is clearly much wider.

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1) M de Villiers The Roman and Roman-Dutch Law of Injuries (1899) 24.

2) Cf R v Umfaan 1908 TS 62, 67; O'Keeffe v Argus Printing & Publishing Co Ltd 1954 (3) SA 244 (C) 247f; Rhodesian Printing & Publishing Co Ltd v Duggan 1975 (1) SA 590 (RAD) 594.

3) M Bliss Belediging in die Suid-Afrikaanse Reg (1933) 61.

4) WA Joubert Grondslae van die Persoonlikheidsreg (1953) 131 but cf JC De Wet and HL Swanepoel Strafreg 3 ed (1975) 239.

5) NJ van der Merwe and PJJ Olivier Die Onregmatige Daad in die Suid-Afrikaanse Reg 2 ed (1970) 390. Cf JC van der Walt "Regspraak: Jackson v NICRO" (1977) 1 TSAR 72, 75E.

6) JC De Wet & HL Swanepoel Die Suid-Afrikaanse Strafreg 2 ed (1960) 284. The 3rd edition of their work contains no such reference. Cf De Wet & Swanepoel Strafreg op cit 236: "/Dit kan/ nie beweer word dat 'dignitas' of 'dignity' in ons praktyk 'n regsgoed geword het met 'n duidelike inhoud, wat kan dien as basis vir 'n misdaadsomskrywing nie".

7) Cf J Neethling Die Reg op Privaatheid (1976) 373.

8) Cf R v Holliday 1927 CPD 395, 400: "Now 'dignitas' it seems to me is not fully translated by the English word 'dignity'." Cf Ed CT Onions The Shorter Oxford English Dictionary (1933) 509: "Dignity ... The quality of being worthy or honourable ... worth, excellence, ... honour".

According to Amerasinghe[1] while *fama* and *corpus* have been extended to include the wrongs of defamation, malicious prosecution, assault and false imprisonment, *dignitas* has remained a "vacuous concept" which can accommodate future developments under the *actio injuriarum*.[2] In the words of Neethling:

> "Die *dignitas* is nie 'n afgebakende selfstandige persoonlikheidsgoed nie, maar eerder die versamelnaam vir persoonlikheidsgoedere wat nog nie geindentisifeer en duidelik van mekaar onderskei is nie".[3]

Neethling goes further and states: "Een van hierdie persoonlikheidsgoedere is sonder twyfel privaatheid".[4] A similar view is taken by Hunt,[5] who after analysing the criminal law cases concludes that *dignitas* is:

> "a somewhat vague and elusive concept which can ... be broadly described positively in terms of a person's right to self-respect, mental tranquility and privacy ... It can be described negatively in terms of his right to freedom from insulting, degrading, offensive or humiliating treatment and to freedom from invasions of his privacy".[6]

Whichever definition is used, apart from those restricting the concept to "die eer" or "honour" it seems clear that *dignitas* is broad

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1) CF Amerasinghe *Aspects of the Actio Injuriarum in Roman-Dutch Law* (1966).

2) Amerasinghe *Actio Injuriarum* op cit 173; cf Joubert *Persoonlikheidsreg* op cit 110. De Wet and Swanepoel *Strafreg* op cit 233 n 92, state that *dignitas* was not an independent personality right like *corpus* and *fama*, but concerned the 'social status' with which a person was clothed. This meaning also appears in the *Shorter Oxford English Dictionary* op cit 509: "Dignity ... Honourable or high estate, position or estimation ... An honourable office, rank or title".

3) J Neethling "Grondslag vir die Erkenning van 'n Selfstandige Persoonlikheidsreg op Privaatheid in die Suid-Afrikaanse Reg" (1976) 39 THR-HR 120, 126; Neethling *Privaatheid* op cit 373. Cf de Wet & Swanepoel *Strafreg* op cit 236.

4) Ibid. Strauss, Strydom & Van der Walt op cit 292, distinguish privacy from "eerkrenking".

5) PMA Hunt *South African Criminal Law and Procedure* (1970) II.

6) Hunt op cit 496. Cf *S* v *Tanteli* 1975 (2) SA 772 (T) 774.

enough to incorporate the right to privacy.[1] Some writers, however, have suggested that privacy should be divorced from dignitas.[2]

Privacy: Aspect of Dignitas or Separate Right? Joubert suggests that the essential questions for a claim under the actio injuriarum are merely:

> "(a) was daar 'n krenking van 'n regtens beskermde persoonlikheidsbelang van die eiser, d.i. van 'n persoonlikheidsreg? en (b) het die dader opsetlik gehandel, d.w.s. met sy wil gerig op die aantasting van die ander se persoonlikheidsreg?" [3]

This approach ignores any analysis of personality interests in terms of corpus, dignitas and fama.[4] Joubert goes further and states that these Roman and Roman-Dutch law categories are unsuited to a modern legal system.[5] It has been said that the learned writer seems to see the right to privacy as a separate personality right,[6] but it could be argued that he regards it as an aspect of "die eer".[7] On the other hand Van der Merwe and Olivier[8] bluntly state that in the future "die erkenning van 'n selfstandige reg op privaatheid slegs realisties sal wees".[9] This view is echoed by Neethling:

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1) For instance, reputation may also be regarded as an aspect of dignitas, in that the lowering of a person's reputation may affect his self-esteem and dignity. Amerasinghe Actio Injuriarum op cit 176, 190. See above 43.

2) Cf van der Merwe & Olivier op cit 394f; Neethling Privaatheid op cit 380; Neethling op cit (1976) 39 THR-HR 128.

3) WA Joubert "Die Persoonlikheidsreg; 'n Belangwekkende Ontwikkeling in die Jongste Regspraak in Duitsland" (1960) 23 THR-HR 23, 41.

4) See above 43.

5) Joubert op cit (1960) 23 THR-HR 42.

6) Cf De Wet & Swanepoel Strafreg op cit 238: "Ook die 'reg op privaatheid' word deur Joubert as 'n reeds afgebakende persoonlikheidsreg beskou".

7) Cf Joubert Persoonlikheidsreg op cit 135: "Dit is 'n ernstige krenking van die eer van 'n mens om in sy private lewe in te dring of om dit bloot te lê vir die oë en ore van die publiek, of selfs van enkelinge wat geen reg op kennisname het nie".

8) Van der Merwe & Olivier op cit 395.

9) Ibid.

> "Die reg op privaatheid word ongetwyfeld as 'n selfstandige persoonlikheidsreg in ons reg erken en is as sodanig reeds uit die dignitas-begrip afgebaken".[1]

Nonetheless, "dignitas" has a wide connotation[2] and it seems clear that our courts regard invasion of privacy as dignitary wrong:

> "The unauthorized publication of a person's photograph and name for advertising purposes is in my view capable of constituting an aggression upon that person's dignitas".[3]

> "There was in the present case an invasion of the plaintiff's privacy which ... constituted an aggression upon his dignitas".[4]

> "I have no doubt that the right to privacy is included in the concept of dignitas, and that there is no dearth of authority for this proposition".[5]

> "Looking through /complainants/ window was clearly an invasion of her privacy. Put another way her dignitas was injured by the invasion of her privacy".[6]

The above dicta indicate that the South African courts regard "dignitas" as wide enough to include the right to privacy.[7] Neethling submits that because the courts see dignitas as a collection of personality rights rather than a separate right, and since such

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1) Neethling Privaatheid op cit 380; Neethling op cit (1976) 39 THR-HR 128.

2) See above 181f.

3) O'Keeffe v Argus Printing & Publishing Co Ltd 1954 (3) SA 244 (C) 249.

4) Mhlongo v Bailey 1958 (1) SA 370 (W) 373.

5) S v A 1971 (2) SA 293 (T) 297.

6) S v I 1976 (1) SA 781 (RAD) 784.

7) See also Gosschalk v Rossouw 1966 (2) SA 476 (C) 490f; cf Neethling Privaatheid op cit 375f. Neethling op cit (1976) 39 THR-HR 127, points out that the equation of privacy and dignity flows from R v Holliday 1927 CPD 395, 401.

personality rights incorporate the right to privacy, the latter should be regarded as a separate right.[1] This contention was, however, rejected by the court in S v I[2] on the grounds that "the defences which can be raised to the charge of invasion of privacy or a charge of injury to dignitas ... are basically the same".[3] It is submitted that in our law, whichever approach is used, an action for sentimental damages arising from invasion of privacy will have to satisfy the requirements of the actio injuriarum. Therefore there is no good reason for contending that privacy should be regarded as a separate right unless it is contended that invasion of privacy should develop as a sui generis action outside the confines of the actio injuriarum or lex Aquilia.[4]

The approach of the South African courts is not unlike that referred to by social scientists,[5] and favoured by Bloustein[6] in the United States. The latter criticizes Prosser's pragmatic classifi-

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1) Neethling Privaatheid op cit 375f.

2) Supra.

3) S v I supra 784.

4) Neethling Privaatheid op cit 380, does not appear to have this in mind, but it seems to be contemplated by Van der Merwe & Olivier op cit 395: "Die persoonlikheidsgoedere van die mens en die erkenning van persoonlikheidsregte is in die twintigste eeu die voorwerp van so 'n dynamiese ontwikkeling dat dit tot verydeling van regsontwikkeling kan lei om nuwe persoonlikheidsregte onder 'n uitgediende sisteem te probeer tuisbring".

5) Cf OM Ruebhausen & OG Brim "Privacy and Behavioural Research" (1965) 65 Columbia LR 1184, 1189: "The right to privacy is therefore a positive claim to a status of personal dignity". E Shils "Privacy: Its Constitution and Vicissitudes" (1956) 31 Law and Contemp Problems 289, 306: "A great deal of the intrusion into personal privacy is ... an immoral affront to human dignity". Cf C Fried "Privacy" (1968) 77 Yale LJ 475, 482: "Privacy is closely implicated in the notions of respect and self-respect, and of love, friendship and trust". But contra De Wet & Swanepoel Strafreg op cit 236: "Mens kan nie 'self-respect', 'peace of mind', 'mental tranquility' of welke ander 'gevoel', aan die een kant, en 'privacy' of liggaamlike integriteit aan die ander kant as een en dieselfde grondslag behandel nie." It should be borne in mind, however, that "dignitas" has a wider meaning than "dignity". See above 182f.

6) EJ Bloustein "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39 NYULR 962.

cation [1] for failing to stress the uniform concept of "dignity" which underlies each of the categories.[2] Bloustein argues that as in the "intrusion" cases, in "publication of private facts" it is not the victim's reputation which is being harmed but his right to a private life.[3] Similarly in both the "false light" and "appropriation" cases the emphasis is not on reputation or commercial exploitation but the affront to the injured party's dignity through the misuse of his name or likeness.[4] In short the right to privacy "has nothing to do with emotional tranquility or reputation or the monetary value of a name or likeness; it concerns 'human dignity and individuality'."[5] It should therefore be regarded as a "dignitary tort".[6]

Neethling criticizes Bloustein for failing to give privacy a definite profile,[7] but it is submitted that an equally pertinent criticism is that the word "dignity" is not wide enough.[8] Conversely

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1) WL Prosser Law of Torts 4 ed (1971) 804; see above 55.

2) Bloustein op cit 962; cf Neethling Privaatheid op cit 161.

3) Bloustein op cit 974; cf Neethling Privaatheid op cit 161.

4) Bloustein op cit 989, 991f; cf Neethling Privaatheid op cit 161.

5) EJ Juta "Some Comments on the Privacy of Public Figures in England and the United States" (1972) 1 NULR 21, 25; Bloustein op cit 1005.

6) Bloustein op cit 1003; see above 120. Cf Neethling Privaatheid op cit 162. There is support for Bloustein's views in SD Warren & LD Brandeis "The Right to Privacy" (1890) 4 Harvard LR 193, 205, 207, 215. "The focus /by Warren & Brandeis/ was on dignity and the "inviolate personality". Note "Defamation, Privacy and the First Amendment" 1976 Duke LJ 1016, 1033f. The dignity aspect has been referred to in other jurisdictions: cf New Zealand Law Revision Commission Report of Sub-Committee on Computer Data Banks and Privacy (1973) 68, which recognized that privacy was necessary "to preserve the human dignity of the individual and his effective freedom to develop and exercise the full human personality". Cf P Burns "The Law and Privacy: The Canadian Experience" (1976) 54 Canadian Bar R 1, 3 n 14; G Del Vecchio Justice (1956) 116, who describes the 'right to solitude' as: "that ideal element of autonomy which constitutes the inviolable essence of the person". See above 15.

7) Neethling Privaatheid op cit 162f; cf Juta op cit 24.

8) See above 182.

the meaning of the word "dignitas" used by the South African courts[1] seems to be sufficiently broad to accommodate most invasions of privacy, and sufficiently narrow to prevent the delict from becoming so wide that it swallows up other actions.[2]

Assuming that privacy is regarded as an aspect of dignitas in South African law a number of other questions arise: Should the concept be tested subjectively or objectively by the courts? Must the plaintiff be aware of the invasion at the time that it occurs? Does the action require an element of degradation or insult?

c) Subjective or Objective Test? In Roman Law the dissimulatione aboletur rule in respect of injuriae[3] seems to suggest that impairment of dignitas was tested subjectively.[4] The principle of dissimulation was given qualified approval by Voet,[5] but appears to form no part of South African law.[6] The question of whether the test for infringement of dignitas should be subjective or objective recently

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1) See above 185.

2) See above 62.

3) Digest 47.10.11.1.

4) The test for whether the conduct was injurious appears to have been objective, but whether the plaintiff had suffered injury was a subjective enquiry. Cf M Tselentis "Book Review" 1972 Acta Juridica 246; Van der Walt op cit 74: "Die siening dat die dignitas van 'n seun meer gekrenk kan wees as die van sy vader, dui op 'n subjektiewe siening van dignitas as beskermingsobjek (Digest 47.10.31). Die feit dat die persoonlikheid van 'n benadeelde 'n ernstige krenking kan meebring ... dui weer eens op 'n vereiste van subjektiewe krenking". Cf Digest 47.10.15.48: "If, however, /an injury/ affects and hurts me I also have an action of injury". Translation by De Villiers op cit 274.

5) Voet 47.10.19, who points out, however, that a person is not presumed to condone an injuria merely because he keeps quiet. Cf Van der Walt op cit 74.

6) De Villiers op cit 188f.

came before the Appellate Division but was not decided. In Jackson v NICRO[1] Jansen JA noted that while some of the Roman-Dutch jurists[2] seemed to favour an objective approach,[3] the modern authorities were conflicting. He pointed out that although Hunt,[4] De Wet and Swanepoel[5] and Bliss[6] appear to adopt a subjective approach there are paragraphs in their works which indicate that the test may also be objective.[7] Furthermore similar conflicts existed in modern Dutch law.[8] Unfortunately Jansen JA did not find it necessary to decide the question:

> "Although a conspectus of all the aforegoing seems to favour the view that dignitas is an objective concept, it would be imprudent to accept, unconditionally, the assumption made by the court a quo in this regard [ie that the test is objective], without fuller investigation of the authority. It may, however, be assumed (without deciding) in favour of the appellant that the true concept of dignitas is subjective, as the appeal may be disposed of on a different ground".[9]

It is submitted, however, that even if the test for impairment of dignitas is subjective, whether or not the courts will uphold the plaintiff's claim will depend upon their recognizing that the defendant's conduct was wrongful.[10] The test for such wrongfulness

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1) 1976 (3) SA 1 (AD).

2) For instance, Mevius Decisiones 7.112; Huber Praelectiones 4.4.3.

3) Jackson v NICRO supra 12.

4) Hunt op cit 10.

5) De Wet & Swanepoel op cit 240.

6) Bliss op cit 61.

7) Jackson v NICRO supra 11f.

8) Van Bemmelen & Van Hattun Hand-en Leerboek van Het Nederlandse Strafrecht (1954) II 489f; Noyon & Longemeijer Het Wetboek van Strafrecht (1954) II 25f; cf Jackson v NICRO supra 12.

9) Jackson v NICRO supra 12.

10) Cf Van der Walt op cit 76, 78. Cf JM Burchell "Dignitas: Subjective or Objective?" (1977) 94 SALJ 5, 7, who favours an objective test seems to overlook the distinction between the recognition of a lawfully protected interest and the effect of a breach of this interest on the plaintiff. Cf R v S 1955 (3) SA 313 (SWA) 316.

is objective,[1] but the effect of the invasion is considered subjectively. The position has been well summarized by Hunt as follows:

> "The concepts of self-respect, mental tranquility and privacy are judged both objectively and subjectively. Objectively in that the law accepts that each person is entitled to them. Subjectively in that it depends upon the particular person and the circumstances whether it can be said that his dignitas has in fact been impaired".[2]

In short once the court is satisfied that the invasion is wrongful, the test for whether or not the plaintiff's dignitas has in fact been impaired is subjective.[3]

d) Awareness by Plaintiff: If the test for whether the plaintiff's dignitas has been impaired is subjective then it would seem to follow the plaintiff must have been aware that the indignity was being perpetrated. This view however is not consistent with the authorities. In Roman law it mattered not that the victims of an injuria were young children or lunatics who were not aware that an injuria had been perpetrated.[4] The explanation seems to be that although their self-respect and mental tranquility has not been disturbed their right to privacy has,[5] and this appears to have been applied in South African criminal law:

> "It is true that /the complainant/ was not conscious of the indignity but it seems to me that knowledge was not essential ... If a person were to pin an offensive placard to the back

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1) See above 180.

2) Hunt op cit 496.

3) Cf R Pound "Interests of Personality" (1915) 18 Harvard LR 343, 362, who points out that "the injury is mental and subjective", but must be confined to the "legal securing of the interest to ordinary sensibilities". The latter refers to the wrongfulness aspect which is measured objectively.

4) Digest 47.10.3.1.

5) Hunt op cit 497; cf De Wet & Swanepoel op cit 238. De Villiers op cit 258 n 27, suggests that such persons were presumed to have taken offence.

> of a lady's dress, I think he could be convicted of injury, even though it was removed by someone else before she became aware of it ... The gist of the present offence /peeping at the complainant while she undressed/ is the impairment of the complainant's rights of personality. If persons guilty of conduct such as that of the accused could not be punished, then the sense of security from intrusion in the minds of women would be disturbed. They could not feel secure that their privacy was not being violated".[1)]

Although in several "peeping tom" cases the accused has been acquitted on the grounds that the peeping was secret, silent and unknown to the complainant at the time,[2)] it is submitted that the better view is that the court may infer that the aggression took place at the time of the accused's act, even though the victim only learns of such conduct afterwards.[3)] Similarly the fact that a woman who is asleep is unaware at the time that she is having intercourse with a man other than her husband will not necessarily defeat a charge of rape.[4)] Furthermore, it has been argued that a person who is unaware that he has been wrongfully arrested may also recover damages in respect of the period when he was unaware that his liberty had been restrained.[5)] De Wet and Swanepoel point out, however, that in S v A[6)] it was unnecessary for the court to refer to the complainant's feelings:

> "Wat die klaer se gevoelens was, skyn in ieder geval nie ter sake te wees nie. Dit gaan nie oor gekrenkte gevoelens nie, maar oor die inbreuk op die reg van privaatheid".[7)]

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1) Per Gardiner J in R v Holliday 1927 CPD 395, 401f; cf R v Daniels 1938 TPD 312, 313.

2) Cf R v Nyandoro 1917 SR 1; R v Van Tonder 1932 TPD 90.

3) Hunt op cit 498. Cf R v Pillay 1958 (1) PH H28 (N) where the complainant was propositioned by an Indian in a language which she did not understand but was told its meaning afterwards. The accused was convicted of crimen injuria.

4) Cf R v C 1952 (4) SA 117 (O) 120f.

5) RG McKerron "Law of Delict" 1949 Annual Survey 130. Cf Birch v Johannesburg City Council 1949 (1) SA 231 (T) 238, where the question was left open.

6) 1971 (2) SA 293 (T).

7) De Wet & Swanepoel Strafreg op cit 238 n 126.

Nonetheless it is clear that the court must take into account the complainant's reaction to the accused's conduct.[1)]

c) Degradation and Insult: In Walker v Van Wezel[2)] it was suggested that the scope of injuria as a cause of action for the impairment of a plaintiff's dignitas must be restricted, and that a remedy should be given only when the words or conduct complained of involved degradation, insult or contumelia.[3)] Joubert points out that the requirement of contumelia is obsolete in modern law, and that even in late Roman law it simply meant an intentional wrong or dolus, "ook bekend as animus injuriandi die opset om 'n injuria of persoonlikheidskrenking te pleeg."[4)] In Foulds v Smith[5)] the Court cautioned against too much emphasis being placed on the requirement of contumelia,[6)] and this view was adopted in O'Keeffe v Argus Printing and Publishing Co Ltd.[7)] O'Keeffe's case has been interpreted to give "contumelia" Joubert's meaning of intention to insult.[8)] Unfortunately in Kidson v SA Associated Newspapers Ltd[9)] and Mhlongo v Bailey[10)] the Court again emphasized the requirement of contumelia in the sense of insult. It is submitted, however, that in both cases the court erred in applying the principle in Walker's case as the judge in the latter case was concerned with the problem of "insult" not privacy.[11)] Neethling

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1) Cf R v Olakawu 1958 (2) SA 357 (C) 360: "Although the test as to what constitutes an impairment of dignity must naturally be an objective one, regard can I think, rightly be had to the complainant's reaction to the accused's conduct". Cf S v A supra 298.

2) 1940 WLD 66.

3) At 70.

4) Joubert Persoonlikheidsreg op cit 92ff; Joubert op cit (1960) 23 THR-HR 41.

5) 1950 (1) SA 1 (AD).

6) At 11.

7) 1954 (3) SA 244 (C) 248.

8) Cf Amerasinghe Actio Injuriarum op cit 186: "it is submitted that in the context of the defence raised, the statement must be taken to refer to the animus".

9) 1957 (3) SA 461 (W) 469.

10) 1958 (1) SA 370 (W) 372.

11) See above 127,, 130 . Cf DJ McQuoid-Mason "Invasion of Potency?" (1973) 90 SALJ 23, 27f. Cf CT Onions The Shorter Oxford English Dictionary (1933): "Insult... to offer indignity to; to affront; to outrage". The Afrikaans equivalent "beledig" is translated by HJ Terblanche Nuwe Praktiese Woordeboek 5 ed (1966) 621 as: "insult, offend, affront, injure"; and by DB Bosman, IW van der Merwe & LW Hiemstra Tweetalige Woordeboek (1962) 71as: "offend, insult, affront, hurt (the feelings of)".

indicates[1] that this emphasis on "insult" was also apparent in R v Holliday[2] and S v A,[3] but it is submitted that in these cases the court was referring to dolus (ie intention to injure, animus injuriandi),[4] not the effect of the aggression on the victim's dignitas. In privacy cases the requirement of degradation or insult appears to be irrelevant.[5]

In short, claims for sentimental damages arising from invasions of privacy can be accommodated within the flexible framework of the concept of dignitas under the actio injuriarum.[6] It is not anomalous to classify invasion of privacy as a dignitary wrong together with such wrongs as assault,[7] false imprisonment,[8] adultery[9] and insult[10] which have the common factor of aggression on the plaintiff's dignity, in addition to separate characteristics of their own. But if invasion of privacy is regarded as a dignitary wrong it seems most unlikely that an artificial person, for instance a corporation, could recover damages.[11]

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1) Neethling op cit (1976) 39 THR-HR 127.

2) 1927 CPD 395, 400, where the court referred to an "intention to do the insulting act". My italics.

3) 1971 (2) SA 293 (T) 299, where the court found dolus eventualis on the basis that: "They must have foreseen the possibility that the complainant could or would be hurt and insulted" my italics.

4) See above 165.

5) McQuoid-Mason op cit (1973) 90 SALJ 27f.

6) See above 183f. Cf Joubert Persoonlikheidsreg op cit 146: "Dit sou alleen 'n kasuisties-gebonde regspraak wees wat die reg op privaatheid in sy verskillende aspekte nie sou kon baseer op die reg op dignitas nie".

7) Cf O'Kelly v Jamieson 1906 TS 822, 824; Prinsloo v Du Plooy 1952 (4) SA 219 (O) 221.

8) Cf Whittaker v Roos & Bateman 1912 AD 92, 118, 123, 135; Makhanya v Minister of Justice 1965 (2) SA 488 (N) 491.

9) Cf Viviers v Kilian 1927 AD 449; Bruwer v Joubert 1966 (3) SA 334 (AD).

10) Cf Walker v Van Wezel 1940 WLD 66; Brenner v Botha 1956 (3) SA 257 (T); Matiwane v Cecil Nathan, Beattie & Co 1972 (1) SA 222 (N).

11) See below 278. . Cf SH Hofstadter & G Horowitz The Right to Privacy (1964) 229; American Jurisprudence, Second (1972) v 62 692f. See now Universiteit van Pretoria v Tommie Meyer Films 1977 (4) SA 376 (T) 385.

4. Damages: A plaintiff who wishes to recover sentimental damages under the actio injuriarum must prove the elements of the action, but need not prove special damages.[1] In addition if the plaintiff proves that he has suffered pecuniary loss, such loss may also be recovered.[2] When awarding damages in defamation cases the court will take into account the contents and nature and extent of the publication, the standing of the plaintiff and the conduct of the defendant.[3] A similar approach has been applied to invasions of privacy.[4] Thus it has been held that the fact that the defendant deliberatly rode roughshod over the plaintiff's feelings was an aggravating factor,[5] while the tendering of an apology was regarded as mitigating.[6] A plaintiff seeking to recover damages for a negligent invasion of privacy will have to prove actual pecuniary loss.[7]

Apart from, or in addition to, damages the court may grant an interdict restraining the proposed or continued invasion of privacy.[8]

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1) RG McKerron The Law of Delict 7 ed (1971) 115; Van der Merwe & Olivier op cit 386.

2) Cf Salzmann v Holmes 1914 AD 471, 480; Sutter v Brown 1926 AD 155, 171; McKerron Delict op cit 115; Van der Merwe & Olivier op cit 398f.

3) Buthelezi v Poorter 1975 (4) SA 608 (W) 613f. Cf Fayd'herbe v Zammit 1977 (3) SA 711 (D) 719.

4) Common law systems seem to doubt whether damages are a suitable remedy for invasion of privacy. Cf P Stein & J Shand Legal Values in Western Society (1974) 195: "Those victims for whom the remedy was most designed ... are the least likely to wish to republish their private affairs or to relive their grief, by protracted and public litigation"; cf J Stone Social Dimensions of Law and Justice (1966) 214. This attitude may explain why in Canada in terms of Privacy Acts "an action for invasion of privacy must by instituted in the Supreme Court of each province". Burns op cit 38.

5) Mhlongo v Bailey supra 372.

6) Kidson v SA Associated Newspapers Ltd supra 468.

7) See below 362f.

8) Epstein v Epstein 1906 TH 87, 88; Rhodesian Printing & Publishing Co Ltd v Duggan 1975 (1) SA 590 (RAD) 595. An interdict was refused in Prinsloo v SA Associated Newspapers Ltd 1959 (2) SA 693 (W) 695f, because the plaintiff had failed to give the defendant sufficient notice. Se above 128. It has been suggested that in Anglo-American law: "(a)ll that is left for the law ... is to prohibit by injunction or to deter by criminal sanctions". Stein & Shand op cit 196. In France the court may seize offending matter to prevent a threatened invasion of privacy (Article 9, Civil Code; see above 99f), and in the Federal Republic of Germany it seems that an injunction may be brought. Neethling Privaatheid op cit 353f.

In order to obtain an interdict the plaintiff must show that he has: (i) a clear right,[1] or a right which though prima facie established is open to some doubt;[2] (ii) suffered injury actually committed or a well grounded apprehension of irreparable injury;[3] and (iii) no other satisfactory remedy available to him.[4] In the granting of an interdict, however, fault by the defendant is irrelevant.[5]

5. CONCLUSION

Having attempted to define invasion of privacy and its essential requirements in respect of actions for sentimental damages it is now necessary to consider the different ways in which a person's "right to seclusion in his private life" can be disturbed. As has been pointed out Prosser divides invasion of privacy into intrusions, public disclosures of private facts, false light cases and appropriation.[6] It is submitted, however, that the last three categories can be included under the head of "publicity", as they all concern exposure of the injured person's private life, image or likeness to the public eye. The same is true of Fleming's categories of interest in seclusion, name, likeness and life history, and personal dignity and self-respect.[7] The former two can be respectively labelled as the right to protection against intrusions and publicity while the latter is analogous to insult under the actio injuriarum in our law.[8] South

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1) Epstein v Epstein supra 88; Mr and Mrs 'X' v Rhodesian Printing & Publishing Co Ltd 1974 (4) SA 508 (R) 514.

2) Setlogelo v Setlogelo 1914 AD 221, 227. Cf McKerron Delict op cit 140f; Van der Merwe & Olivier op cit 387f.

3) Ibid; cf Epstein v Epstein supra 88.

4) Cf Mr and Mrs 'X' v Rhodesian Printing & Publishing Co Ltd supra 514: "Petitioners (on behalf of the children) have a clear right to the privacy they claim, and the only effective means of enforcing that right is by way of an interdict."

5) Setlogelo v Setlogelo supra 227; cf Van der Merwe & Olivier op cit 227; Neethling Privaatheid op cit 380.

6) WL Prosser Law of Torts 4 ed (1971) 804. See above 55.

7) JG Fleming The Law of Torts 4 ed (1971) 526ff. See above 121.

8) Cf Walker v Van Wezel 1940 WLD 66; Brenner v Botha 1956 (3) SA 257 (T); Matiwane v Cecil Nathan, Beattie & Co 1972 (1) SA 222 (N).

African and Ceylonese writers generally follow categories closely related to those mentioned in Anglo-American law. Thus Joubert's reference to intrusions, public disclosures and disruptions of a person's peaceful existence[1] is closely followed by Strauss, Strydom and Van der Walt[2] as well as Van der Merwe & Olivier.[3] It seems, however, that "disruption" (for example, where a salesman continually calls at your home to sell you something)[4] may be accommodated as an intrusion. Amerasinghe, on the other hand, seems to recognise that most invasions take the form of either intrusions or publicity.[5] More recently, under the influence of German law,[6] Neethling has suggested a three-fold classification: intrusion, disclosures, and fixation.[7] The latter also includes disclosures[8] but is distinguishable in that there is a violation of privacy even if the disclosure is made to a small group of individuals,[9] whereas a "disclosure" will only be actionable if it is made to a large group[10] or constitutes a breach of trust.[11] It is submitted, however, that in our law the degree of publicity is usually a factor to be taken into

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1) WA Joubert Grondslae van die Persoonlikheidsreg (1953) 136. See above 143. But contra JC De Wet & HL Swanepoel Strafreg 3 ed (1975) 239 n 128: "Ek kan egter nie met Joubert saamstem dat dit 'n skending van 'n ander se reg op privaatheid is om aan hom die aanskouing op te dring van dinge wat op sy ongestoorde lewe inbreuk maak nie".

2) SA Strauss, MJ Strydom & JC Van der Walt Die Suid Afrikaanse Persreg (1976) 289.

3) NJ Van der Merwe & PJJ Olivier Die Onregmatige Daad in die Suid-Afrikaanse Reg 2 ed (1970) 395.

4) Strauss, Strydom & Van der Walt op cit 289. But contra De Wet & Swanepoel Strafreg op cit 239 n 128.

5) CF Amerasinghe Aspects of the Actio Injuriarum in Roman-Dutch Law (1966) 180ff.

6) Cf J Neethling Die Reg op Privaatheid (1976) 52f, 67f.

7) Neethling Privaatheid op cit 315, 318 and 324.

8) Neethling Privaatheid op cit 324.

9) Ibid.

10) Neethling Privaatheid op cit 319.

11) Neethling Privaatheid op cit 320.

account when assessing damages,[1] and the fact that the disclosure was made to a small group of persons or did not constitute a breach of confidence will not in itself deprive the plaintiff of a remedy for invasion of privacy.[2] Nonetheless, the greater the publicity, or the fact that the disclosure was a breach of confidence, the more likely it is that such conduct will be considered wrongful.[3] It is submitted that Neethling's categories can again be reduced to two: intrusions and publicity, and that the latter is wide enough to include both disclosure and fixation.

In the light of the above it is clear that most invasions of privacy can be broadly classified into intrusions and publicity. It is intended to consider both of these in some detail, and to indicate how the broad principles of the South African action may accommodate many of the invasions experienced in modern society, other than those by data banks.[4] Although it has been suggested that the German law of privacy may in some respects have overtaken developments in the United States,[5] it seems fair to assume that the most comprehensive analysis of the wrong has occurred in the United States.[6] For this reason during the course of the analysis of the basic categories of intrusions and publicity, considerable use will be made of American authorities. An attempt will also be made to show how Prosser's categories[7] would be accommodated in South African law. It must be borne in mind, however, that in all cases involving an action for invasion of privacy in our law the essential elements of either the actio injuriarum or the lex Aquilia must be satisfied.[8]

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1) See above 194.

2) See below 255.

3) See below 282.

4) On the question of data banks see below 283f.

5) Cf HD Krause "The Right to Privacy in Germany - Pointers for American Legislation?" 1965 Duke LJ 481, 516.

6) Cf Prosser Torts op cit 804, points out that cases number "something over four hundred".

7) Prosser Torts op cit 804. See above 55.

8) See above 144.

CHAPTER FIVE

INTRUSIONS

A. INTRODUCTION

This form of invasion occurs where there is an intrusion "upon the plaintiff's physical solitude or seclusion".[1] Neethling states that in the United States there are three requirements: (i) there must be an intrusion, (ii) the occasion must be private, and (iii) the intrusion must be regarded as offensive by a reasonable man.[2] The fact that the defendant intruded into the plaintiff's "inner" rather than his "outer" life may *prima facie* indicate that it is more likely that the invasion is actionable,[3] but ultimately liability will depend upon the particular circumstances of the case.[4] Similarly the requirement of a "private occasion" may lead to difficulties, particularly where the intrusion takes the form of persistent following[5] or harassment.[6] Can it be called a private "occasion" when a person walks in a public street? Nonetheless although the "outer" man is visible on the street, the privacy of the "inner" man may be violated by persistent following. The question of "offensiveness" concerns wrongfulness and has already been considered in the broad sense.[7] These United States requirements will be referred to incidentally during the ensuing discussion.

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1) WL Prosser *Law of Torts* 4 ed (1971) 807.

2) J Neethling *Die Reg op Privaatheid* (1976) 179f, 315f.

3) Cf Neethling *Privaatheid* op cit 168ff. For instance, an unjustified intrusion into the "core-self" may have a devastating psychological effect on the victim. AF Westin *Privacy and Freedom* (1967) 33f. See above 3.

4) Cf *O'Keeffe v Argus Printing & Publishing Co Ltd* 1954 (3) SA 244 (C) 248. See above.

5) See below 224.

6) See below 228.

7) See above 170.

Intrusions occur in a variety of ways and it would be impossible to consider them all. Therefore an attempt has been made to select what the present writer sees as the more important forms of intrusion. The selection which is obviously open to criticism and does not pretend to be exhaustive includes the following: (i) peeping toms; (ii) illegal searches; (iii) mail interception; (iv) telephone tapping; (v) eavesdropping and surveillance; (vi) nuisance calls; (vii) persistent following; (viii) harassment; (ix) statistical and revenue requirements; (x) criminal investigation procedures; (xi) medical examinations and treatment; (xii) miscellaneous statutory intrusions.

B. ACTIONABLE INTRUSIONS

1. Peeping Toms: In criminal law most prosecutions concerning peeping toms involve an element of sexual impropriety, for instance where a man watches a woman undressing[1] or bathing[2] or relieving herself.[3] It is submitted that such cases would also be actionable delictually.[4] On the other hand where the complainant was not undressing or conducting her toilet or involved in some other intimately private activity a criminal action will not lie,[5] although the injured party may be able to sue in delict.[6] In any event awareness at the time by the victim is irrelevant.[7] Other examples would be spying on a person or his family with a pair of binoculars,[8] or watching their movements

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1) R v Holliday 1927 CPD 395, 401f; R v Daniels 1938 TPD 312, 313; R v R 1954 (2) SA 134 (N) 135.

2) R v Schoonberg 1926 OPD 247.

3) PMA Hunt South African Criminal Law and Procedure (1970) I 500f. Cf C Fried "Privacy" (1967-8) 77 Yale LJ 475, 487: "in our culture the excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing, as detracting from one's dignity and self-esteem".

4) Cf De May v Roberts (1881) 9 NW 146, an American case where a woman successfully sued her doctor for bringing a young man who was not a physician into her room while she was giving birth. See above 52.

5) Cf R v Rail 1939 SR 239, 242; R v Woods 1940 SR 58, 59; R v Peverd 1956 (1) PH H23 (O). But cf Mtetwa v State 1966 (1) PH H25 (O).

6) Cf Hunt op cit 501.

7) See above 190f.

8) SA Strauss, MJ Strydom & JC Van der Walt Die Suid-Afrikaanse Persreg (1976) 289.

in their house or garden.[1] It is probably becoming more difficult to detect this form of invasion because of the increasing use of sensitive electronic devices[2] and telephoto cameras. Nonetheless the man in the street is aware that such conduct is criminally punishable and this may act as a deterrent.[3] In some instances such peeping may be justified, for instance, where a wife wishes to obtain evidence of her husband's adultery.[4]

2. Illegal Searches:

(a) Of the Person: In terms of the Criminal Procedure Act,[5] a person may be searched if he has been arrested[6] or the person conducting the search has been issued with a search warrant.[7] Otherwise, apart from certain statutory provisions,[8] a search without such authority would constitute a wrong.[9] If a person is physically searched illegally, such a search would be an assault,[10] whereas if the injured party was asked to turn out his pockets or remove his clothes for the purposes of the search he may have an action for invasion of privacy. Thus in the United States where a prospective

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1) Cf JE Scholtens "Abuse of Rights" (1958) 75 SALJ 39, 41f, who submits that it is an abuse of rights to undertake "the erection of a building or the insertion of new windows in a house, merely in order to spy upon the private life of others, for instance, where this is done in order to provide the opportunity of peeping into a monastery or to watch the wife or daughter of a neighbour".

2) See below 216 n 7.

3) S v A 1971 (2) SA 293 (T) received wide coverage in the press. BvD Van Niekerk "Unplugging the Bug, or the Right to be Let Alone in Criminal Law - Some Reflections" (1971) 88 SALJ 171.

4) S v I 1976 (1) SA 781 (RAD). See below 218, but cf S v A supra 299.

5) Act 51 of 1977.

6) Section 23, but such search "shall be conducted with strict regard to decency and order, and a woman shall be searched by a woman only". Cf s 42(1), Act 56 of 1955.

7) Section 21(2). Cf s 42(1), Act 56 of 1955.

8) For instance, in certain circumstances search powers are given to: (i) customs officials, under the Customs & Excise Act, 91 of 1964 (ss 4, 8, 10 and 11); (ii) the police, under the Abuse of Dependance-Producing Substances and Rehabilitation Centres Act, 41 of 1971 (s 11), and the Arms and Ammunition Act 75 of 1969 (s 41).

9) Cf Act 51 of 1977, ss 29, 53; Act 56 of 1955, ss 41, 45. See above 160. But see also Act 51 of 1977, ss 46, 331; cf Act 56 of 1955, ss 31, 32.

10) Cf Hunt op cit 435, who states: "A mere touching may in the circumstances not be trivial, and technically the slightest contact may constitute an assault."

buyer left a self-service store without purchasing anything and was overtaken by a manager who put his hand on her shoulder, obstructed her path, ordered her to take off her coat, reached into her dress pockets, inspected her handbag and replaced its contents, the manager was held liable for invasion of privacy.[1] Technically in our law such touching would constitute an assault,[2] while in English law "person" includes clothing and therefore in England reaching into a woman's dress pockets would have been a trespass to the person.[3] It is submitted that in our law such conduct would also constitute an invasion of privacy.[4]

(b) Of the Home: An action for injuria arising from an intentional entry into another's home without their consent has its roots in early Roman and Roman-Dutch law.[5] In some instances an action will lie for trespass,[6] but otherwise it seems that the plaintiff should sue for invasion of privacy. In S v I[7] although the court held that the peeping was justified,[8] there was no appeal against the conviction for "being found by night without lawful excuse".[9] It is submitted that the accused could also have been convicted for invasion of privacy on the second count.[10] When discussing the fictitious case of the "jealous wife" and the unfortunate "Mr and Mrs P",[11] the court considered it in terms of privacy.[12] In the United

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1) Bennett v Norban (1959) 396 Pa 94, 151 A 2d 476, 479; 71 ALR 2d 803; Sutherland v Kroger Co (1959) 110 SE 2d 76.

2) Hunt op cit 429. See above 200 n 10.

3) JC Smith & B Hogan Criminal Law 2 ed (1969) 253; cf Hunt op cit 438.

4) Neethling Privaatheid op cit 385.

5) See above 32,44. See also De Fourd v Capetown Council (1898) 15 SC 399 402

6) RG McKerron The Law of Delict 7 ed (1971) 225.

7) Supra.

8) At 789.

9) At 789f.

10) Even though the first invasion had not exceeded the bounds of reasonableness the second had.

11) Cf Amicus Curiae "Criminal Injuria and the Jealous Wife" (1971) 88 SALJ 403f.

12) S v I supra 786.

States it has been held to be an invasion of privacy to enter another's house without his consent,[1] even when he is not there.[1] It is submitted that the same would apply in our law [3] and that in any event the wrongdoer may also be liable for trespass.[4] Beadle ACJ in S v I[5] also seemed to suggest that an action will lie where the injured party is staying in a hotel,[6] and this approach has been applied in the United States.[7] It is submitted that as the action for invasion of privacy in our law is regarded as an aspect of impairment of dignitas it makes no difference where the victims were staying at the time that their privacy was disturbed provided they were in a private room secluded from the public.

(c) By the Police: Where law enforcement officers wish to enter a person's property for the purposes of search they are generally required to have a valid search warrant.[8]

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1) Cf Welsh v Pritchard (1952) 241 P 2d 816; Thompson v City of Jacksonville (1961) 130 So 2d 105; Dieteman v Time Inc (1971) 449 F 2d 244 (9th Cir).

2) Cf Ford Motor Co v Williams (1963) 132 SE 2d 206; cf Neethling Privaatheid op cit 169.

3) For instance where privacy rather than possession is disturbed.

4) McKerron op cit 225. Trespass is also actionable under the lex Aquilia.

5) Supra.

6) At 788. In Roman law an action was also available to guests. See above 30.

7) Cf Newcomb Hotel Co v Corbett (1921) 108 SE 309 (hotel room); cf Byfield v Chandler (1924) 125 SE 905 (stateroom on a steamer); cf Neethling Privaatheid op cit 169.

8) Act 51 of 1977, s 21. A warrant may also be issued in terms of s 25(1): "If it appears to a magistrate or justice (of the peace) from information on oath that there are reasonable grounds for believing - (a) that the internal security of the Republic or the maintenance of law and order is likely to be endangered by or in consequence of any meeting which is being held or is to be held in or upon any premises within his area of jurisdiction; or (b) that an offence has been or is being or is likely to be committed or that preparations or arrangements for the commission of an offence are being or are likely to be made in or upon any premises within his area of jurisdiction, he may issue a warrant authorizing a police official to enter the premises in question at any reasonable time .." (my italics). It is submitted that midnight and dawn raids by the security police could not be regarded as entry "at any reasonable time". This question does not seem to have been raised when interpreting s 44(1) of Act 56 of 1955. But such entry may also be made without a search warrant if a police official on reasonable grounds believes that a warrant in terms of s 25(1) will be issued, and delay in obtaining such a warrant would defeat the object thereof. s 25(3). Cf Act 56 of 1955, s 44(2).

> "To enter premises, to search those premises, and to remove goods therefrom is an important invasion of the rights of the individual. The law empowers police officers to infringe the rights of citizens in that way provided that they have a legal warrant to do so".[1)]

This right was protected at common law even where the occupier lived an immoral life, eg. prostitutes in a place suspected of being a brothel.[2)] But if a policeman believes on reasonable grounds that a search warrant would be issued to him and that delay in obtaining a warrant will defeat the object of the search, he may search a person or premises without such a warrant.[3)] If, however, he meets resistance and is compelled to enter the premises by force, a policeman must first make audible demands and state his purpose before breaking in.[4)] Furthermore a policeman, who reasonably suspects that a person in possession of information concerning an offence or alleged offence is on any premises, may enter such premises without a warrant "for the purpose of interrogating such person and obtaining a statement from him" - provided he obtains the occupier's consent.[5)] Other powers of search without a warrant have been extended to the

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1) De Wet v Willers NO 1953 (4) SA 124 (T) 127; cf NUSAS v Divisional Commissioner of SAP 1971 (2) SA 553 (C) 558.

2) De Fourd v Cape Town Council (1898) 15 SC 399, 402. See above125. But see now the Immorality Act, 23 of 1957, s 20(2).

3) Act 51 of 1977, s 22; cf Act 56 of 1955, s 43, where there was no reference to belief by the police official that a warrant would be issued to him.

4) Act 51 of 1977, s 27; cf Act 56 of 1955, s 44(4).

5) Act 51 of 1977, s 26; cf s 44(3)(4) of Act 56 of 1955. "Occupier is not defined, but its ordinary meaning is "One who takes or holds possession; a holder or occupant". Ed CT Onions Shorter Oxford English Dictionary (1933) 1356. Cf Ed AB Harcourt Swift's Law of Criminal Procedure 2 ed (1969) 83 who comments on the similar provision in s 44(3) of Act 56 of 1955: "It is strongly submitted that the section does not affect the common law relating to cautions and the power of a person to refrain from answering incriminating questions or making admissions, etc, since the invasion of the individual's rights and liberties in this regards is most serious".

police[1] and public officials[2] in certain circumstances. If an injured party can establish that such persons did not act on reasonable grounds or under a reasonable suspicion when searching his property without a search warrant he may have an action for invasion of privacy. The attitude of the courts towards such violations of individual freedom was forcefully expressed in Solomon v Visser,[3] a wrongful arrest case in which Steyn J said:

> "It is true that the Police have many onerous duties and that the court must not make it difficult for them to perform their functions. If the court were to do so the public could be deprived of the full measure of the protection to which it is entitled. On the other hand the Police have considerable powers, and should they exceed or abuse those powers and they injure the individual, the court must, in my view, not hesitate to compensate the citizen in full measure for any humiliation, indignity and harm which results".[4]

Where, however, a valid search warrant has been issued the injured party will not succeed in an action unless he can show that the warrant was issued on the basis of false information.[5] In such cases if the person who gave the false information is convicted of perjury any person against whom a warrant was executed and who has suffered damage as a consequence of the unlawful entry, search or seizure, may himself or through the prosecutor, apply to court for

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1) Cf Arms and Ammunition Act, 75 of 1969, ss 11(2), 12(2), 41(1) (any policeman "who has reason to suspect"); Diamond Cutting Act, 33 of 1955, s 43 (police "at all reasonable hours"); Bantu (Urban Areas) Consolidation Act, 25 of 1945, s 38(1); Abuse of Dependence Producing Substances & Rehabilitation Centres Act, 41 of 1971, s 11; Community Development Act, 3 of 1966, s 48; Liquor Act, 30 of 1928, s 139 (1).

2) Cf Food, Drugs & Disinfectants Act, 13 of 1929, s 22 (health inspectors); Wines, Spirits & Vinegar Act, 25 of 1957, s 29 (authorized officials); Customs & Excise Act, 91 of 1964, ss 4, 8, 10, 11 (customs officers); Diamond Cutting Act, 33 of 1955 s 13 (authorized inspectors); National Parks Act 42 of 1962, s 26(2) (Parks' officials); Criminal Law Amendment Act, 8 of 1953 (post office officials); Bantu (Urban Areas) Consolidation Act, 25 of 1945, s 29 (authorized officials). Private persons who occupy of control land may also enter premises in which they reasonably suspect there is stolen stock, or produce, or articles have been stored in contravention of laws relating to intoxicating liquor, dependence-producing drugs, arms.

3) 1972 (2) SA 327 (C).

4) At 345; cf Areff v Minister van Polisie 1977 (2) SA 900 (AD) 914.

5) Act 51 of 1977, s 28(2).

compensation in respect of such damage.[1] There is no provision for the preservation of the victims' common law right to sue for wrongful search in the 1977 Criminal Procedure Act,[2] but it is submitted that such rights are preserved.

Difficulties arise where such searches are made in connection with political offences as the police may argue that the warrant was issued because there were reasonable grounds for suspicion, but that they are not bound to disclose such grounds because it will be "prejudicial to the interests of the State or public security".[3] It could perhaps be argued that if the plaintiff led evidence to establish that he had an unblemished record and that his opposition to the State had been kept within the law, the court may draw an inference that the warrant was issued without a reasonable suspicion being raised. Unfortunately because the Terrorism Act[4] defines "terrorism" so widely that it includes any act which is likely "to embarass the administration of the affairs of the State",[5] the police may argue that even lawful opposition may sometimes cause a reasonable suspicion to arise.

During the debate on Lord Mancroft's Bill in the House of Lords[6] the Lord Chancellor mentioned that the framers of Article 12 of the Universal Declaration of Human Rights,[7] "were aiming mainly at physical interferences such as the activities of secret police and other

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1) Ibid. In terms of s 45(1) of Act 56 of 1955, the guilty person was liable to a fine not exceeding R50 and on application by the injured party, compensation not exceeding R200.

2) Act 51 of 1977, s 28, makes no reference to common law rights, unlike s 45(2) of Act 56 of 1955 which read: "Nothing in subsection (1) contained shall be construed as depriving any aggrieved person of the right to elect any other remedy allowed by law in lieu of the remedy under that sub-section". The victim was put on election. Cf Swift & Harcourt op cit 84.

3) General Law Amendment Act, 101 of 1969, s 29(1). A certificate to that effect may be issued by the Prime Minister or "any person authorized by him ... /or by/ any other Minister. Cf AS Mathews Law, Order and Liberty in South Africa (1971) 258f.

4) Act 83 of 1967.

5) Section 2(2)(1) cf Mathews op cit 170f.

6) See above 79.

7) See above 141f.

officers of public authority".[1] It is interesting to note that the British proposal for Article 8(1) of the European Convention on Human Rights read as follows:

> "Everyone shall have the right to freedom from governmental interference with his privacy, family, house or correspendence".[2]

"Governmental interference" was replaced by "interference by a public authority" in Article 8(2) of the Convention which was eventually ratified by the member countries.[3] Article 8(2) in the ratified Convention does, however, allow such interference which is:

> "necessary in a democratic society in the interests of national security, public safety, for the prevention of disorder or crime or for the protection of health or morals".[4]

Similar principles could be applied in South Africa although it can be questioned whether the country can be regarded as truly democratic.[5]

3. Interception of Correspondence:

(a) Letters. It is submitted that it is trite that to intercept and read another's correspondence without his consent is an injuria.[6]

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1) House Lords Debates (1961) Vol 229, Col 629; cf B Neill "The Protection of Privacy" (1962) 25 Modern LR 393, 401 n 48.

2) Ed AH Robertson Privacy and Human Rights (1973) 17. My italics.

3) See above 108.

4) Ibid. For instance, in South Africa health inspectors may enter premises suspecting of creating a nuisance s 127, 146 Public Health Act, 36 of 1919.

5) Cf Mathews Law, Order and Liberty op cit 308f.

6) Cf Neethling Privaatheid op cit 386. For the publication of contents of letters see below 248. Such interception is a tort in the United States; Restatement of Torts (1939) §867, comment (b); AF Westin Privacy and Freedom (1967) 336ff.

That such interception is wrongful is clearly recognized by the Legislature which found it necessary to authorize specified officials to intercept and read the contents of correspondence in certain circumstances.[1] The Post Office Act[2] provides for the opening of "postal articles",[3] where for instance a letter in the "returned letter office" has no address on the envelope,[4] or the article is suspected of relating to lotteries, sports pools or obscene or indecent matter,[5] or the interception is necessary "in the interests of state security".[6] Otherwise it is an offence for anyone to open or make public the contents of any postal article.[7]

It is in the sphere of "state security" however that the biggest threat to the individual's right to privacy regarding his correspondence is likely to occur. Prior to the Post Office Amendment Act[8] there was no legislation in South Africa "authorising any body or organisation to listen in to telephone conversations or to open postal articles ... for /the/ purposes of the investigation of matters relating to the security of the State".[9] Section 118A extends the power to intercept such correspondence to persons designated by the Minister of Posts and Telegraphs or a Minister who is a member of the State Security Council,[10] who must follow certain prescribed procedures:[11]

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1) Using the approach of Beadle ACJ in Rhodesian Printing & Publishing Co Ltd v Duggan 1975 (1) SA 590 (RAD) 595, it could be argued that postal legislation in South Africa indicates that private correspondence should be protected from publicity, and that the prevailing modes of the community is that such publicity is actionable. See above 177.

2) Act 44 of 1958; cf English Post Office Act of 1953, s 58(1); Justice Report Privacy and the Law (1970) 15, para 66.

3) "Postal article" means any letter, post-card, reply post-card, letter-card ... when in course of transmission by post, and includes a telegram when conveyed by post." s 1.

4) Section 28.

5) Section 35.

6) Section 118A. Cf Defence Act 44 of 1957, s 101 (1).

7) Section 96. Offenders are liable to imprisonment not exceeding 7 years.

8) Act 101 of 1972, s 1.

9) Report of the Commission of Inquiry into Matters Relating to the Security of the State RP 102 (1971) § 208.

10) Section 118A (2)(a).

11) Section 118A (2)(b). The Commission of Inquiry had recommended that it would be "desirable that interception could take place on an application, giving good grounds, from the Head of the Bureau /for State Security/, the Head of the Security Police or the Director of Military Intelligence". Commission of Inquiry op cit §212. My italics. But such "good grounds" were not specified

> "Such a person shall make the request only if he believes that the interception in question is necessary for the maintenance of the security of the Republic, and such request shall state -
> (i) the grounds upon which such a person believes that such interception is necessary for the maintenance of the security of the Republic;
> (ii) where applicable, the period in respect of which such interception is required; and
> (iii) sufficient particulars to identify any postal article, telegram or communication involved, including particulars relating to the name and, where known, the address of the person, body or organisation concerned, and any number allocated by the department in respect of any telephone sercice involved".

The danger is that the grounds referred to in Section 118A 2(b)(i) may be withheld on the basis that the official concerned is not bound to disclose them as it would be prejudicial to the security of the State.[1)]

It seems that in the United States mail interception is regarded as an invasion of proprietary interests[2)] whereas in our law it would seem to be an infringement of personality rights under the actio injuriarum.[3)] A practical difficulty for the potential litigant is that it is becoming increasingly difficult to prove that one's correspondence has in fact been intercepted. As Westin points out:

> "If private parties manage to get access to letters (before, during, or after they are in the hands of the Post Office), such mail can be opened secretly by steaming the adhesive seam open, reading the contents, and re-sealing the envelope. Modern technology has added to these existing situations the possibility of passing visible light or reflected infra-red energy through an envelope and taking pictures of the contents. These pictures can then be read - or, more properly, deciphered- by persons skilled in reading handwriting or typing while lines are

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1) See above 205. cf Defence Act, 44 of 1957, s 101.

2) Cf 62 American Jurisprudence 2d (1972) Privacy §7, 685f.

3) See above 206. See below 252. The only South African common law reference to mail interception is to be found in relation to the question of theft. Digest 47.2.14.17.

4) Westin op cit 79.

inverted and superimposed. There is also available today a needle-thin 'flashlight' that can be inserted in a sealed envelope to 'light it up' for quick reading by a trained investigator".[1]

On the other hand it is easier to establish that such interception has taken place where the contents of the correspondence have been made public.[2] Furthermore if a person uses a telegram or postcard when corresponding he must expect that his privacy may be invaded by postal authorities,[3] but it is submitted that he is still protected vis-a-vis third parties.[4]

(b) Telegrams. It is submitted that although the contents of telegrams may be known to those who transmit them, once the telegram has been sealed and ready for despatch anybody who opens it will be liable for invasion of privacy. It is clear that such an act is wrongful as the Post Office Act[5] makes it a punishable offence for anyone other than a postal official to wilfully open a telegram addressed to another.[6] Once again, however, such telegram may be intercepted in the interests of State security.[7]

It has been suggested that in the United States the disclosure of the contents of a telegram to others does not constitute an invasion of privacy.[8] In Western Union Tel Co v McLaurin,[9] the plaintiff failed in an action for privacy, where the defendants had disclosed and caused to be made public certain telegrams sent to the

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1) Westin op cit 79. The Department of the Interior uses clumsier methods, see The Daily News, 7 October 1977.
2) See below 248.
3) "Dit moet verwag word dat die inhoud van 'n poskaart of 'n telegram deur andere gelees kan word" Pretorius v Niehaus 1960 (3) SA 109 (O) 112; cf Sadgrove v Hole [1901] 2 KB 1.
4) See below 248.
5) Act 44 of 1958.
6) Section 98; cf Telegraph Messages Protection Act, 44 of 1963, s 2. Cf English law, Wireless Telegraph Act of 1868, s 20. Justice Privacy op cit 15, para 67.
7) Act 44 of 1958, s 118 A. Cf Defence Act, 44 of 1957, s 101 (1).
8) 62 American Jurisprudence op cit §7, 686 n 11.
9) 108 Miss 273, 66 So 739.

plaintiff by a prostitute. Plaintiff failed because he could not make out a case without showing that he had been guilty of unlawful and immoral conduct, and his humiliation and shame sprang from his illicit relationships with the woman. It could be argued that such disclosures would constitute an impairment of dignitas in our law, as truth alone is not a defence.[1] But if such revelations were made to expose criminal action by the plaintiff then they would be in the public interest.[2] It should be noted that Graham v Ker[3] is distinguishable in that the illicit conduct of the soldier was in the public interest because he was being paid by the public purse. On the other hand if the plaintiff himself lives a depraved life he may have very little dignity, in which case the damages awarded may be greatly reduced.[4]

It is submitted that in our law to open and read the contents of a letter or a telegram addressed to another is prima facie an invasion of that person's privacy.

4. Telephone Tapping:

(a) By Private Individuals. It seems clear that the tapping of another's telephone is an invasion of privacy in our law.[5] Telephone tapping is merely an extended form of eavesdropping.[6] This is the view taken in the United States. In Rhodes v Graham[7] damages were awarded against a defendant who had tapped the plaintiff's private telephone and listened-in on conversations by the plaintiff, his family and friends. Similarly in La Crane v Ohio Bell Telephone Co,[8]

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1) Cf Voet 47.10.9; Patterson v Engelenburg 1917 TPD 350, 356; Sutter v Brown 1926 AD 155, 172.

2) It seems that in our law it is not a criminal offence to have intercourse with a prostitute. JRL Milton & NM Fuller South African Criminal Law and Procedure (1971) III 343.

3) (1892) 9 SC 185, 187.

4) Cf Voet 47.10.13; Hunt op cit 496.

5) Cf S v A 1971 (2) 293 (T) 298; cf Van Niekerk op cit 174.

6) SH Hofstadter & G Horowitz The Right of Privacy (1964) 105.

7) (1931) 238 Ky 225, 37 SW 2d 46; cf Hofstadter & Horowitz op cit 107.

8) (1961) 114 Ohio App 299, 19 Ohio Ops 2d 236, 182 NE 2d 15.

where the defendants had tapped the plaintiff subscriber's telephone and intercepted her private conversations without notice or authority it was held that such wire-tapping prima facie constituted an invasion of privacy. The court recognized that such tapping could cause embarassment and humiliation,[1] and that it was an invasion, regardless of whether the information was published or not. On the other hand where such tapping is done in defence of the interests of a telephone company, (eg to check whether the plaintiff was using her private line to make business calls), and the taps merely established which type of call was made, and did not listen to the whole conversation, such tapping was held not to be an invasion.[2] No disclosures or publications were made other than to the plaintiff to confront her with the breach of her contract.[3] It is submitted that a similar approach would be adopted by our courts which would regard the occasion as privileged.[4]

It has been suggested that there is no remedy available in Scotland because tapping "requires the co-operation of Post Office engineers",[5] and that even though "the Crown has no power conferred by law to tap telephones ... the citizen has no means of redress if the Crown does authorize tapping of his calls."[6] This view seems to overlook two factors: Firstly, it is possible to tap telephones without such co-operation simply by placing an induction coil,[7] a few feet from the telephone or its connecting wire before it joins the other lines.[8] Secondly, as wiretapping is an extended form of

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1) Hofstadter & Horowitz op cit 109.

2) Schmuckler v Ohio-Bell Tel Co (1955) 116 NE 2d 819 (Ohio CP); cf People v Appelbaum (1950) 301 NY 738, 739; cf Hofstadter & Horowitz op cit 110; Prosser Torts op cit 818.

3) Hofstadter & Horowitz op cit 109.

4) See below 324.

5) DM Walker The Law of Delict in Scotland (1966) II 710.

6) Ibid. Cf H Street Freedom: The Individual and the Law (1963) 37.

7) Induction coils have been used in the United States since before 1941. Westin op cit 78.

8) "No cutting or breaking into the telephone wires or equipment is required. The coil, being in the magnetic field carrying the voice signal, draws off a very small amount of that signal and carries it to a receiver that permits listening or recording of the entire conversation". Westin op cit 78.

eavesdropping,[1] and as eavesdropping is a common law crime in Scotland and England,[2] it is submitted that the courts in the United Kingdom should adopt the flexible approach used in the United States.[3]

(b) By the State: Prior to the 1972 Post Office Amendment Act,[4] there was no authority for any person including the State to listen-in to telephone conversations. Such listening-in by the State is now permitted and despite the procedures provided[5] there is again the danger that the State may refuse to disclose the grounds on which an application is made because it would prejudice the safety of the State.[6] In any event the decision to authorize the tap is left to a State employee delegated by the Minister of Posts and Telegraphs, or a Minister who is a member of the State Security Council.[7] There is therefore no judicial control over wire tapping procedures in South Africa.

In the United States, on the other hand, 15 states have introduced legislation to regulate use by the State of electronic eavesdropping devices and the interception of private communications during criminal investigation.[8] Furthermore the Federal government enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968[9] to protect the privacy of oral and wire communications in the course of the fight against crime:[10]

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1) Cf "Wire-tapping is akin to eavesdropping which is an indictable offence at common law". Rhodes v Graham supra; Hofstadter & Horowitz op cit 107.

2) W Blackstone Commentaries on the Law of England IV 16 ed (1825) 168.

3) But see Justice Privacy op cit 15f, para 67.

4) Act 101 of 1971, s 1. See above 207.

5) Act 44 of 1958, s 118A (2)(b). See above 207f.

6) See above 208.

7) Act 44 of 1958, s 118A (1)(a).

8) P Burns "The Law and Privacy: The Canadian Experience" (1976) 54 Canadian Bar Rev 1, 61, n 305.

9) 18 United States Code §§ 2510-2520 (1970 & Supp V 1975); cf CS Fishman "The Interception of Communications without a Court Order: Title III, Consent, and the Expectation of Privacy" (1976) 51 St John's LR 41.

10) Ibid.

> "Title III describes in detail who may apply to which courts for authorization to intercept oral or wire communications, what the application and order must contain, what crimes must be investigated by means of court authorised eavesdropping, the circumstances under which evidence obtained through eavesdropping may be utilized, and the manner in which taps used to record intercepted conversations are to be sealed and preserved".[1)]

Prior to Title III the Supreme Court in Berger v New York[2)] had laid down "certain procedural and substantive safeguards which were constitutional prerequisites to the assurance of an electronic surveillance warrant"[3)] where there was no express or implied consent by the party concerned.[4)] Title III provides that it is not unlawful to intercept a wire or oral communication where there is prior consent by the person intercepting or one of the parties to the communication,[5)] but some states still require judicial authorixation for such "consensual" interceptions.[6)] The court in Berger's case[7)] listed the following requirement for the issuance of a surveillance warrant for a nonconsensual interception:

> "(1) There must be probable cause to believe that a particular offence has been or is being committed; (2) the conversations to be intercepted must be particularly described; (3) the eavesdrop must be for a specific and limited period of time to minimize the intrusion; (4) present probable cause must be shown for the continuance or removal of the eavesdrop; (5) the eavesdropping must terminate once the evidence sought has been

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1) Fishman op cit 42.

2) (1967) 388 US 41; cf Katz v United States (1967) 384 US 347; Fishman op cit 42.

3) Fishman op cit 42 n 4.

4) Ibid.

5) 18 United States Code § 2511 (2)(c)(1970).

6) Cf Fishman op cit 90ff, who mentions Illinois, Maryland, Nevada, Oregon, Washington and Wisconsin.

7) Berger v New York supra 54ff.

> seized; (6) there must be notice unless a showing of exigency based on the existence of special facts is made; and (7) there must be a return on the warrant so the Court may supervise and restrict the use of the seized conversations".[1]

Title III was enacted to satisfy these requirements,[2] and in addition to protecting the privacy of oral and wire communications against intrusions by private citizens,[3] also provides a civil remedy for any person "whose wire and oral communication is intercepted, disclosed or used".[4]

Legislation in South Africa provides certain safeguards for the search of a person's premises[5] and it has been said in the United States that "a telephone interception is far more devastating than any search warrant".[6]

> "Those in possession of the searched premises know the search is going on and, when the officer has completed his search, whether successfully or not, he departs. Not so, in the case of a telephone interception. The interception order is obtained ex parte and the person whose line is to be tapped is, of course, in ignorance of the fact. The tap is monitored continuously day and night. Everything said over the line is

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1) Cf Fishman op cit 42 n 4. Westin op cit 391f, had previously recommended that wire-tapping should be limited to the Secret Service and certain other law enforcement agencies in respect of crimes involving kidnapping and national security. Urgent application could be made to a judge in chambers who could grant an order for 20 days, and a further 20 days "on a showing of continued need". In emergency cases the Attorney-General could grant provisional authority subject to confirmation by a judge within 24 hours. In South Africa s118A(1)(a), Act 44 of 1958, provides no time limits and authority may be given "for such period as the functionary concerned may specify".

2) Fishman op cit 41f.

3) Fishman op cit 66.

4) 18 United States Code §2520 (1970).

5) See above 202f. "A search warrant is confined to a definite place and to specific items or at least to items of a stated class or description". Hofstadter & Horowitz op cit 106; cf NUSAS v Divisional Commissioner of SAP 1971 (2) SA 553 (C) 558.

6) Hofstadter & Horowitz op cit 106.

heard, however foreign to the stated objective of the law enforcement officers".[1)]

It seems most undesirable that in South Africa the authority which determines whether or not to allow the tap is a representative of the very body which seeks to enforce it. Telephone tapping is a fundamental breach of a person's right to privacy,[2)] and it seems right that the authority for such a breach should only be given on good cause shown to a judge of the Supreme Court.[3)]

5. Eavesdropping and Electronic Surveillance: This form of intrusion overlaps with telephone tapping and may be covered by similar legislation in the United States[4)] and Canada,[5)] and the Penal Codes of

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1) Ibid.

2) Cf "The government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth". Katz v United States supra 353; Cf Fishman op cit 45.

3) This approach has been adopted in Canada where in terms of the Protection of Privacy Act of 1973 an ex parte application signed by the provincial Attorney-General or the Solicitor-General, or their agent may be made to a judge. (s178.12 of the Criminal Code, RSC 1970 c 34). Cf Burns op cit 51: "The application must be accompanied by an affidavit which may be sworn on the information of a peace officer, disposing to (a) the facts relied upon to justify the belief that an authorization should be given together with particulars of the offence, (b) the type of private communication proposed to be intercepted, (c) the names and addresses, if known, of persons whose communications, if intercepted, would assist the investigation of the offence, (d) the period for which the authorization is required, and (e) whether or not other investigative procedures have been tried and failed and so on". The Canadian Privacy Act outlaws the wilful interception of private communications by "electromagnetic, mechanical or other devices" (s 178.11 of the Criminal Code, R SC 1970 c 34), unless the originator or receiver expressly or impliedly consents (s 178.11 (2)(a)) or the person intercepting is authorized by law (s 178.11 (2)(b)). Burns op cit 50f.

4) See above 56.Cf JF Decker & J Handler "Electronic Surveillance: Standards, Restrictions and Remedies" (1975) 12 Cal West LR 60.

5) See above 119.

most European countries.[1] Electronic surveillance is merely a more sophisticated method of eavesdropping and it is clear that South African courts regard both as an invasion of privacy.[2] In S v A[3] the accused, both private detectives, were convicted on a charge of crimen injuria for installing a "transmitter wireless microphone" under the dressing table of the complainant, during an investigation into the latter's private life at the request of the estranged spouse. The court experienced no difficulty in holding that their act amounted to an invasion of privacy.[4] In South Africa evidence obtained on a tape recorder is admissable (provided the tape has not been tampered with,[5] and the voices are identified by corroborating evidence),[6] but notwithstanding the increasing availability of electronic surveillance devices,[7] the use of electronically recorded evidence in the courts seems to be limited.

In the United States, surveillance and counter-surveillance devices have been readily available to the public,[8] and it seems that the same is true of South Africa.[9] Rhodesia has introduced the Private Investigators and Security Guards (Control) Act[10] which makes it an offence, inter alia, for any private investigator[11] or security guard[12] to:

a) possess or use any device or instrument for the tapping of telephones; or

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1) See above 110f.
2) S v A 1971 (2) SA 293 (T) 297.
3) Supra.
4) S v A supra 297.
5) S v Reake 1962 (3) SA 288 (C); Cf LH Hoffman South African Law of Evidence 2 ed (1970) 288.
6) R v Behrman 1957 (1) SA 433 (T); Hoffman op cit 288.
7) David Barrit "Big Brother's Alive, Well and Watching .." Sunday Tribune, Insight, 19 August, 1973, 1.
8) Cf Westin op cit 81f.
9) Cf The Daily News, 30 November 1977, 7: "Mr. Bill Barnfather whose South African company also makes and distributes 'sweeping' devices for detecting bugs (said).. 'America will tell you that as far as they are concerned South Africa is one of the most inundated countries as far as sophisticated bugging and electronic intelligence equipment is concerned' ".
10) Act 23 of 1977. The Act provides for the licensing and control of private investigators and security guards.
11) A private investigator is a person who carries on business whereby he seeks information, for reward, not contained in public records concerning another's "personal actions, behaviour or character .. financial position .. business or occupation .. identity or whereabouts" (s 3(1)).
12) A security guard is a person who carries on business whereby for reward he guards movable or immovable property of another, or enters another's premises to advise on the guarding of such property, or guards any person as a client (s 4(1)).

b) use any camera, cinematograph camera, long-range listening device, microphone, television camera or video-tape camera for the surreptitious surveillance of persons.[1]

Unfortunately paragraph b) "shall (not) be construed as preventing the use of surveillance systems in or on any premises with the consent of the occupier or owner thereof"[2]. Therefore although it may be a civil wrong it seems that the Act does not outlaw the use of such systems to intrude on the privacy of a tenant or hotel guest if permission for their use is granted by a landlord or hotel-keeper.

It is submitted that in South Africa legislation should be introduced not only to control the activities of private investigators and security guards but also to outlaw "the unauthorised importation, manufacture, sale, delivery and .. use of monitoring devices".[3]

Surveillance and Private Detectives:[4] In S v A[5] it was held that a private detective was liable for invading the privacy of another at the request of the latter's estranged (but not legally separated or divorced) spouse. It seems trite that because of the intimate nature of the marriage relationship itself the parties inter se may be regarded as having waived their respective rights to privacy.[6] Therefore until such time as the marriage has been terminated or suspended[7] by the court or by a private separation[8] the marital

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1) Section 24 (1)(e),(f).

2) Section 24(1)(f), proviso ., Cf A Enker "Controls on Electronic Eavesdropping - A Basic Distinction" (1967) 2 Israel LR 461, who distinguishes "internal eavesdropping" where one of the parties co-operates with the eavesdropper from "external eavesdropping" where neither of the parties are aware that their conversation is being monitored.

3) Van Niekerk op cit 174f. On the need for such legislation, see above 216 n 9.

4) There are approximately 2,000 private investigators in South Africa, whose operations primarily include the detection of industrial piracy and the leaking of inside information; the tracing of missing persons; and the surveillance of unfaithful spouses. Cf "Revealed - the Secrets of the private eye" Sunday Times Magazine, 25 September 1977. For a definition of "private investigator", see above 216 n 11.

5) Supra.

6) Marriage creates a "consortium omnis vitae" HR Hahlo The South African Law of Husband and Wife 4 ed (1975) 109f. Cf "A Medical practitioner who treats one of the spouses does not necessarily create a breach of confidence by disclosing the nature of the disease from which he or she is suffering to the other spouse" Hahlo op cit 110f. It is submitted that in such a case the disclosure is privileged. See below 324.

7) For instance by judicial separation. See Hahlo op cit 329ff.

8) It seems that provided it is accompanied by justa causa an "agreement to live apart" may in certain circumstances be recognized as suspending some of the consequences of the marriage. Hahlo op cit 353, 357.

privileges (including the forfeiture of the right to privacy vis-a-vis the other spouse) would appear to continue. The decision in S v A does not distinguish between the situation where the spying is done by an estranged spouse and where a detective is employed for that purpose.[1] Thus it seems to follow that if in S v A the surveillance device had been installed by the complainant's spouse the latter may also have been held liable criminally for invasion of privacy. In a delictual action, however, the complainant in S v A would only have been able to sue his wife if the spouses were married out of community of property.[2] Christie submits that in cases where the invading spouse is seeking evidence of adultery by a guilty spouse the former should be allowed the defence of qualified privilege[3] which in certain circumstances should also apply to private investigators.[4]

In S v I[5] the Rhodesian Courts were faced with the situation where the appellants, a wife and a private detective employed by her, had invaded the privacy of her guilty husband and his paramour in order to obtain evidence of their adultery. The court seemed to accept that the defences open to an intruding spouse would also be available "to any agent lawfully engaged by [her]",[6] and decided the case on the basis of wrongfulness ie. whether or not the accused's

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1) Cf RH Christie "Invasion of Privacy" (1971) 11 Rhod LJ 15, 16.

2) Cf Tomlin v London & Lancashire Ins Co Ltd 1962 (2) SA 30 (D); RG McKerron The Law of Delict 7 ed (1971) 84f; Hahlo op cit 210. Cf Rohloff v Ocean Accident & Guarantee Corporation 1960 (2) SA 291 (AD).

3) Christie op cit (1971) 11 Rhod LJ 16f. This view was rejected in S v I 1976 (1) SA 781 (RAD) 788f, although the Court's formulation of the degree of justification was very similar to that proposed by Christie. See below.

4) Christie op cit Rhod LJ 17.

5) Supra.

6) S v I supra 787. It is submitted however, that this statement should be qualified. For instance it may not be actionable for an estranged husband to observe his wife walking about naked in order to determine whether or not she is pregnant, but it is submitted that such conduct by a private detective employed by the husband may constitute an actionable invasion of privacy. The husband's privilege would flow from the marriage relationship. See above 217.

conduct was justified. The Court adopted a combined subjective - objective approach and required the invading spouse to prove (i) that the invasion was done "solely with the bona fide motive of obtaining evidence of the adultery", (ii) that he or she had reasonable grounds for believing that they were not invading the privacy of innocent persons", and (iii) that it was "no more than reasonably necessary for the purpose of obtaining that evidence".[1] Therefore provided the invading spouse (or her lawful agent) acts with a bona fide motive and that the intrusion is reasonably necessary for the lawful ends to be achieved such conduct will be justified. The decision has been criticized for objectifying the mens rea requirement in criminal law which is traditionally tested subjectively,[2] and for allowing "a good motive and the moral reprehensibility of the act of adultery ... alone [to] sway the balance against the protection of the adulterer's privacy".[3] It is submitted however, that the court could have decided the case simply by referring to the question of wrongfulness,[4] and that if the appellant's conduct was not wrongful[5] the question of mens rea was irrelevant.[6] But if it could be shown that notwithstanding the prima facie lawfulness of the appellant's conduct they had been actuated by an improper motive (eg. not to obtain evidence of the adultery, but to satisfy their prurient tastes), they would have abused their rights and the objectively lawful act would become unlawful.[7] It is submitted that similar principles should apply where

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1) Ibid.

2) G Feltoe "Private Lives and Public Sins" (1976) 16 Rhod LJ 21, 28.

3) JM Burchell "Is the Adulterers' Home their Castle? A Case of Criminal Injuria" (1976) 93 SALJ 265, 268.

4) See above 170. But cf Burchell op cit (1976) 93 SALJ 268 who doubts whether the boni mores is "a relevant factor in determining whether a serious invasion of privacy is justified." Cf Hunt op cit 487f. It is submitted however that in delictual actions boni mores is a useful criterion for determining wrongfulness. See above.

5) See above 156. But if the accused's act is wrongful it is still necessary to prove that he has mens rea in respect of each element of the crime. Hunt op cit 493.

6) On the question of animus injuriandi see above 147ff.

7) See above 156.

the invading spouse intrudes on the privacy of the other spouse with the motive of effecting a reconciliation. Furthermore although the courts are reluctant to preserve an irretrievably broken marriage,[1] it seems that they will be even more reluctant to inhibit a spouse's attempt to reconcile himself or herself with the other spouse.[2] In terms of Beadle ACJ's test in S v I such attempts must be bona fide and reasonable: there is a world of difference between contacting a person during reasonable hours and interrupting him continuously throughout the night. In any event persistent telephone calls and unwelcome midnight visits could hardly be conducive to reconciliation. It is for this reason that S v A[3] can be distinguished from S v I.[4] In S v A the accused had indulged in continuous surveillance of the complainant, whereas in S v I the intrusion was made on a single occasion when the appellants reasonably suspected that they would be able to obtain evidence of adultery by the guilty spouse.[5] It is submitted that apart from the question of fault the manner and duration of the intrusion are important factors to be taken into account when determining the reasonableness of the intrusion.[6] Thus whether or not the invaders conduct was reasonable will depend upon the particular circumstances.[7] For instance, it may not be necessary to intrude physically into the other spouse's premises where mere peeping will

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1) Cf Wassenaar v Jameson 1969 (2) SA 349 (W) 353; cf Hahlo op cit 362.

2) For instance, one of the purposes of judicial separation is to encourage the spouses to become reconciled. Cf Hahlo op cit 335.

3) 1971 (2) SA 293 (T).

4) 1976 (1) SA 781 (RAD).

5) S v I supra 790. But cf Burchell op cit (1976) 93 SALJ 290.

6) Cf O'Keeffe v Argus Printing & Publishing Co Ltd 1954 (3) SA 244 (C) 249. Cf Neethling Privaatheid op cit 335f. See above.

7) In Canada the British Columbia Privacy Act SBC 1968 c 39, the words "reasonable in the circumstances" (s 2(s)) have been interpreted to mean that (i) the private detective was the wife's agent acting in her legitimate interests, (ii) his observation did not attract public attention, (iii) his observation was not offensively executed, and (iv) his observation was not unduly close or continuous. Davis v McArthur (1971) 17 DLR 3d 760 (CA) 763; cf Burns op cit 36. In Davis' case a private detective had connected an electronic device known as a "bumper beeper" to the plaintiff's car. Burns op cit 33.

suffice.[1] Similarly in cases where adultery can be established by circumstantial evidence, such as where a detective observes the guilty spouse entering a brothel[2] or a bedroom in suspicious circumstances with a person of the opposite sex,[3] it is submitted that an intrusion into the room concerned may be regarded as unreasonable - although it should be borne in mind that "mere opportunity for misconduct" may not be sufficient evidence of adultery by the guilty spouse.[4]

The courts have on occasion allowed a successful party in a divorce case to recover the reasonable qualifying fee of a private investigator who has given essential evidence of the guilty spouse's adultery.[5] It has been held, however, that such fees should only be allowed where the detective has used special skills - eg training in the analysis of finger prints or books of account - otherwise his evidence should be treated like that of any other witness.[6]

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1) Cf S v I supra 789f.

2) McDougall v McDougall 1908 EDC 455, 457; but contra Epstein v Epstein (1901) 11 CTR 650, where it was held that the fact that a detective saw the guilty spouse leaving a brothel was not per se evidence of adultery.

3) Hemens v Hemens (1910) 20 CTR 137, where the couple occupied a bedroom for some time behind a locked door.

4) Cf Truter v Truter 1938 NPD 250, 254f.

5) Cloete v Cloete 1961 (2) SA 607 (W) 608; Humphreys v Humphreys 1965 (3) SA 793 (SR) 794: "/but/ the fee allowed is not necessarily related to the zeal displayed by the private detective ... and this order must not be understood as condoning the degree to which the defendants' and the co-respondents' rights to privacy were invaded".

6) Barratt v Barratt 1966 (3) SA 364 (D) 365: "Such investigations would not include unprofitable periods spent in observation of persons suspected of adultery." Champion v Morkel 1971 (2) SA 121 (R) 128: "Its value remains no more than that which would attach to any ordinary observer of the events attested to". Christie op cit (1971) 11 Rhod LJ 17, submits that qualifying fees should be allowed for a "paid investigator operating according to strict professional standards". Generally on the activities of private detectives in England see D Madgwick & T Smythe The Invasion of Privacy (1974) 110f; M Jones Privacy (1974) 134f. Cf Jolliffe v Wilmett & Co /1971/ 1 All ER 478 (QB) 484, decided on the basis of trespass: "when the parties are separated and living at arm's length, the wife has no right whatsoever to introduce an enquiry agent into the husband's home, whatever the purport may be, and certainly not in order to garner evidence of the husband's adultery". Cf the Federal Republic of Germany: "The court has now decided that a man who lets his wife be watched in her home by a stranger, so that he can obtain evidence for divorce proceedings of her matrimonial breaches of duty, cannot use the evidence so obtained". "Current Legal Developments"(1971) 20 ICLQ 152.

The courts therefore appear to accept that both the guilty spouse and the paramour are entitled to a measure of privacy - even though they may be wrongdoers vis-a-vis the innocent spouse. Thus they will refuse to grant an interdict (except under exceptional circumstances) to an innocent spouse restraining a third party from committing adultery with the guilty spouse, on the basis that the latter has a right to dispose of his or her body as they choose.[1] Furthermore the adulterous paramour is entitled to protection against unreasonable intrusions into his private life. This is well illustrated by an Australian case:[2]

> "/T/he defendant's conduct was outrageous, high-handed and contumelious .. He broke into a private dwelling in the small hours of the morning .. He .. stripped the bed clothes from the unwilling plaintiff .. inflicting in consequence definite, though minor, injuries, and caught her by the hair .. "His desire to assist his daughter's divorce suit .. was such that he was prepared to resort .. to grossly extravagant means to obtain evidence of adultery by /his son-in-law/ with the plaintiff. In this pursuit he had no consideration for her feelings or her rights. He knew the risk he was taking and he was prepared to take it. Now he must pay the forfeit .. The adulterous have as much right as the chaste to the protection of their castles against invasion and their person against force".[3]

It is submitted that similar considerations would apply in our law to both estranged spouses and investigators employed by them, and that the victim of the intrusion in such circumstances could sue for invasion of privacy and assault.[4]

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1) Wassenaar v Jameson supra 353; cf Amra v Amra 1971 (4) SA 409 (D) 410.

2) Johnstone v Stewart 1968 SASR 142; cf "The Adulterer's Castle" (1-70) 87 SALJ 409.

3) Per Bray CJ at 145.

4) In the United States the general rule that a master or principal is liable for the wrongs of his servant or agent committed within the scope of the latter's authority has been applied to invasions of privacy committed by a private investigator during the course of his investigation. Annotation "Liability of One Hiring Private Investigator or Detective for Tortious Acts Committed in Course of Investigation" (1976) 73 ALR 3d 1175. Cf Souder v Pendleton Detectives Inc (1956) 88 So 2d 716 (La App); Pinkerton Nat Detective Agency Inc v Stevens (1963) 108 Ga App 159, 132 SE 2d 119; Tucker v American Employers Ins Co (1969) 218 So 2d 221 (Fla App); Nader v General Motors Corp (1970) 25 NY 2d 560, 307 NYS 2d 647, 225 NE 2d 765; Ellenberg v Pinkerton's Inc (1972) 125 Ga App 648, 188 SE 2d 911; 130 Ga App 254, 202 SE 2d 701.

6. "Nuisance" Calls: Where a person's peace and tranquility in his home is disturbed by another continuously telephoning him,[1] or persistently calling to sell him something,[2] an action for invasion of privacy may lie. A classic example of such conduct is the Canadian case of Robbins v Canadian Broadcasting Corporation.[3] The plaintiff, a doctor, had written a letter of criticism to the producer of a particular television programme. Several weeks later during a further edition of the programme, plaintiff's name, address and telephone number were displayed on the screen, and viewers were invited to write or telephone him in order to "cheer him up". Plaintiff was subsequently inundated with a barrage of offensive letters and telephone calls obliging him to disconnect his telephone and causing him serious inconvenience. Plaintiff sued the television company and recovered damages for invasion of privacy. In the United States the principle has been applied where a creditor has persistently and unwarrantedly telephoned a debtor,[4] and it has been suggested that an action will also lie where a person's mental repose has been disturbed by a flood of advertisements in the mail or by telephone.[5] It seems, however, that according to the decision in Nader v General Motors Corp[6] such intrusions will only be regarded as invasions of privacy where they are made with a view to obtaining private or confidential information.[7] Therefore in the United States on the principle in Nader's case the plaintiff in Robbin's case may

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1) RFV Heuston Salmond on Torts 16 ed (1973) 35.

2) NJ Van der Merwe & PJJ Olivier Die Onregmatige Daad in die Suid-Afrikaanse Reg 2 ed (1970) 395; WA Joubert Die Grondslae van die Persoonlikheidsreg (1953) 136; Strauss, Strydom & Van der Walt op cit 289,

3) (1957) 12 DLR 2d 37; cf Burns op cit 39.

4) Housh v Peth (1956) 133 NE 2d 340; cf Prosser Torts op cit 808.

5) R Kamlah Right of Privacy (1969) 102f; cf Neethling Privaatheid op cit 174.

6) (1970) 255 NE 2d 765; cf Neethling Privaatheid op cit 174.

7) Nader v General Motors Corp supra 770. See generally M A Franklin Injuries and Remedies : Cases and Materials on Tort Law and Alternatives (1971) 829.

not have succeeded on the grounds of invasion of privacy although presumably he would have had an action for nuisance.

It is submitted that our courts would not draw such a fine distinction, as according to the old authorities it was an *injuria* to violate a person's domestic peace.[1] If however the requirements for an invasion of privacy are not met it may be possible for the plaintiff to fall back on nuisance as a remedy. Privacy is an aspect of impairment of a person's *dignitas*,[2] while nuisance relates to interference with a person's property rights.[3] Thus if a person persistently telephoned another but put down the receiver without speaking each time the latter answered, it might be argued that it is the plaintiff's peaceful occupation of his property which is being disturbed rather than his *dignitas*. But it is submitted that if the element of *animus injuriandi*[4] is present such conduct could be regarded as an invasion of privacy. Similarly where a salesman deliberately and defiantly persists in coming onto a person's property although technically he is trespassing, an action for invasion of privacy may lie under the *actio injuriarum*.[5] It is submitted that the dividing line between an invasion of a person's property rights and an invasion of privacy is the manner in which the intrusion is carried out.

7. *Persistent Following*: The continuous shadowing of a person even in a public place has been held to be an *injuria* in our law,[6] and in *Epstein* v *Epstein*[7] the court interdicted a husband from employing

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1) *Digest* 47.10.5; see above 30; Voet 47.10.7; see above 44.

2) See above 185.

3) *Regal* v *African Superslate (Pty) Ltd* 1963 (1) SA 102 (AD) 109; cf McKerron *Delict* op cit 227; Van der Merwe & Olivier op cit 447.

4) See above 147. Cf P Stein & J Shand *Legal Values in Western Society* (1974) 185: "If a defective chimney falls on one's home, that is an invasion of privacy" - it is submitted that this can only be regarded as such if the chimney was *intentionally* made to fall in a manner which caused an impairment of the plaintiff's *dignitas*.

5) Cf TW Price "Patrimonial Loss and Aquilian Liability" (1950) 13 *THR-HR* 87, 101f.

6) *R* v *Jungman* 1914 TPD 8; *R* v *Van Meer* 1923 OPD 77, 82; *R* v *Ferreira* 1943 NPD 19, 21; Hunt op cit 504.

7) 1906 TH 87.

private detectives to shadow his wife. In Epstein's case the detectives had followed the plaintiff in public, knocked on her door every evening for a week and had once tried the handle of the door. Furthermore an employee of the plaintiff's landlord had observed the detectives and thought that she was being watched to see if she was using the premises for immoral purposes.[1] The court held that the plaintiff was entitled to an interdict and pointed out that in Roman law it was an injuria "if a person is shadowed in such a way as to draw public attention to the fact".[2] It is submitted, however, that whether or not the plaintiff is shadowed in a manner "which draws public attention to the fact" is merely a factor relating to overall unreasonableness and wrongfulness,[3] and should not per se determine the liability of the shadower.[4] Privacy concerns an aspect of the dignitas of the victim,[5] and the fact that he or she was openly shadowed may affect the assessment of damages. The deciding issue should be whether or not such shadowing was reasonable in the circumstances.

Prosser suggests that in the United States a person generally cannot recover if the surveillance of shadowing is done in a public place or street,[6] but it is submitted that the better view is that expressed by the American Jurisprudence in relation to personal injury investigations by private detectives:

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1) At 87.

2) At 88. For the American concept of "rough shadowing". See below 226.

3) See above 170

4) The fact that a private detective's observations "did not attract public attention" was one of four factors taken into account by a Canadian court when determining the reasonableness of the defendant's conduct in attaching a "bumper beeper" to the plaintiff's motor car. Davis v McArthur (1971) 17 DLR 3d 760 (CA) 763. Cf Burns op cit 36.

5) See above 185.

6) Prosser Torts op cit 834; Cf Neethling Privaatheid op cit 181.

> "where the surveillance, shadowing and trailing is conducted in a reasonable manner, it has been held that owing to the social utility of exposing fraudulent claims and because of the fact that some sort of investigation is necessary to uncover fictitious injuries, an unobtrusive investigation, even though inadvertently made apparent to the person being investigated, does not constitute an actionable invasion of his privacy".[1)]

On the other hand it has been held that "overzealous"[2)] or "rough shadowing",[3)] where there has been an open, public and persistent following of the plaintiff without any attempt at secrecy and in such a manner as to make obvious to the public that the plaintiff was being followed and watched (as in Epstein's case) is actionable. It seems that the references to "reasonable manner" and "social utility" in the American Jurisprudence are similar to the boni mores approach by our courts.[4)] In our law such "overzealousness" or "rough shadowing" may be important factors in deciding whether the shadowing was unlawful but would not be essentials for liability. For instance in R v Jungman[5)] an accused was convicted for continually and intentionally following a woman for about ten minutes and then going up to her and staring into her face without any legitimate reason. Similarly, in R v Van Meer[6)] the accused was found guilty of injuria for following a young woman from place to place in a public library, staring at her face while moving close to her, following her out of the library to her motor car and temporarily obstructing her from driving off.

In any event such shadowing may sometimes be justified as is the case where the public interest is at stake. Therefore law enforcement officers should be able to follow individuals suspected on

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1) American Jurisprudence, Second op cit §41, 741, my italics; cf Tucker v American Employer's Ins Co (1965) 171 So 2d 437, 13 ALR 3d 1020 (Fla App); cf Forster v Manchester (1965) 410 Pa 192, 189 A 2d 147.

2) Page Keeton & Robert E Keeton Cases and Materials on the Law of Torts (1971) 1102; cf Nader v General Motors Corp supra 771.

3) Schultz v Frankfort M Acci & PG Ins Co (1913) 151 Wis 537, 139 NW 386; cf Souder v Pendleton Detectives Inc (1956) 88 So 2d 716, 13 ALR 3d 1025, 1026. Cf Hofstadter & Horowitz op cit 98.

4) See above 172f.

5) 1914 TPD 8, 10, 11.

6) 1923 OPD 77, 82.

reasonable grounds of committing criminal acts in the performance of their duties to prevent crime.[1] In the United States this view appears to have been extended to private investigators in personal injury insurance claim cases. Thus in Forster v Manchester[2] the court held that the investigation of the validity of a personal injury claim was socially desirable, and that under such circumstances the following, photographing, and recording of the plaintiff's movements did not give rise to an actinn for invasion of privacy. There seems to be no good reason, however, why private investigators concerned with personal injury claims should be in a better position than investigators dealing with matrimonial matters. Surely it is also "socially desirable" that an innocent spouse should be entitled to obtain evidence of adultery by a guilty spouse where such evidence is essential to enable her to institute divorce proceedings? It is submitted that the solution lies in the requirement of reasonableness and lack of male fides on the part of the innocent spouse or her agent.[3]

A practical problem which arises in connection with privacy actions based on persistent following is the difficulty of detecting the wrongdoer's conduct due to the increasing availability of sophisticated electronic "tagging" devices. Westin mentions that such devices vary from fluorescent powders or dyes which can be applied secretly to a person's body, clothing or toiletries, with the result that he is illuminated for the investigator by an ultraviolet light

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1) CF Amerasinghe Aspects of the Actio Injuriarum in Roman-Dutch Law (1966) 183.

2) Supra.

3) See above 219. Cf S v I supra 787. For instance, in Van der Vyver v Netherlands Insurance Co of SA Ltd 1968 (1) SA 412 (AD) where a private detective and his assistant crept up on a couple in a motor car parked at a dam, and attempted to photograph them by opening the door, it seems that the insured could have claimed for invasion of privacy. Unfortunately privacy was not raised as the case was solely concerned with a personal injury claim by the detective who had leapt on the bonnet to prevent the car being driven away and had been subjected to a hair-raising high speed journey before he fell off!

source carried by him;[1] to miniature radio signal transmitters secreted in clothing, motor cars, hearing aids, eye-glasses or wrist-watches; and even a "radio pill" which can be introduced into a person's medicine bottle so that "a tag can be lodged in the stomach of the subject himself".[2]

> "In addition tiny quantities of gamma-ray-emitting substances, put into a person's food, drink, a medication, are enough to 'tag' a person by indications on radiation detectors".[3]

It is submitted that notwithstanding an action for invasion of privacy the introduction of a "radio pill" or "gamma rays" into a person's stomach may also constitute an assault.[4] Whether or not the victim was aware that such technological tags had been introduced into his person or property, such action per se will constitute an impairment of his right to privacy.[5]

8. Harassment: Harassment cases often overlap with "nuisance calls",[6] and in the United States most cases are concerned with the activities of persons seeking to recover debts. In Housh v Peth[7] where a collection agency harassed the plaintiff debtor by telephoning him six to eight times every day both at his home and place of employment over a period of 3 weeks (sometimes as late as 11.45 p.m.) and on one occasion called at the plaintiff's office three times in 15 minutes so that his employer threatened to discharge him, the plaintiff was awarded substantial damages.[8] The plaintiff also recovered in Biederman's

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1) Westin op cit 69.

2) Westin op cit 70; cf V Packard The Naked Society (1970) 121ff.

3) Westin op cit 70.

4) Cf Hunt op cit 437, who gives as an example of assault "the administration of poison, drugs and excessive alcohol."

5) Cf S v A 1971 (2) SA 293 (T) 297

6) See above 223.

7) (1956) 133 NE 2d 340.

8) Hofstadter & Horowitz op cit 167.

of Springfield Inc v Wright,[1] in which the defendant's agent appeared in a cafe where the plaintiff worked as a waitress and followed her around the restaurant shouting in a loud voice that plaintiff and her husband had refused to pay their bill, were "dead beats" who did not intend to pay, and that he would get both of them fired. Damages were similarly awarded in Norris v Maskin Stores[2] where an agent attempted to collect a debt due from the plaintiff by a series of telephone calls. A female voice had telephoned members of the plaintiff's family on several occasions stating that she was "in trouble" and that it was necessary for her to contact the plaintiff.[3] An extreme example of harassment by a creditor occurred in Santiesteban v Goodyear Tire & Rubber Co[4] where the plaintiff had purchased automobile tyres and tubes from the defendants on credit and was up to date in his payments. Nevertheless the defendant removed all the tyres and tubes from the plaintiff's car while it was parked outside his place of work. The court awarded the latter damages for invasion of privacy.[5] It is submitted that although the wrongful act was perpetrated on the plaintiff's property, the fact that it was done in a high-handed manner likely to embarass him would ground a similar action in our law under the actio injuriarum.[6] Furthermore it is submitted that where a creditor unreasonably intrudes into the private life of a debtor in an attempt to recover outstanding debts, an action for invasion of privacy will lie in our law. Similar principles would apply where such harassment is carried out by any other person, for instance, public officials or the police where they act unjustifiably.[7]

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1) (1959) Mo 322 SW 2d 892.

2) (1961) 272 Ala 174, 132 S 2d 320. It seems that such conduct would also be actionable as defamation. See below 252f.

3) Hofstadter & Horowitz op cit 169.

4) (1962) CCA 5 Fla 300 F 2d 9.

5) Cf Hofstadter & Horowitz op cit 169.

6) Cf Price op cit (1950) 13 THR-HR 104f; Digest 9.2.27.28.

7) See above 205. It is conceded that difficulties will arise when considering whether or not such officials had acted bona fide on a "reasonable suspicion".

In the United States such harassments have sometimes been equated to the tort of "intentional infliction of emotional distress" (eg causing mental pain, anguish and humiliation),[1] which in our law would be regarded as an injuria under the actio injuriarum. Thus in Barnett v Collection Service Company[2] a widow owed $28.75 for coal and was harassed by a collection agency sending her a series of dunning letters. Defendant knew that plaintiff was exempt because of her low wages, but continued to forward numerous threatening letters of demand couched in offensive language (eg defendant would bother plaintiff's employer "until he is so disgusted that he will throw you out the back door"), as well as suggestions that plaintiff was behaving like a criminal.[3] As plaintiff suffered nervous anxiety and was compelled to take to her bed (even then the letters continued), she was awarded damages for wilful and intentional infliction of mental pain and anguish.[4] It is submitted that in our law even if the plaintiff had not been harassed by the defendant she would have been able to recover for insult.[5]

9. Statistical and Revenue Requirements: Part of the price of living in a sophisticated technological society is the continual quest by the State for information concerning its individual members. Therefore in South Africa, as in other developed countries,[6] a number of statutes have been introduced to compel such members to submit certain personal information about themselves to the State. In most cases, however, the State has taken steps to prevent the uncontrolled dissemination of such information.[7]

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1) Hofstadter & Horowitz op cit 170.

2) (1932) 214 Ia 1303.

3) Hofstadter & Horowitz op cit 170.

4) Hofstadter & Horowitz op cit 171.

5) Cf Matiwane v Cecil Nathan, Beattie & Co 1972 (1) SA 222 (N) 227.

6) Cf Stein & Shand op cit 198: "Where, however, the good of society is involved, the law may not only permit but require the invasion of privacy. Thus a citizen is obliged to make a return of his income to the Inland Revenue, to fill in his census form, and to notify the authorities of certain dangerous and infectious diseases."

7) But there is no guarantee that these safeguards will always work. Cf Stein & Shand op cit 192; cf the English Report on the Security of the Census of the Population (1973 Cmnd 5365), Stein & Shand op cit 204 n 35.

(a) Statistics Act:[1] This Act consolidates the 1957 Statistics[2] and Census[3] Acts and provides for the collection of statistics "relating to any aspect of any matter",[4] and the taking of a census.[5] For the purposes of carrying out his duties under the Act, the Secretary for Statistics may enter any land, premises, building or structure "at any reasonable time after reasonable notice" to the owner or person in control.[6] Questions asked in terms of the Act must be answered by everyone "to the best of his knowledge or belief".[7] Failure to answer such questions constitutes an offence[8] except in respect of questions "relating to his religious belief or denomination or political convictions".[9] It is also an offence to knowingly give false information,[10] to refuse authorized persons entry for the purpose of inspecting premises,[11] and to forge any form, questionnaire, return or notice.[12] Privacy is afforded some protection in the Act

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1) Act 66 of 1976.

2) Act 73 of 1957.

3) Act 76 of 1957.

4) Act 66 of 1976, s 5(1)(a). Cf Act 73 of 1957, s2, which provided for the gathering of a variety of statistics concerning inter alia population, housing, migration, primary and secondary industrial production, trade services, prices, savings and investments, ownership, labour relations, employment, unemployment, conditions of service, injuries, accidents, social matters and family and household surveys. Presumably Act 66 of 1976 will be used to gather similar statistics.

5) Act 66 of 1976, s 5(1)(b), which provides that a census is to be taken in 1980 and thereafter every 10 years unless the Minister of Statistics determines otherwise.

6) Act 66 of 1976, s 5(1).

7) Section 5(2).

8) Section 13(a).

9) Section 14.

10) Section 13(b).

11) Section 13(c).

12) Section 13(d).

by the secrecy provisions[1] and the fact that it is an offence for an officer to put "an improper or offensive question" to anyone.[2] It is submitted that a breach of either of these two provisions may constitute an invasion of privacy.

(b) Population Registration Act:[3] The Act requires certain disclosures of a person's private lifestyle to be made should he wish to be classified as a member of a particular race group. For instance:

> "in deciding whether any person is in appearance obviously a white person or not a white person .. his habits, education and speech and deportment and demeanour shall be taken into account".[4]

In addition such person shall not be deemed to be generally accepted as a white person unless he is so accepted in the area in which he is ordinarily resident, employed or carries on business, or mixes socially, or takes part in other activities with other members of the public, and in his association with the members of his family and any other members with whom he lives.[5] Such inquiries clearly constitute a flagrant invasion of a person's right to privacy.[6] Furthermore a 1970 Amendment to the Act,[7] now requires all residents of South Africa other than "Bantu" to obtain a "book of life", which contains a long list of personal information eg a person's identity number; date and place of birth; sex and race classification; ordinary place of residence and postal address; electoral division and polling district in which he lives; (in the case of aliens, date of arrival in the Republic and country of origin); particulars as to his marriage contained

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1) Section 8.

2) Section 12(a).

3) Act 30 of 1950.

4) Section 1(2)(a).

5) Section 1(2)(c).

6) In order to establish that he is accepted as white, a person would have to make numerous disclosures concerning his private life-style, which may require others to give evidence on his behalf which in itself could be embarassing to all concerned.

7) Act 29 of 1970, s 5.

in the marriage register; a recent photograph; particulars of compulsory immunization against certain diseases; particulars concerning passports and permits to leave the Republic, particulars concerning driver's licences; particulars concerning firearms licences; educational qualifications and occupation; and home language.[1] There are, however, only limited safeguards to the use of such information in that it shall not be published to anyone other than for the purposes of the Act or any criminal proceedings, and any person receiving such information in contravention of the Act shall not publish or communicate it to any other person.[2] In addition the Secretary for the Interior may furnish such information to any department of State, local authority or statutory body, for any of their purposes, and to any other person who makes a written application and pays the prescribed fee, provided the Secretary is satisfied it is in the interest of the person so registered to furnish such particulars.[3] No reference is made to consent by the person concerned, nor is provision made for him to be advised as to who has received such information.[4] The fact that such information can be used by the State for its own purposes exposes members of the public to invasions of privacy which may result in their being prosecuted under the Immorality Act[5] or Prohibition of Mixed Marriages Act,[6] both of which are in themselves interferences with a person's right to privacy.[7] The "interest of the person so registered" seems to refer to requests by State departments, local authorities, statutory bodies and any other persons, but not to requests concerned with "any criminal proceedings" ie. by the Police.

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1) Section 7; cf Identity Documents in South West Africa Act, 37 of 1970; s 2(2).

2) Section 17(1); cf Act 37 of 1970, s 9.

3) Section 17(2).

4) See below 285.

5) Act 23 of 1957.

6) Act 55 of 1949.

7) See below 241.

(c) Income Tax Act:[1] In order to assess the taxable income of individual members of society the Department of Inland Revenue requires certain highly confidential information concerning a person's financial position, family, property holdings, liabilities and the like. To safeguard the privacy of taxpayers and others obliged to submit such returns, employees of the Department are required to take an oath of secrecy.[2] An income tax official:

> "shall preserve and aid in preserving secrecy with regard to all matters that may come to his knowledge in the performance of his duties ... and shall not communicate any such matter to any person whatsoever, other than the taxpayer concerned or his lawful representative, nor suffer or permit any such person to have access to any records in the possession or custody of the Secretary except in the performance of his duties under /the/ Act or by order of a competent court".[3]

In any event where such a breach occurs it is submitted that the victim can sue at common law for invasion of privacy.

Apart from statutory intrusions into the individual's personal sphere his privacy is also invaded by credit bureaux and other non-governmental information-gathering agencies.[4] In addition an invasion of privacy which has not yet come before the courts in South Africa but which it is submitted will be actionable in this country is prying into a person's private bank account.[5]

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1) Act 58 of 1962; cf Bantu Taxation Act, 92 of 1967, s 3.

2) Section 4(2).

3) Section 4(1).

4) See below 286f.

5) Cf Prosser Torts 808; Brex v Smith (1929) 104 NJ Eq 386, 146 A 34; Zimmermann v Wilson (1936) 81 F 2d 847 (3 Circ); cf D.J. McQuoid-Mason "Invasion of Potency?" (1973) 90 SALJ 28, 29. See below 282.

10. Criminal Investigation Procedures: The Criminal Procedure Act[1] provides that a police official[2] may take, (or cause to be taken), the finger-prints, palm-prints or foot-prints of any person arrested on a criminal charge, or convicted of a crime.[3] A police official may in addition subject an arrested person to an identity parade,[4] and take steps to ascertain whether the body of an arrested person has any mark, characteristic or distinguishing feature or shows any condition or appearance.[5] Similar steps may be taken by a medical practitioner or district surgeon at the request of a police official.[6] Furthermore a court before which criminal proceedings are pending[7] or the accused has been convicted[8] may order the recording of prints or bodily characteristics. Where, however, such a person is acquitted, or his sentence set aside, or should the State decline to prosecute, then the record of finger-prints, palm-prints or foot-prints must be destroyed.[9]

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1) Act 51 of 1977, which repealed Act 56 of 1955.

2) Section 37(1). A police official means a member of the South African Police, or Railway Police s 1(1)(xxvi). Cf Act 56 of 1955, s 289(1), where this power was given to "peace officers", s 1.

3) Section 37 (1)(a); cf Act 56 of 1955, s 289.

4) Section 37 (1)(b); cf Act 56 of 1955, s 289(1). For identity parades see Swift & Harcourt op cit 871.

5) Section 37(1)(c); cf Act 56 of 1955, s 289(1). Special provision is made for the examination of females, s 37(1)(c), proviso. In the United States the courts have distinguished between the mere taking of finger-prints and photographs, and the publication thereof. Cf Reed v Harris (1941) 348 MO 426, 153 SW 2d 834; McGovern v Van Riper (1947) 140 NJ Eq 341, 54 A 2d 467; Mavity v Tyndal (1946) 224 Ind, 364, 66 NE 2d 755; (1947) 333 US 834. Hofstadter & Horowitz op cit 186f.

6) Section 37(2).

7) Section 37(3), where a police official is not empowered to order the taking of such records.

8) Section 37(4). Cf Act 56 of 1955, s 289 (3).

9) Section 37(5). Cf Act 56 of 1955, s 289 (5). In the United States it has been held that in certain cases the police are justified in retaining fingerprints, photographs and measurements if an arrested person has been acquitted or the charge withdrawn because "an accurate idenitification system ... may be an assistance not only for finding the guilty ... but in clearing an innocent suspect". Voelker v Tyndal (1947) 226 Ind 43, 75 NE 2d 548; cf Barletta v McFeeley (1930) 107 NJ Equity 141, affirmed (1931) 109 NJ Equity 241, 156 A 658; Fernicola v Keennan (1944) 136 NJ Equity 9. Hofstadter & Horowitz op cit 187. In McGovern v Van Riper (1947) 140 NJ Equity 341, 54 A 2d 467, it was pointed out that: "the state bureau kept such material under lock and key; inspection was permitted under careful safeguards; copies were given to other police organisations only upon request and for good, specific reasons" Hofstadter & Horowitz op cit 189.

If the person is convicted it seems that the State may retain the identity records,[1] and the same view has been adopted in the United States on the basis that:

> "the relation to the public of one who has been convicted of a crime is such as to forfeit whatever right of privacy he may be said to have ever possessed".[2]

It is submitted, however, that such forfeiture of privacy only applies to keeping of criminal records, it does not entitle others to "rake up the ashes of the past" by making such disclosures several years after the criminal has paid his penalty.[3] With respect to the taking of such prints or bodily characteristics it has been held that an accused may refuse to the taking of his fingerprints in public or in open court.[4] It seems that the purpose of ss 37(1),(2),(3) is to enable the State to produce evidence which may be used in the case, and not for the purposes of the records of the Criminal Bureau,[5] although s 37(4) may be used for the latter, as it refers to convicted criminals. Where such prints or records of bodily marks are taken against the will of the accused, the evidence of such palm print is not inadmissible, as neither the maxim nemo tenetur se ipsum nor the confession rule apply to such evidence.[6]

It is submitted that where a person's prints are intentionally wrongfully taken by the police, or the latter refuse to expunge their records after such person has been acquitted, or his sentence set aside, or he has had the charge against him withdrawn, he may bring an action for invasion of privacy.

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1) Cf s 37(4), refers to "any court which has convicted any person of any offence ..." cf Act 56 of 1955, s 289(4).

2) Hodgman v Olsen (1915) 81 Wash 615, 150 P 2d 1222, 1226; cf Hofstadter & Horowitz op cit 189.

3) See below 268f.

4) S v Mkize 1962 (2) SA 457 (N) 460.

5) R v Daniels 1956 (2) SA 126 (N) 127.

6) Ex parte Minister of Justice : in re R v Matemba 1941 AD 75, 82f; cf Swift & Harcourt op cit 534f.

Section 37 also empowers the police to subject an accused to blood tests[1] (eg. in the case of motorists suspected of driving, or a person suspected of murder). In the United States it has been held that where a person has been forced to undergo a blood test,[2] or where a test has been carried out without the person's knowledge or consent,[3] such conduct constitutes an invasion of privacy. In our law such conduct, if illegal, also be regarded as an assault.[4]

It has been suggested that in our law the investigating authorities should not make use of injections of sodium-amytal, the so-called truth drug, in the course of investigations[5] and in the United States evidence obtained from polygraphs,[6] truth drugs[7] and hypnosis[8] have been excluded on the grounds of scientific unreliability.[9]

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1) Sections 37(1)(c), (2), (3); cf RW Darroll "We be of one Blood - Ye and I" (1965) 82 SALJ 317, 320. Provisions concerning blood tests also exist in France, Sweden, the Federal Republic of Germany and the United Kingdom. Cf Internation Commission of Jurists "The Legal Protection of Privacy: A Comparative Study of Ten Countries" (1972) 24 Int Soc Sci J 418, 472f, 476. The same applies in the Netherlands re drunken driving offences. Cf F De Graaf "The Protection of Privacy in Dutch Law" (1976) 5 Human Rights 177, 186.

2) Bednarik v Bednarik (1940) 16 A 2d 80; Prosser Torts op cit 808.

3) People v Tucker (1948) 198 P 2d 941; cf Breithaupt v Abram (1957) 352 US 432; cf Westin op cit 351f.

4) The insertion of a needle would constitute "application of force". Cf Hunt op cit 437.

5) R v Lincoln 1950 (1) PH H 68 (AD). "Truth drugs" are authorised in West Germany. Article 136(a), Penal Code; (1972) 24 Int Soc Sci J 473.

6) S v Mattron (1962) 184 A 2d 225; In re Mayer (1966) 421 P 2d 781; cf Neethling Privaatheid op cit 177. Polygraphs may not be used for criminal investigation in West Germany under Article 136(a) Penal Code; (1972) 24 Int Soc Sci J 473.

7) Cf LM Despress "Legal Aspects of Drug-Induced Statements" (1947) 14 U of Chicago LR 601.

8) People v Ebanks (1897) 49 P 1049; S v Push (1951) 46 NW 2d 508.

9) Cf Neethling Privaatheid op cit 177f. Westin op cit 214f.

In America the stomach pumping of a person suspected of taking narcotics was held to be an invasion of his right to privacy.[1)]

11. Medical Examinations, Tests and Treatment: In Roman[2)] and Roman-Dutch law,[3)] the wrongful subjection of a woman to an inspectio ventris constituted an injuria, and it could be argued that such an inspection was analogous to a medical examination. An unauthorized medical examination may in any event constitute an assault,[4)] and, it is submitted, could also be regarded as an invasion of privacy.[5)] In some instances the law compels a person to undergo a medical examination.[6)] Therefore in South Africa compulsory medical examinations may be required where a person is suspected of being mentally ill,[7)] or suffering from an infectious[8)] or venereal disease.[9)] Furthermore, persons wishing to recover damages for personal injuries arising from a motor vehicle collision may be subjected to a compulsory medical examination.[10)] The latter is a legally recognised invasion of privacy

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1) Rochin v California (1951) 342 US 165; cf De Graaf op cit 186, on the position in the Netherlands.

2) See above 33.

3) See above 45.

4) See above.

5) Cf Neethling Privaatheid op cit.

6) See generally (1972) 24 Int Soc Sci J 469, some protection is given constitutionally in Article 19 of the Argentina Constitution, Article 76 of the Venuzuela Constitution and the Fourth and Fifth Amendments of the United States Constitution.

7) Cf Mental Disorders Act, 38 of 1916, s 27(2); Mental Health Act, 18 of 1973, ss 9, 12(5), 18(1),(2), 30(3); Criminal Procedure Act, 51 of 1977, s 79, cf Act 56 of 1955, s 290. Similar provisions exist in West Germany, Switzerland and the United Kingdom (1972) 24 Int Soc Sci J 473, 474, 476.

8) Public Health Act, 36 of 1919, s 23.

9) Act 36 of 1919, s 61. There is a duty on a person suffering from venereal disease to be treated (s 54). Medical practitioners are obliged to warn an infected person against contracting a marriage until the disease has been cured or neutralized (s 55(1)). It is an offence to communicate the disease to others (s 59). In Mexico, Argentina, Brazil and France future spouses are compelled to undergo a medical examination before marriage (1972) 24 Int Soc Sci J 470. Such spouses in Mexico and Argentina may not marry if they suffer from certain specified diseases. Ibid.

10) Rule 36, Uniform Rules of Court, promulgated in terms of s 43(2)(a) Supreme Court Act, 59 of 1959; cf s 66 Railways & Harbours Act, 70 of 1959. Previously at common law the courts had refused to make such an order. Eynon v Du Toit 1927 TPD 76, 80.

aimed at preventing fraudulent claims.[1] Difficulties arise, however, concerning the taking of blood tests in civil cases and the rendering of involuntary medical treatment.

It is submitted that in our law to compel a person to undergo a blood test in a civil matter (eg to determine whether he has been drinking or to prove paternity) may be actionable.[2] In the United States where such tests are in the interests of minor children, the courts appear to recognize that they do not constitute an invasion of privacy.[3] There seems to be no reason why such a principle should not be applied in our law, although our courts have not yet decided whether the court can order a minor child to be blood-grouped.[4] In E v E[5] the court refused to order a blood test of a wife and child in order to establish their blood-group identity in an action for anulment of a marriage on the grounds of stuprum.[6] It could perhaps be argued that in the past such tests were only used to exclude paternity, whereas recently in Van der Harst v Viljoen[7] it was shown that in rare cases paternity can be affirmatively corroborated,[8] and that therefore the rule should be relaxed. It is submitted, however, that the courts are unlikely to interfere with the bodily integrity of an individual unless specifically authorized to do so by Parliament.

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1) Cf Durban CC v Mndovu 1966 (2) SA 319 (D) 324; Mgudlwa v AA Mutual Insurance Assoc Ltd 1967 (4) SA 721 (E) 723.

2) Cf Darroll op cit 320f.

3) Cortese v Cortese (1950) 76 A 2d 717, 719. Provision is made for the courts to order compulsory blood tests in paternity cases in Sweden, Switzerland ((1972) 24 Int Soc Sci J 472f, 474), Denmark (K Henningsen "Some Aspects of Blood Grouping in Cases of Disputed Paternity in Denmark" in F Lundquist Methods of Forensic Science (1963) v II 209, 220) and West Germany (AR brownlie "Blood and the Blood Groups: A Developing Field for Expert Evidence" (1965) 5 J of Forensic Sci Soc 124, 163).

4) Ranjith v Sheela 1965 (3) SA 103 (D); cf Darroll op cit 320f.

5) 1940 TPD 333.

6) At 335.

7) 1977 (1) SA 795 (C).

8) At 796.

In the United States it seems that it is an invasion of privacy to compel a person to undergo a blood transfusion (for instance, where it is refused on religious grounds).[1] It is submitted that in our law such conduct may also be actionable as an assault - although a medical practitioner may have the defence of necessity available to him.[2] Furthermore in South Africa the Children's Act[3] empowers the Minister on the report of certain medical officers to consent to an operation despite a refusal by the child's parents or guardian, if satisfied after due enquiry that the operation or treatment is necessary.[4] The words "operation or treatment" seem wide enough to include a blood transfusion.[5]

Other intrusions occur where a person is compelled to be vaccinated in the interests of public health,[6] and where certain employees are subjected to medical examinations[7] or psychological testing.[8]

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1) Cf In re Estate Brooks (1965) 32 Ill 2d 361.

2) Cf Stoffberg v Elliott 1923 CPD 148, 150.

3) Act 33 of 1960.

4) Section 20(6).

5) "Operation .. An act or series of acts performed upon an organic body with the hand alone or by means of an instrument, to remedy deformity or injury, cure or prevent disease or relieve pain". Ed CT Onions The Shorter Oxford English Dictionary (1933) 137. "Treatment ... management in the application of remedies; medical or surgical application or service" Shorter Oxford Dictionary op cit 2238.

6) Public Health Act, 36 of 1919, ss 92, 96, 100. See also ss 102, 104. Similar provisions exist in Argentina, West Germany, Sweden, the United Kingdom (1972) 24 Int Soc Sci J 472f, 476) and the Netherlands (De Graaff op cit 186).

7) Cf Factories, Machinery and Building Works Act, 22 of 1941, ss 39 A (3), (5). Cf the position in France and Mexico (1972) 24 Int Soc Sci J 470, 471.

8) Cf EPJ Myjer "Sollicitant, privacy en psychologische test" (1975) 26 Ars Aequi 222. See above 9.

12. Miscellaneous Statutory Intrusions: There are several other South African Acts which impinge on a person's right to privacy, for instance: the Immorality Act[1] makes it a crime for a white person to have sexual intercourse with a person of another non-white race group;[2] the Prohibition of Mixed Marriages Act[3] prevents a white person from marrying a non-white person;[4] the Publications Act[5] limits a person's right as to the publications and other objects he may keep in his home;[6] and the many other statutes which impinge on a person's freedom of movement and privacy because of his race.[7]

Detention without Trial: Furthermore where a person has been detained by the police under security legislation[8] he may be subjected to interrogation against his will.[9] Such a detainee's right to privacy is qualified[10] in that the court must balance the interests of the State against those of the individual.[11]

> "Obviously [the police] are not entitled, in order to induce a detainee to speak, to subject him to any form of assault or to cause his health or resistance to be impaired by inadequate food, lack of sleep, living conditions or the like. Nor may they resort to methods of interrogation commonly referred to as the 'third degree'."[12]

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1) Act 23, of 1957.

2) Section 16. Cf E Cahn The Moral Decision (1966) 88.

3) Act 55 of 1949.

4) Section 1.

5) Act 42 of 1974.

6) Section 8(1)(d); cf the American case of Stanley v Georgia (1969) 394 US 557, 565, where the court held that similar but less far reaching legislation was contrary to the First Amendment.

7) See generally JD Van der Vyver Die Beskerming van Menseregte in Suid-Afrika (1975) 95ff.

8) For instance, s 185 Criminal Procedure Act, 51 of 1977; cf s 215 bis, Criminal Procedure Act, 56 of 1955; s 6, Terrorism Act, 83 of 1967. See generally Mathews op cit 133ff.

9) Gosschalk v Rossouw 1966 (2) SA 476 (C) 493.

10) Gosschalk v Rossouw supra 490.

11) Gosschalk v Rossouw supra 492.

12) Per Corbett J in Gosschalk v Rossouw supra at 492.

In practice, however, it is difficult for the courts to ensure that such procedures are not being used as access to detainees is restricted to State officials[1] except with special permission of the Attorney-General or a person delegated by him,[2] or the Minister of Justice.[3] Thus in Cooper v Minister of Justice[4] the court refused to grant an order interdicting the police from assaulting, or subjecting certain detainees to undue or unlawful pressure or duress on the basis that insufficient evidence had been given to establish a prima facie case.[5] Furthermore,

> "even if the court had the power to request a magistrate to take statements from the detainees on affidavit or on commission or by interrogations the magistrate would by virtue of the provisions of sec 6(6), not be entitled to disclose information so obtained to this court or to the applicants /relatives of the detained persons/".[6]

In Nxasana v Minister of Justice,[7] on the other hand, Didcott J found himself "in firm disagreement" with the court in Cooper's case,[8] and held that in principle such evidence could be so obtained and disclosed to court, but that on the facts there was nothing to show that the detainee could verify the alleged ill-treatment by his evidence.[9] The court observed that the Terrorism Act was:

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1) Section 185(5), Act 51 of 1977; cf Section 215 bis (4), Act 56 of 1955; s 6(6), Act 83 of 1967.

2) Ibid.

3) Section 6(6), Act 83 of 1967.

4) 1977 (2) SA 209 (T).

5) At 210.

6) Per Trengrove J at 212.

7) 1976 (3) SA 745 (D). The case was, however, decided after Cooper's case.

8) Nxasana v Minister of Justice supra 755.

9) At 761. The applicant had submitted an affidavit on information gathered by hearsay, as against affidavits by several police officers denying that the detainee (applicant's husband) had been ill-treated, and by 4 magistrates and the Chief District Surgeon of Durban, who had all visited him in private and had heard no allegations of ill-treatment. It is difficult to comprehend why the detainee should not have been given an opportunity to verify or deny the alleged ill-treatment, as it is not beyond the bounds of possibility that other threats or pressures could be brought to bear on him to prevent him complaining to the visiting magistrates or district surgeon. See also below 243 n 8.

> "draconian in its general effect ... [by] providing for the detention for indefinite periods of those who have not been convicted of crimes, for their isolation from legal advice and from their families, and for their interrogation at the risk of self-incrimination".[1]

The Act did not, however, sanction ill-treatment or the use of third degree methods to interrogate detainees and therefore did not limit the court's power to protect the individual against maltreatment.[2] Even though the court could not order a person detained under s 6 to be brought before it to give evidence orally,[3] in terms of the Uniform Rules of the Supreme Court,[4] it could order evidence to be taken on commission.[5] Didcott J was of the view that details about terrorist activities attributed to a detainee, or to his knowledge, and disclosures made by him during interrogation could be regarded as "official information", but doubted whether this applied to information obtained from the detainee about his health, even though it was conveyed to court by a magistrate who had visited him "in the performance of his official duties".[6] The decision in Nxasana's case has been welcomed as a "noteworthy decision" which is "a fine example of a judge giving expression to the principle of acting in favorem libertatis",[7] but it is submitted that Didcott J could have gone further and granted the order. The shroud of secrecy which surrounds detention without trial makes it virtually impossible for an applicant to obtain evidence,[8] other than hearsay, concerning the treatment or

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1) At 747.

2) At 748. Cf Schermbrucker v Klindt NO 1965 (4) SA 606 (AD) 612.

3) Cf Schermbrucker v Klindt NO supra 619, 625f.

4) Rule 6(s)(g), Rule 38(3),(5).

5) Nxasana v Minister of Justice supra 751f.

6) At 755.

7) Cf H Rudolph "'Official Information' and the Detainee - A Noteworthy Decision" (1977) 94 SALJ 147.

8) For instance during the inquest into the death of Mr Steve Biko who died in detention on 12th September 1977, the only evidence concerning his physical condition while in detention was given by the security police and medical practitioners consulted by them. The evidence indicated that Mr Biko had died of brain injuries inflicted in "a scuffle" with the police; had been kept naked in his cell; chained to a grille at night; left lying in a urine-stained blanket; while ill taken naked on a 1200km journey in the back of a police vehicle; and left dying in his cell with an empty drip bottle attached to his arm. "Editorial" Sunday Times 4 December 1977. The inquest lasted 15 days after which the presiding magistrate gave a 3 minute verdict that nobody was to blame for Biko's death. Sunday Times 4 December 1977.

physical well-being of a detainee, and it seems that the authorities would have nothing to lose by allowing evidence as to his well-being or good-health to be made public. Such disclosures can have little effect on a lawfully conducted investigation into a detained person's activities, and could well obviate a repetition of the unhappy Biko affair, [1] and alleviate growing public concern about the number of deaths of persons held in detention. [2] It seems, however, that even if assaults or "third degree" interrogation methods are not used, the same ends can be achieved by subjecting a person to long periods of solitary confinement.[3]

Conclusion: In the United States the introduction of the Freedom of Information Act[4] allows for the disclosure of information compiled by government agencies to be released under certain conditions to private individuals, but prohibits the disclosure of information which could constitute a "clearly unwarranted invasion of privacy".[5] The Privacy Act of 1974[6] also controls invasions of privacy by state agencies,[7] although records maintained by the CIA and law enforcement

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1) The death of Mr Steve Biko in detention (see above 243 n 8); the comments thereon by the Minister of Justice (Daily News, 14 September 1977; Natal Mercury 17 September 1977; Sunday Express, 25 September 1977); and the result of the inquest (see above 243 n 8) led to world-wide condemnation of South Africa (Daily News, 5 December 1977).

2) The Sunday Times, 4 December 1977, reported that as at that date 45 people were known to have died in detention.

3) Cf AS Mathews & RC Albino "The Permanence of the Temporary - an Examination of the 90- and 180-Day Detention Laws" (1966) 83 SALJ 16, 30ff. Cf TB Benjamin & K Lux "Solitary Confinement as Psychological Punishment" (1977) 13 Cal WLR 265, 268: "The evidence appears overwhelming that solitary confinement alone, even in the absence of physical brutality or unhygienic conditions, can produce emotional damage, declines in mental functioning and even the most extreme forms of psychopathology, such as depersonalization, hallucination and delusions".

4) 5 United States Code §552; cf Westin op cit 386ff.

5) 5 United States Code §552(b) (Supp III 1965-7). Cf Neethling Privaatheid op cit 277f.

6) 5 United States Code §552(a). Cf JJ Hanus & HC Relyea "A Policy Assessment of the Privacy Act of 1974" (1976) 25 American ULR 555; JM Gorski "Access to Information? Exemptions from Disclosure under the Freedom of Information Act and the Privacy Act of 1974" (1976) 13 Willamette LJ 135.

7) See above 68f.

agencies are generally exempt.[1] As yet there is no such legislation in South Africa and on the contrary there is a trend towards secrecy, not only in law enforcement, but also in the collection of government statistics concerning private individuals.[2] Furthermore such private information may sometimes be disclosed to other State departments.[3]

As has been mentioned,[4] for an intrusion to be actionable it must be unreasonable and offensive to the prevailing values of the community. Thus it should not be an invasion of privacy merely because a landlord collects his rent on a public holiday,[5] nor because a passerby calls in to ask directions to a home in the neighbourhood.[6] In the words of Fleming:

> "Clearly no liability is warranted unless the interference is substantial and of a kind that a reasonable man of normal sensitivity would regard as offensive and intolerable. Merely knocking at another's door or telephoning him on one or two occasions is not actionable, even when designed to cause annoyance; but if the calls are repeated with persistence, and in the midst of the night, so as to interfere unreasonably with the plaintiff's comfort or sleep, liability will ensue."[7]

It is submitted that the same principles apply in our law.

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1) 5 United States Code §552(a)(i) (Supp IV, 1974); cf Hanus & Relyea op cit 585. See above.

2) Cf AS Mathews "Disclose and be Damned - The Law Relating to Official Secrets" (1975) 38 THR-HR 348, 360.

3) See above 233.

4) See above 172f.

5) Prosser Torts op cit 808; cf Horstman v Newman (1956) 291 SW 2d 567 (Ky).

6) But cf Watson v Absche 1931 TPD 499 at 505, where it was held that a person who asks directions at night has no legal right to be on another's premises and is a trespasser. Cf Veiera v Van Rensburg 1953 (3) SA 647 (T) 651. The approach of McKerron Delict op cit 254 and Salmond Torts 359 seems to be preferable viz: "no person is to be accounted a trespasser who enters [premises] in order to hold communication with the occupier or any other person on the premises, unless he knows or ought to know that his entry is prohibited". It is submitted that a similar principle should be applied to invasions of privacy.

7) JG Fleming Law of Torts 4 ed (1971) 529.

CHAPTER SIX

PUBLICITY

A. INTRODUCTION

Apart from intrusions into a person's private life, his privacy may also be invaded by disclosures concerning his personal life, publicity misrepresenting himself or his lifestyle, and unauthorized use of his image and likeness.[1] Prosser describes the common elements of intrusions, disclosures, false light situations, and appropriations[2] as follows:

> "the first and second require the invasion of something secret, secluded or private pertaining to the plaintiff; the third and fourth do not. The second and third depend upon publicity, while the first does not, nor does the fourth, although it usually involves it. The third requires falsity or fiction: the other three do not. The fourth involves a use for the defendant's advantage, which is not true of the rest".[3]

Notwithstanding Prosser's contention that the above forms of invasion of privacy are distinct and based on different elements,[4] there is much to be said for Bloustein's view,[5] and the attitude of our courts,[6] that invasion of privacy is a dignitary wrong which is designed to protect the plaintiff's "inborn right to the tranquil enjoyment of his peace of mind".[7] This is the approach adopted by the courts in the intrusion cases,[8] and it is submitted is the one which has been applied to the other three categories in

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1) For a theoretical analysis of the disclosure cases see J Neethling Die Reg op Privaatheid (1976) 389.

2) WL Prosser Law of Torts 4 ed (1971). See above 55.

3) Prosser Torts op cit 814.

4) Ibid.

5) EJ Bloustein "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39 New York ULR 962, 1003. See above 60f.

6) Cf O'Keeffe v Argus Printing & Publishing Co Ltd 1954 (3) SA 244 (C) 249; Mhlongo v Bailey 1958 (1) SA 370 (W) 373; S v A 1971 (2) SA 293 (T) 297; S v I 1976 (1) SA 781 (RAD) 784. See below 185.

7) M De Villiers Roman and Roman-Dutch Law of Injuries (1899) 24; cf Rhodesian Printing & Publishing Co Ltd v Duggan 1975 (1) SA 590 (RAD) 594.

8) See above 199f.

our law. It is intended to consider how the courts in South Africa have handled cases concerning publication of private facts, false light and appropriation. The problem of data banks will be considered under the section on publication of private facts[1] which is primarily concerned with disclosures.

B. PUBLICATION OF PRIVATE FACTS

In their article on privacy Warren and Brandeis mentioned, inter alia, that:

> "The common law secures to each individual the right of determining ordinarily, to what extent his thoughts, sentiments and emotions shall be communicated to others".[2]

Any interference with this right therefore would seem to be an impairment of aspects of a person's dignity. The interest primarily protected is dignitas not reputation,[3] although impairment of the latter may be an aggravating factor in the assessment of damages, and would usually ground an action for defamation. In privacy cases the plaintiff is being compensated for the hurt and humiliation suffered by him as a result of having his private life made public. It is submitted that Neethling's contention that generally in the "disclosure" cases, the disclosure must be made to a large group of people[4] is not part of our law, in that the degree of publication is one of several factors to be taken into account by the courts when deciding if the act was wrongful.[5]

The ability of South African law to accommodate Prosser's category of invasions arising from publication of private facts can be illustrated by reference to disclosures concerning (i) the contents

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1) See below 283f.

2) SD Warren & LD Brandeis "The Right to Privacy" (1890) 4 Harv LR 193, 196. See above 52.

3) Bloustein op cit 974.

4) Neethling Privaatheid op cit 311.

5) See above 196f.

of private correspondence; (ii) debts; (iii) physical deformities and health; (iv) life style; (v) childhood background; (vi) family life; (vii) past activities; (viii) embarassing facts; (ix) confidential information; and (x) information stored in data banks.

1. Contents of Private Correspondence: Not only was it an injuria in Roman Law to disclose the contents of a will prior to the testator's death,[1] but Cicero himself castigated Mark Antony for lacking a sense of decency when he read Caesar's letter in the Senate.[2] Similarly early English[3] and American cases[4] held that to publish the contents of a private letter was a civil wrong,[5] although it seems that the writer not the receiver could restrain such publication.[6] De Villiers has stated that

> "Some writers have supposed that it must also be an injury to the writer of private correspondence when his letters are published to the world, and possibly where the effect of such publication will be to hurt another by bringing him into disrepute, dislike or contempt, this view is a correct one".[7]

It is submitted that the learned writer has stated the requirement too strongly as in privacy cases it is not necessary to show "disrepute, dislike or contempt".[8] The only case in our law which seems to deal indirectly with the problem of privacy and private correspondence appears to follow De Villiers' view. In Nelson & Meurant v Quin & Co[9] the plaintiffs applied for an interdict restraining the publication of certain private letters which had been produced at a judicial

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1) Digest 9.2.41. pr. See above 33.
2) Cicero Second Phillipic Against Mark Antony IV; cf SH Hofstadter & G Horowitz The Right of Privacy (1964) 155. See below 249.
3) Gee v Pritchard (1818) 2 Swan 402.
4) Dennis v Leclerc (1811) 1 Mart (OS) 297 (La).
5) Hofstadter & Horowitz op cit 156f.
6) Pope v Curl (1741) 3 Atk 342; cf Hofstadter & Horowitz op cit 155f.
7) De Villiers op cit 142.
8) See above 192f.
9) (1874) 4 SC 46.

inquiry. The court held that as there was no allegation that the publication would entail irreparable damage the application should be refused.[1] De Villiers CJ conceded that an action might lie if the letters contained defamatory matter or "would cause any loss, damage, injury, trouble or even inconvenience" to the plaintiff, or constituted a breach of contract.[2] He was not however prepared to grant an interdict in cases where there were no "special grounds, independently of the mere privacy of the communication".[3] There was no civil law authority for the plaintiff's application but such disclosures were apparently frowned on by the Romans:

> "Cicero, in one of his speeches (Oratio Philip 2, Chap 4) speaks of the practice of publishing private letters as a breach of good manners and an offence against common decency, and as calculated to put an end to all familiar correspondence between friends; but he does not condemn the practice as illegal, on the contrary, he rather seems to assume that it is not illegal".[4]

In any event it is submitted that the learned Chief Justice's criteria of "trouble" and "inconvenience" in themselves are wide enough to embrace invasions of privacy. The court did not refer to the question of privacy. Not only was the action grounded on proprietary rights and a common law form of copyright, but the court relied on the English authorities which are in any event reluctant to recognize an action for invasion of privacy.[5] The matter was considered on the basis of copyright and the court accepted the English rule[6] that there was no common law right of copyright to letters,[7] except in the

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1) At 56.

2) At 50.

3) Ibid.

4) At 51. Contra Hofstadter & Horowitz op cit 158f: "Italy, heir to ancient Rome, adheres still to Cicero's principle that to publish private letters without consent of the writer is a moral and legal wrong".

5) See above 72. Nelson's case was decided 25 years after Prince Albert v Strange (1849) De G & Son 652, which had hinted that there might be a right of privacy in English law.

6) Nelson & Meurant v Quin & Co supra 53.

7) Jeffreys v Boosey (1854) HL, 4 HLC 815; 94 RR 389.

case of literary works.[1] It seems, however, that the court completely overlooked the concept of privilege although it came to the right conclusion for the wrong reasons when it stated:

> "If once the principle be established that a person may obtain an injunction to restrain the publication of his letters on the mere ground of his right of property therein, where are we to stop? If the absolute right contended for exists, it would equally apply to letters and all other documents produced and read in open court; and however necessary they may be for the proper apprehension or elucidation of the case, it would be competent to the author or writer to apply to the court to restrain the publishers of newspapers and even of law reports from publishing such letters or documents".[2]

It is submitted that the above passage is open to criticism, in that outside of Parliamentary privilege,[3] there can be no question of an "absolute right" in cases where the disclosure is subject to a privilege.[4] On the other hand the semble that where the writer of a letter allows it to pass out of his possession without restriction as to its circulation he has no right on which to found an application for an interdict to restrain the publication of such a letter,[5] is untenable. Why should the onus be on the writer to state each time he writes a letter that its contents are not to be published to the world at large? It may be that it was doubtful whether there was an English common law right of copyright,[6] and that no such right exists in our law[7] but copyright refers to proprietary rights. In matters of privacy we are dealing with impairments to the plaintiff's dignitary not

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1) Pope v Curl supra, where the poet obtained an injunction against the defendants who wished to publish a book entitled "Letters from Swift, Pope and Others".

2) Nelson & Meurant v Quin & Co supra 55.

3) See below 323.

4) See below 324.

5) Nelson & Meurant v Quin & Co supra 47.

6) Nelson & Meurant v Quin & Co supra 52ff. See now English Copyright Act, 1956, s 46(s); cf Ed EP Skone-James Copinger and Skone-James on Copyright 11 ed (1971) 5.

7) Cf AJC Copeling Copyright Law in South Africa (1969) 1.

property rights.[1] It could be argued that Nelson & Meurant's case was decided before Warren and Brandeis' historic article[2] and that it was for this reason that the matter was only considered in the light of copyright. This approach was, however, adverted to by Centlivres J in Goodman v Van Moltke.[3] The earlier Anglo-American cases regarded the right to privacy in correspondence as a "property right".[4] It is submitted, however, that the better view is that publication of private letters is an interference with the writer's personality rights as such documents often contain his thoughts and feelings.[5]

In the United States the courts recognized that although ownership of the letter passes to the receiver, who has its use and enjoyment, such a letter cannot be published without the writer's consent except for his own defence or vindication.[6] On the other hand in the United States the courts have extended the "property" concept by allowing the executors of a deceased writer's estate to restrain publication of the deceased's private letters,[7] and it has been suggested that this right should also be given to a surviving spouse on the basis that:

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1) See above 185.

2) See above 247 n 2.

3) 1938 CPD 153, 155: "It is quite clear in our law ... that the author of a letter has a copyright in that letter and can prevent the letter being published by anyone without his authority".

4) Cf Woolsey v Judd (1855) 4 Duer (NY) 379, 404; Hofstadter & Horowitz op cit 157; "The ground on which equity will enjoin the publication of private letters is generally said to be the property rights of the writer" American Jurisprudence, Second (1972) v 62 Privacy §7.

5) Cf F De Graaf "The Protection of Privacy in Dutch Law" (1976) 5 Human Rights 177, 185: "In the case of private letters however, it is not reputation which is at stake ... but rather the protection of someone's personal thoughts and feelings from dissemination against his will".

6) Cf Grigsby v Breckenridge (1867) 65 Ky 480; cf Hofstadter & Horowitz op cit 157.

7) Baker v Libbie (1912) 210 Mass 599, 97 NE 109, 112; Hofstadter v Horowitz op cit 157.

> "When a husband and wife are living together, an act of this nature necessarily injures the other spouse. The result of invasion, the mental distress, embarrassment and humiliation clearly indicate that the damage is not visited upon only one".[1)]

It is submitted that the reference to "mental distress, embarrassment and humiliation" by the court is a realistic recognition that such publications cause sentimental hurt, rather than infringement of property rights. Similarly it can be argued that in English law the publication of the contents of a private letter without the author's consent amounts to a "breach of confidence",[2)] which is usually con-concerned with hurt feelings.

In our law the person wishing to interdict the publication of private correspondence, or recover damages for such publication would have to show that he or she would personally suffer injury as a result of the contents being publicized.[3)]

2. Debts: In the United States it is an invasion of privacy to publicize that a person has not paid his debts.[4)] The action is probably used because although truth alone is a defence to an action for defamation it does not apply to invasions of privacy.[5)] In our law, however, truth alone is no defence to defamation and for the defence of justification public interest is also required.[6)] Consequently in South Africa cases concerning publication of the fact that a person owes another money have proceeded on the basis of defamation. This is probably because generally it is not in the public interest to

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1) Clayman v Bernstein (1940) 38 Pa D & C 543 (CP No 5 Phila Co); cf Hofstadter & Horowitz op cit 158.

2) Cf Gee v Pritchard (1818) 2 Swan 402, 418; See above 75.

3) See below 355. But cf Goodman v Von Moltke 1938 CPD 153, 155. See, however, Dun & Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) Pty Ltd 1968 (1) SA 209 (C) 215, where the court was not referred to to Goodman's case and assumed that there was no common law right of copyright. Cf Copeling op cit 175f. It is submitted that the better view is that such publication is an injuria.

4) Prosser Torts op cit 810.

5) Prosser Torts op cit 798; cf 62 American Jurisprudence, Second (1972) v 62 Privacy § 7. Cf Hofstadter & Horowitz op cit 167.

6) Cf Sutter v Brown 1926 AD 155, 172; RG McKerron The Law of Delict 7 ed (1971) 186f; NJ Van der Merwe & PJJ Olivier Die Onregmatige Daad in die Suid-Afrikaanse Reg 2 ed (1970) 369f.

know that one person owes another money. Thus in Piering v Bridger[1] respondent:

> "had in conformity with his usual custom posted upon a blackboard in the bar of his hotel headed 'Bodger's ledger' the name of the appellant with the sum of £2.18.9 against it, this being the amount actually owing by the /appellant/ for liquors consumed at the bar and unpaid for after demand".[2]

It was held that appellant could not recover as there was no proof of animus injuriandi on the part of the respondent. The same principle would have applied had the appellant sued for invasion of privacy.[3] In Conroy v Bennett[4] a journalist recovered damages for defamation in an action against a hotel keeper who had published an advertisement in a newspaper which read:

> "Notice, will Mr PE Bennet, sub-reporter of the Independent, please call and pay his board, lodging, washing and liquor accounts at the Masonic Hotel, and redeem his box of valuable papers".[5]

As the defendant had admitted that the aim of the publication was to make the plaintiff feel ashamed of himself, it was held that he had animus injuriandi and was liable. It is difficult to conceive of situations where publication of the fact that a debtor owes money to a creditor would not amount to defamation and would only be an invasion of privacy. Furthermore if the plaintiff was a habitual debtor, it may be in the public interest for this to be known, and such interest would ground a defence to an action for either defamation [6] or invasion of privacy.[7] A case that causes some difficulty is Coomer v Moorosi [8] where the defendant said of the plaintiff "You don't pay your debts" in the presence of

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1) (1884) 1 Cape LJ 289.
2) Piering v Bridger supra 289.
3) See above 147.
4) (1886) 4 HCG 201.
5) Ibid.
6) See above 252.
7) See below 319.
8) 1936 EDL 233.

other customers in defendant's shop. The court held that although the defendant's words were prima facie defamatory, in the circumstances:

> "he was not making a general allegation to the effect that the plaintiff was not in the habit of paying all his debts to other persons ... In other words the defendant informed the plaintiff that he was not prepared to give him further credit and he must leave his shop because he had not paid his account".[1)]

The basis for the rejection of the plaintiff's action is not clear. Even though the statement was not a "general allegation", it should make no difference to the question of liability, but may affect the quantum of damages. Whether a person is accused of not paying his debts to one person, (as in Piering's case[2)] or Conroy's case[3)]), or to many persons, would seem to be in both cases defamatory. Perhaps ex facie the facts the court intended to apply the de minimus non curat lex principle, in which case an action for invasion of privacy would also have failed. It is submitted however that on the facts the plaintiff should have recovered.[4)]

The courts in the United States have on occasion recognized that a communication addressed to a debtor's employer, advising that the debtor owes money, and seeking the latter's aid in recovering such money does not amount to an invasion of privacy.[5)] Such communications, however, must not amount to harassment:[6)]

> "A single telephone call to an employer, advising him that a certain employee owed a bill and was refusing to pay same and that the creditor or his assignee intended to start proceedings, and garnishee the employee's wages would not constitute either 'undue' or 'oppressive' publicity and would not be an actionable violation of such employee's right of privacy".[7)]

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1) Coomer v Moorosi supra 235.

2) Supra.

3) Supra.

4) For false publications that debts are owing see below 293.

5) Voneye v Turner (1951) Ky 240 SW 2d 588; Hawley v Professional Credit Bureau Inc (1956) 345 Mich 500, 176 NW 2d 835; Gouldman -Taber Pontiac Inc v Zerbst (1957) 213 Ga 682, 101 SE 2d 881; cf Hofstadter & Horowitz op cit 173f.

6) See above 228 .

7) Lewis v Physicians & Dentists Credit Bureau (1947) 27 Wash 2d 267, 177; P 2d 896, 899; cf Hofstadter & Horowitz op cit 174f.

It is submitted that our courts would not take such a lenient view,[1] unless the defendant can show that the occasion was privileged.[2] Furthermore despite the decision in Coomer's case,[3] there is no reason in principle why our courts should follow the American approach that it is not an invasion of privacy:

> "to communicate the fact /of the indebtedness/ to the plaintiff's employer, or to any other individual, or even to a small group, unless there is some breach of contract, trust or confidential relation which will afford an independent basis for relief".[4]

In the case of defamation publication need only be made to a single person other than the plaintiff for it to be actionable,[5] and there seems to be no reason why the same should not apply to invasions of privacy.[6] Hofstadter and Horowitz also suggest that:

> "to communicate with the debtor himself by a writing that may be read by others as by telegram or postcard is no breach of the right of privacy though it may be libelous if defamatory".[7]

This view, however, is untenable in view of the fact that where such methods are used for correspondence there is a presumption that the communications will be read by others,[8] and it is submitted that in our law such conduct by the defendant would amount to an invasion of privacy. It is possible that in some situations where the publication is to a "small group" the court will apply the de minimus principle.

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1) Cf Dauberman v Blumenfel 1934 NPD 314 (letter to plaintiff's superior that plaintiff's debts not paid). It seems that generally in the United States publication to the debtor's employer is regarded as privileged. A Hill "Defamation and Privacy under the First Amendment (1976) 76 Columbia LR 1205, 1287.

2) See below 324.

3) Supra.

4) Prosser Torts op cit 810; Cf Neethling Privaatheid op cit 319f, 311. But contra Hill op cit 1287: "Prosser's view that disclosure of a private fact is not actionable unless made in a public manner was based on authorities involving the use or abuse of a privilege, and not pertinent at all to the proposition for which he cited them".

5) Whittington v Bowles 1934 EDL 142, 145; McKerron Delict op cit 183; Van der Merwe & Olivier op cit 337.

6) For instance, in intrusion cases no publication is needed at all. See above 198.

7) Hofstadter & Horowitz op cit 176.

8) See above 209. Cf Western Union Tel Co v McLaurin 108 Miss 273, 66 So 739.

3. Physical Deformities and Health: In Roman-Dutch law it was an injuria to reveal that a person suffered from some physical defect (eg that he was a cripple, squint-eyed, blind, hunch-backed, flat-footed or deformed)[1] or that he suffered from a disease (eg the itch or scurvy).[2] In certain instances where there is an innuendo of moral turpitude by the sufferer such disclosures may be defamatory,[3] but it seems that it is no longer defamatory per se to say that a person suffers from an infectious disease which causes others to shun and avoid him. Thus in SA Associated Newspapers Ltd v Schoeman,[4] Steyn CJ said:

> "Ek kan my nie voorstel dat dit lasterlik is om van 'n buurman se kinders te sê dat hul masels of waterpokkies het nie".[5]

It is conceded that in such instances the de minimus rule might also apply to an action for invasion of privacy. If, however, the disclosures concerned certain physical deformities suffered by the children which were not usually visible to third parties, it is submitted that despite the fact that an action for defamation would fail, an action for invasion of privacy at the suit of such children would succeed.[6] In the United States, for instance, a woman was able to recover for embarassing disclosures concerning certain masculine characteristics which she possessed,[7] while in England the courts have held that it is defamatory to publish a photograph of a young woman without any teeth.[8] In Barber v Time Incorp[9] plaintiff suffered from a

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1) De Villiers op cit 86. See above 48.

2) Ibid.

3) Cf Tothill v Foster 1925 TPD 857, where an envelope had "Foster has syphilus" written on the outside. Cf Conroy v Westwood 1936 NPD 245.

4) 1962 (2) SA 613 (AD).

5) At 617.

6) Cf French law where a photograph was taken in hospital of a child of a famous French actor. Anne Philipe v Societé 'France Editions et Publications' (1966) 2 JCP 14222; cf G Lyon-Caen "The Right to Privacy" (1967) 14 Rev of Contemp Law 69, 84: "since the photograph was reproduced and reports given on the state of health of a minor and on the nursing given him for purely commercial reasons /it/ constitutes intolerable interference in the private life of the Philipe family".

7) Cason v Baskin (1945) 155 Fla 198, 20 So 2d 243, (1947) 159 Fla 31, 30 So 2d 635; Prosser Torts op cit 809f.

8) Funston v Pearson The Times March 12, 1915; cited in RFV Heuston Salmond on Torts 16 ed (1973) 35 n 36. This case was decided on the basis of defamation because no action for invasion lies in English law. See above 72. It is submitted, however, that this was in fact an invasion of privacy.

9) (1942) 348 Mo 1199, 159 SW 2d 291; cf L Brittan "The Right to Privacy in England and the United States" (1963) T

disease which gave her a voracious appetite. Without her consent a picture of her in hospital duly captioned with her name and address was printed in defendant's magazine along with an article about the disease. The court held that there was an invasion of privacy, as one of the rights protected was the right to obtain medical treatment for a non-contagious disease without personal publicity - if the article had been for the benefit of the medical profession there was no need to publish the plaintiff's name and address. Similar principles have been applied to the unauthorized publication of X-ray pictures of a person's pelvic region;[1] coloured photographs of an injury suffered by a workman;[2] a person's deformed nose;[3] and the public exhibition of films of a caesarian operation undergone by the plaintiff.[4] Society's aversion to unauthorized disclosures concerning a person's bodily privacy is closely linked with its attitude towards unpublicized intrusions into such privacy:

> "/Ā/mong the rights of personality to which under our civilization a woman is entitled, is the right of privacy in regard to her body".[5]

It is submitted that the same principles apply to intrusions on the bodily privacy of a man. In some cases, however, certain disclosures concerning physical defects or disease are permitted in the interests of society, for instance in crime control (where bodily abnormalities may be recorded on arrest or after conviction, but not otherwise),[6] and for public health purposes (eg the reporting of "notifiable",[7]

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1) Banks v King Features Syndicate (1939) 30 F Supp 352; cf Prosser Torts op cit 809 n 78.

2) Lambert v Dow Chemical Co (1968) 215 So 2d 673 (La App).

3) Griffin v Medical Society (1939) 11 NYS 2d 109 (Sup Ct), cf Prosser Torts op cit 809 n 78.

4) Feeney v Young (1920) 191 App Div 501, 181 NYJ 481; cf Prosser Torts op cit 809 n 78.

5) R v Holliday 1927 CPD 395, 401; See above 199.

6) Criminal Procedure Act, 51 of 1977, s 37; cf Act 56 of 1955, s 289 See above 235.

7) Public Health Act, 36 of 1919, s 19 (by a head of family, nearest relative, person in attendance, or occupier of premises); s20 (by a medical practitioner). Section 18 defines a "notifiable disease" as including, inter alia, small-pox, scarlet fever, diptheria, cholera, typhoid.

"formidable epidemic",[1] or venereal[2] diseases, or that a person is mentally ill[3]). The question of breach of confidence by a medical practitioner will be discussed later.[4]

It is submitted, however, that in all cases where the plaintiff sues for invasion of privacy, apart from the fact that the disclosure must be offensive to the prevailing boni mores of society,[5] the plaintiff himself, or the fact that it is part of his anatomy, must be identifiable.[6] For instance, merely to publish a photograph of a person's wound, or pelvic region, or nose, or operation will not be actionable if it is published in such a manner that the person in the picture cannot be identified.[7]

4. Life Style: Where a person is not a public figure,[8] it seems that there is no good reason for disclosures to be made concerning his private mode of life, standard of living, place of dwelling and the like.[9] Prosser mentions that in the United States it is accepted that:

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1) Public Health Act, 36 of 1919, s 38.

2) Public Health Act, 36 of 1919, s 55(2); "Every medical practitioner who knows or has reason to believe that any person is suffering from a venereal disease in a communicable form and is not under treatment by a medical practitioner, or is not attending regularly for such treatment, shall report the matter in writing to the medical officer of health of the local authority". See also s 58(1), and the limited protection afforded in s 64.

3) Mental Health Act, 18 of 1973, s 13.

4) See below 280f.

5) See above 172f.

6) Cf Brewer v Hearst Pub Co (1950) 185 F 2d 846; cf Prosser Torts op cit 806.

7) Cf Prosser Torts op cit 806: "/T/here is no liability for the publication of a picture of /a plaintiff's/ hand, leg or foot, or of his house, his automobile, or his dog, with nothing to indicate whose they are".

8) See below 315.

9) For the position in France, see above 100f. Cf the German "Geheimsphäre", see above 92; the Norwegian Penal Code, Article 390, see above 113; the United States, see above 57f, 174f.

> "anything visible in a public place can be recorded and given circulation by means of a photograph, to the same extent as by written description, since this amounts to nothing more than giving publicity to what is already public and what anyone present would be free to see".[1)]

But he is presumably referring to photographs or descriptive articles about the exterior of houses or gardens which are visible to the public and would not be actionable, unless perhaps they were used for commercial purposes.[2)] If, however, the photographer or writer went further and intruded behind the scenes into the more intimate spheres of domestic life then such disclosures would be actionable.[3)]

In our law most cases involving publication of a person's life-style have been decided on the basis of defamation. For instance defendant was held liable where it was said of a plaintiff "you live like a kaffir",[4)] and where a plaintiff was described as "a queer combination of garrulousness and courtesy, squalor and dignity".[5)] In the latter case the court accepted that "squalor" ordinarily meant "a person living under conditions and amid surroundings characterized by personal filth or dirt".[6)] The most dramatic example, however, is to be found in Masters v CNA[7)] in which an article appeared in a newspaper, distributed by defendants, attacking George Bernard Shaw's suggestion that miscegnation was the solution to South Africa's race problem. The article highlighted the dismal plight of young White girls who married Blacks, and particularly a young Scots girl who married an Indian from South Africa:

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1) Prosser Torts op cit 811. Cf French law: see above 102.

2) See below 300. It has been held that a couple who embrace in public may have forfeited their right to privacy. Gill v Hearst Pub Co (1953) P 2d 441. Cf Neethling Privaatheid op cit 187. It is submitted that a photograph of such conduct in our law would amount to an invasion of privacy. But see above 102.

3) It is submitted that had the plaintiff in Sidis v FR Publishing Corp (1940) 2 Cir 113F 2d 806 not been a "public figure" he would have been able to recover. See above 174.

4) De Villiers v Vels 1921 OPD 55.

5) Schoeman v Potter 1949 (2) SA 573 (T) 574.

6) At 574f.

7) 1936 CPD 388.

> "It took a year to disillusion the young wife. A year of life among negroes and half-castes in the slums of District Six .."[1)]

> "After describing the half-castes as being despised by the Whites and herding themselves in slums where they live under disreputable and degrading conditions, the article cites the plaintiff's marriage with an Edinburgh girl and holds it up as an example illustrating the suffering endured by White women as a result of their marriage with Black men ... /the innuendo/ is clear that after the marriage of the plaintiff he went to live with his wife under disreputable and degrading conditions".[2)]

Counsel for the defendant argued that it was not defamatory especially of a doctor to say that he lived in the slums - but the court found that in view of the innuendo contained in the whole article it was defamatory.[3)] It is submitted that invasion of privacy could have been pleaded in the alternative.

In France revelations concerning a person's leisure activities have been held to be actionable,[4)] and it is submitted that the same should apply in our law. On the other hand it is a question of what is offensive to the prevailing mores of society[5)] as Prosser says:

> "Anyone who is not a hermit must expect the more or less casual observation of his neighbour and the passing public as to what he is and does, and some reporting of his daily activities. The ordinary reasonable man does not take offence at mention in a newspaper of the fact that he has returned home from a visit or gone camping in the woods, or given a party at his house for his friends".[6)]

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1) At 392.

2) At 393.

3) Ibid.

4) Brigitte Bardot v Société de Presse Marcel Dassault /1967/ Dalloz 450. See above 101.

5) See above 172f.

6) Prosser Torts op cit at 811. Cf Neethling Privaatheid op cit 319, who suggests that the same principle applies to idle gossip between neighbours.

5. Childhood background: Unless a person is a public figure or such disclosures are in the public interest,[1] it seems that they will give rise to an action for invasion of privacy. Our courts have only considered the matter in an action for defamation. In Jonker v Davis[2] the defendant (a retired blacksmith) said to the plaintiff (an assistant municipal health officer) in the presence of others:

> "Jy moet onthou dat ek die seun van 'n ryk man is en dat ek wel opgevoed is. Ek duld nie dat 'n seun soos jy wat in 'n krot groot geword het, en 'n bietjie geleerdheid van jou pa ontvang het, vir my so 'n beledigende brief stuur nie".[3]

Bresler AJ found that the word "krot" was an Afrikaans word with a number of meanings:

> "'oud, vervallen huis, ellendige woning' ... 'armoedige hut' .. 'krothuis' is 'a bawdy house' ... 'krot' .. 'cot, hovel, hole, wretched lodging ... mawdy-house' /sīc/ ... 'den, hovel, shanty, kennel, dog-hole' ... and /īn/ the plural 'krotte' /means/ ... 'slum'".[4]

The judge then turned his mind to the problem of what right-thinking members of society would have thought, and concluded:

> "Having regard to the present standard of public opinion what would the presumed reasonable man think of statements that a person had not the opportunities of wealth and upbringing (or education) of which another is so vocal? What would he say about the fact that the person attacked obtained such education as he had only from his father and that he finally came from the humblest of homes? ... There is not in the present case an imputation of personal squalor ... The right-thinking man may just as well feel more sympathy for a man so criticized. Early disadvantages, especially those which were beyond the control

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1) Cf Sidis v FR Publishing Corp supra. See above 174. See below 319.
2) 1953 (2) SA 726 (W).
3) At 727.
4) At 731.

> of the person attacked would not, I feel, today inspire a feeling of contempt or ridicule or hatred, nor would those disadvantages cause the target of such a boastful attack to be s/h/unned".[1]

It is difficult to understand the learned judge's comments concerning "sympathy" and the fact that the plaintiff would not be "shunned". In defamation cases the fact that the listeners or readers felt sympathy for the plaintiff is irrelevant,[2] and although shunning may be evidence of defamation it does not per se indicate that the plaintiff has been defamed.[3] Nevertheless even if the statement was not defamatory it is submitted that it was a clear invasion of the plaintiff's privacy, and that had the plaintiff proceeded on the latter basis he would have succeeded.

6. Family life: Such disclosures concerning a person's family (eg his wife or children) would seem prima facie to constitute an invasion of the privacy of members of the family directly concerned.[4] The courts in the United States sometimes allow an action to other members of the family who do not form the subject of disclosures, but are identified as relatives of the subject. In Bazemore v Savannah Hospital[5] defendants published, without plaintiff's consent, a photograph taken in the hospital of the nude body of their dead child which had been born with its heart on the outside of its body. The court found that such conduct amounted to a "violation of the confidence and trust reposed in the hospital", and held the hospital, the photographer and the newspaper liable to the parents for invasion of their privacy.[6] Similarly in Douglas v Stokes[7] the parents of a freak child[8] who died shortly after birth had engaged the defendant photographer to

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1) At 731. The report uses the word "stunned" but this is obviously a misprint for "shunned".

2) Cf De Villiers op cit 28.

3) SA Associated Newspapers Ltd v Schoeman 1962 (2) SA 613 (AD) 617.

4) Cf French law: Bernard Blier v Société 'France Editions et Publications' (1966) 2 JCP 14875; Lyon-Caen op cit 81. See above 101.

5) (1930) 171 Ga 257, 155 SE 194; cf L Brittan "The Right to Privacy in England and the United States" (1963) 37 Tulane LR 236, 247.

6) Hofstadter & Horowitz op cit 122.

7) (1912) 149 Ky 506, 149 SW 849. Cf Hofstadter & Horowitz op cit 121.

8) Siamese "twins" but joined from the shoulder down. See below 358.

take photographs of the child's nude body - twelve pictures and no more. The photographer made additional copies without their consent, one of which he copyrighted. The plaintiff's recovered for invasion of privacy.[1] Such disclosures, however, will not be actionable if they are in the public interest,[2] and can be considered as being a valid "news" item. Thus in Bremmer v Journal Tribune Publishing Co[3] the court held that the publication of a photograph of plaintiff's son's mutilated and decomposed corpse, illustrating a news article on his disappearance was not an invasion as it was "news".

There are no examples of such invasions in our law, but most similar claims have been argued on the basis of defamation and have concerned the mores of the plaintiff himself rather than his family. In Viviers v Linde[4] defendant had said to a third party:

> "Ik wil Viviers niet langer op mijn plaats heben als zijn tijd om is, want die meisje /plaintiff's daughter/ by te veel rond met die Engelsman; morgen en overmorgen kan daar slechte dingen van kom en dan beschuldig zy eenig een daarmee en die moet daarvoor loop".[5]

Plaintiff sued for defamation of his minor daughter in that the above implied that she had had a carnal connection with the Englishman and would in the case of his absconding, and of her confinement, accuse another of being the father of her child. The court found that the words were not defamatory and granted absolution. It is submitted, however, that an action for invasion of privacy may have succeeded if it could be shown that there was no good reason for the third party to know what plaintiff's daughter was doing with her private life. In Naidu v Naidu[6] defendant had said of plaintiff "After all, Raja Naidu got a Woda's daughter in marriage to his son" - where "Woda" meant a person of low caste several degrees lower than that of a "Naidu". The court held that the statement was defamatory on the basis that:

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1) It has, however, been suggested that this decision was in fact based on breach of contract; Kelley v Post Publishing Co (1951) 327 Mass 275, 91 NE 2d 286; cf Hofstadter & Horowitz op cit 121.

2) See below 319.

3) (1956) 76 NW 2d 762; cf TL Yang "Privacy: A Comparative Study of English and American Law" (1966) 15 ICLQ 175, 177.

4) (1897) 14 Cape LJ 298.

5) Ibid.

6) (1915) 36 NLR 43.

> "the dignity and reputation of a 'Naidu' would be impaired if he were termed a member of the 'Woda' caste".[1)]

It is submitted that here the court appears to have applied a sectional test similar to that found in the United States,[2)] rather than the usual test of "right-thinking members of society generally".[3)] It could be argued that the majority of the population in South Africa would not have regarded the statement as defamatory, but it is clear that in fact our courts have on occasion recognized a more sectional test.[4)] In any event to pry into the background of someone's family would give rise to an action for invasion of privacy at the suit of the person affected. This principle could have been applied in Mejane v Cossie[5)] if the occasion had not been privileged. Here the plaintiff, a Xhosa married to another Xhosa, was accused of passing-off a child of another race. Members of the congregation of his church had threatened not to take the sacrament if his light coloured child was baptized there. The local official of the congregation called a closed meeting and said that the congregation "do not understand the colour and hair of the child ... /īt/ is neither a Xosa /sic/ European or Hottentot".[6)] There was a simple explanation for the phenomenon as the child's great-grandmother was Cape Coloured.[7)] The court found that the words were per se defamatory /ie because they implied that the child was illegitimate/[8)] but held that the occasion was privileged.[9)]

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1) At 44.

2) "The American courts have taken a more realistic view, recognizing that the plaintiff may suffer real damage if he is lowered in the esteem of any substantial and respectable group, even though it may be quite a small minority". Prosser Torts op cit 743.

3) Cf Conroy v Stewart Printing Co Ltd 1946 AD 1015, 1018; Prinsloo v SA Associated Newspapers Ltd 1959 (2) SA 693 (W) 695; Chesterton v Gill 1970 (2) SA 242 (T) 247.

4) Cf Brill v Madley 1937 TPD 106, 110; Omarjee v Post Newspapers (Pty) Ltd 1967 (2) PH J 33 (D). See also PQR Boberg 1967 Annual Survey 154; DJ McQuoid-Mason "Calling White Black" (1972) 1 NULR 14, 16f.

5) 1923 EDL 299.

6) At 302.

7) Mejane v Cossie supra 305.

8) At 302.

9) At 305.

It is clear, however, that there must be some identification of the plaintiff in the disclosure. In Spruyt v Dagbreek Pers Bpk[1] defendants had published a photograph of the plaintiff's father to illustrate an article decrying the practice of ungrateful children who place their aged parents in old age homes. A heavy black cross was superimposed over the top part of the old man's face but certain friends of the plaintiff gave evidence that they recognized him. Under the photograph was a caption "Step-child". Plaintiff sued for defamation but the court found that apart from very special circumstances a statement that children placed their parents in a home for the aged was not defamatory.[2] In any event on the facts the court found that the average reader would not have recognized the person in the photograph. The writer would agree that it may not be defamatory to say that children had placed their elderly parents in an old age home, but it is submitted that to make such a disclosure would constitute an invasion of privacy. However, in order to succeed under the latter the plaintiff would have to show that his relationship with the subject of the photograph could be identified. Furthermore had the parent been identifiable, because privacy is concerned with a person's dignitas,[3] it would not have mattered whether the "average reader" could have identified him, as identification by his friends would have been sufficient. The fact that the "average reader" could have identified him would have been an aggravating factor influencing the quantum of damages.[4] On the facts in Spruyt's case, however, it seems that only the father could have successfully brought an action for invasion of privacy.

In Botha v Shaw[5] the defendant was a well-known singer who had recently divorced the plaintiff. Some time after their divorce she had made certain disclosures concerning her marriage with the plaintiff during an interview with reporters. She had stated inter alia

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1) 1958 (4) SA 243 (W).
2) At 246.
3) See above 185f.
4) See above 194.
5) 1972 (1) SA 257 (O).

that on the physical side the plaintiff was not really interested in her and appeared to have a "psychological block about wanting her, although she was a full-blooded woman who needed to be loved in every respect".[1] Despite her efforts to give herself to the plaintiff in full, he wanted "no intimate closeness", and, eventually, after she had unsuccessfully "tried everything on earth to make him physically interested" in her, she had begun to think that there was something wrong with herself. Finally she had mentioned that they had not been lovers before the marriage, because that was the way the plaintiff wanted it.[2] The interview was published in two newspapers and the plaintiff sued for defamation on the basis that the reports imputed that he was impotent or had some abnormal defect affecting his ability to have sexual intercourse. The court held that the statements were not defamatory.[3] It is submitted that the court's decision was correct but that the plaintiff could have succeeded in an action for invasion of privacy.[4] Whereas defamation is primarily concerned with a person's reputation - "that character for moral or social worth to which he is entitled amongst his fellow-men",[5] invasion of privacy is concerned with a person's dignitas,[6] which includes, inter alia, "that valued and serene condition in his social or individual life which is violated when he is, either publicly or privately, subjected by another to offensive and degrading treatment".[7] A person's sexual relationship with another is probably the most intimate of all human relationships, particularly when such relationship is consecrated by marriage, and any invasion of sexual privacy must be one of the most flagrant invasions of privacy imaginable.[8] Even in

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1) At 258.

2) Ibid.

3) At 260.

4) Cf DJ McQuoid-Mason "Invasion of Potency?" (1973) 90 SALJ 23; J Neethling "'n Geval van Privaatheidskending?" (1972) 35 THR-HR 370.

5) De Villiers op cit 24.

6) See above 185f.

7) De Villiers op cit 24.

8) McQuoid-Mason op cit (1973) 90 SALJ 31. The criminal law appears to recognize the close relationship between a husband and wife by providing that the one cannot give evidence against the other in a criminal case. Act 51 of 1977, s 198. See also McKerron Delict op cit 55, who describes marriages as "the most intimate of human relationships".

English law which does not recognize invasion of privacy as a common law tort,[1] the courts have recognized that any disclosures concerning what passed between a husband and wife during the marriage may be construed as an actionable breach of confidence.[2]

In the United States special legislation has been introduced to protect the family against disclosures concerning the family life of school children and students. The Family Educational Rights and Privacy Act of 1974,[3] was enacted to "protect the integrity of the school information gathering and retrieval process",[4] in the face of the:

> "potential and actual invasions of familial privacy inherent in federally funded research programs where school-age children were given psychological and/or attitude [sic] tests and sometimes were subjected to behaviour modification experiments".[5]

Prior to the introduction of this legislation, several court cases were brought against school authorities as a result of such intrusions,[6] and in Merriken v Cressman[7] the court stated that there:

> "is probably no more private a relationship, except marriage, which the Constitution safeguards than that between parent and child".[8]

It is submitted that our courts would recognize at common law an equally close relationship between parent and child, although it has been suggested that our law no longer recognizes the actio injuriarum

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1) See above 72.

2) Argyll v Argyll [1965] 1 All ER 611 620, 623ff. Cf McQuoid-Mason op cit (1973) 90 SALJ 31f.

3) Pub L No 93-380 § 513 (Aug 21, 1974); cf MA Siskind "Protecting the Privacy of School children and their Families through the Family Educational Rights and Privacy Act of 1974" (1975) 14 J of Family Law 255.

4) Siskind op cit 255.

5) Ibid.

6) See generally Siskind op cit 259ff.

7) (1973) 364 F Supp 913 (ED Pa); cf Siskind op cit 259.

8) At 918. Cf Sellers v Henry (1959) 329 SW 2d 214, where the plaintiffs could recover for invasion of privacy for the publication of a photograph of their young daughter showing her as she lay dead in a wrecked car. Hofstadter & Horowitz op cit 122f.

per consequentias.[1] The fact that disclosures concerning a child are made in such a manner as to identify the child's parents would seem to ground an action for invasion of privacy on the part of such parents.

7. Past History: Our courts have consistently maintained that a person is entitled to live down his past. In Graham v Ker[2] De Villiers CJ said:

> "As a general principle I take it to be for the public benefit that the truth as to the character or conduct of individuals should be known. But the worst characters sometimes reform, and some of the inducement to reformation would be removed if stories as to past transgressions could with impunity be raked up after a long lapse of time. Public interest as I conceive it, would suffer rather than benefit from any unnecessary reviving of forgotten scandals".[3]

In Graham's case the defendant had disclosed that the plaintiff was having illicit intercourse with African women and the court found that "it certainly was for the public interest that the conduct of the plaintiff should be known /as h/e was a private in the Cape Mounted Rifles, and as such received his pay out of the public purse".[4] It seems that the learned Chief Justice was referring to moral transgressions and it is submitted that where such disclosures are not tainted with moral turpitude or criminality they will be even less in the public interest. Furthermore the disclosures in Graham's case were contemporaneous with the event, and it is submitted that had they concerned scandals of the past they would not have been justified. For instance in Patterson v Engelenburg & Wallachs Ltd[5] defendants published an article stating that during the Anglo-Boer War

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1) PQR Boberg "Defamation Per Consequentias" (1962) 79 SALJ 261, 263 cf McKerron Delict op cit 55, who suggests that it applies to a husband and wife relationship; cf Van der Merwe & Olivier op cit 347f. See below 351.

2) (1892) 9 SC 185; cf Mathews v Hartley (1880) 1 HCG 13 (doctor's student life); Bade v Bade (1903) 17 EDC 26 (infidelity 20 years ago); Scholz v Kriel 1946 GWLD 86 (disclosure that plaintiff had assaulted his father the previous year).

3) At 187.

4) Ibid.

5) 1917 TPD 350.

plaintiff who was a post office official at the time had broken his oath to the Zuid-Afrikanse Republiek by disclosing the contents of telegrams to several British officers held prisoner in Pretoria, including Winston Churchill. Wessels J said:

> "Is it ... for the benefit of the large public ... to rake up an old story of what took place in a time of war seventeen years ago? If it were a crime for which /Plaintiff/ had been punished, it could clearly not be resuscitated, unless in the interests of the State the occasion demanded it ... A fortiori, a scandal cannot be raked up unless it is done for the public benefit; and this depends largely upon the time, the manner and the occasion of the publication".[1)]

On the facts the court found that the plaintiff had not objected to a similar article in another newspaper, and only awarded nominal damages. It is submitted that an action for invasion of privacy may have been met with the defence that the plaintiff had forfeited his right to privacy by allowing the previous publication.[2)] In Lyon v Steyn[3)] where the defendant had wrongly accused the plaintiff of being a National Scout (ie an Afrikaner who had fought with the British against the Boers during the Anglo-Boer war) a similar view was expressed:

> "It cannot be in the public interest to rake up the ashes of the dead past and accuse a man of having done something 30 years ago. Surely there must be a time when a man can live down his past. It would be a sorry day if any busy-body, who discovered anything about a man's past, could come along years afterwards and rake it up against him notwithstanding the fact that he has lived down that past and has acquired a good and honourable reputation".[4)]

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1) At 361.

2) Cf O'Keeffe v Argus Printing & Publishing Co Ltd 1954 (3) SA 244 (C) 249; see above 179. If, however, the plaintiff's story in the other newspaper was copyrighted the plaintiff could have recovered for breach of copyright. Cf Copeling op cit 30ff. But consent in one publication does not mean consent to another. See below 331.

3) 1931 TPD 247; cf Unie Volkspers v Hofmeyr 1939 CPD 41 (stating that a person had acted as intelligence officer for the British during the Anglo-Boer War); Weichardt v Argus Printing & Publishing Co Ltd 1941 CPD 133 (saying a person fought for the Germans in 1914).

4) At 254.

Furthermore the Criminal Procedure Act[1] provides that even the most heinous crimes(apart from those where the death sentence may be imposed) become prescribed after a lapse of 20 years,[2] therefore a fortiori there can be no interest for the public in revealing that a person has indulged in such activities more than 20 years ago. Where, however, a person has persisted in past misdemeanours the court has held that disclosures concerning them may be justified. Therefore in Yusaf v Bailey[3] where the plaintiff persisted in his claim that he was a member of the Abyssinian Royal Household and a popular magazine exposed his life history, mentioning, inter alia, that he had been imprisoned for theft, fraud and attempting to defeat the ends of justice, the court held that such disclosures were in the public interest:

> "It is not the case of a man who has ceased to make false representations. He persists and has persisted in this Court in so doing. It is my view in the public interest that the history of such a man be made known so long as he continues to make his false claims".[4]

Yusaf's action was for defamation, but it is submitted that the same principle would have applied had he sued for invasion of privacy. Furthermore, where the plaintiff himself was responsible for raking up the ashes of his past, he may have no remedy if the disclosures are published by others. In Coetzee v CNA,[5] the applicant unsuccessfully applied for an interdict to prevent a magazine publishing a story about a murder of which he had been convicted 17 years previously. Plaintiff had sold a serial of the story to a magazine which had extensively advertised it. Thereafter although the magazine was taken over by another company, the previous owners printed the story. The new proprietors of the magazine did the same and the plaintiff applied for an interdict. In dismissing his application the court observed:

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1) Act 51 of 1977.

2) Section 18 "unless some other period is expressly provided by law". Contra Act 56 of 1955, s 388, where prosecution of any offence other than murder was barred after the lapse of 20 years. Cf Lyon v Steyn supra 253.

3) 1964 (4) SA 117 (W).

4) At 127.

5) 1953 (1) SA 449 (W).

"The protection which the applicant could have derived from the passage of time may well, in my view, not be available to him when he has made old news new again".[1)]

It is conceded that all the above cases concerned defamation actions, but it is submitted that as in the United States such disclosures would also constitute an invasion of privacy. Thus in Melvin v Reid[2)] where the plaintiff was a reformed prostitute who had been the accused in a sensational murder trial and had lived as a respectable citizen in a neighbourhood where her past was unknown, she was able to recover for invasion of privacy when a film of her life was made some seven years after the event.[3)] The American courts, however, have not been consistent, particularly in deciding when such disclosures are in the public interest.[4)] The principle that a person's past history is private appears to have been accepted by our courts in Mhlongo v Bailey,[5)] although no reference was made to the fact that the ashes of the plaintiff's past had been dragged up. Photographs of the plaintiff, a retired schoolmaster, taken while he was a student in the company of a woman who subsequently became a popular singer, were purloined after he had refused to allow them to be used and published in a magazine. The court found that the defendants had "trampled roughshod" over his feelings and awarded damages for invasion of privacy.[6)] Where, however, the plaintiff is a public figure involved in public life, eg a Member of Parliament or a Cabinet Minister, disclosures concerning his past may be justified.[7)]

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1) At 453. Except perhaps in the "appropriation cases". where consent will have to be proved, (see below 331) or where there is a breach of copyright. Copeling op cit.

2) (1931) 112 Cal App 285, 297 Pac 91; cf Yang op cit 182.

3) See above 174.

4) Ibid.

5) 1958 (1) SA 370 (W). See above 127.

6) At 372.

7) See below 316.

8. Embarassing facts: Where such disclosures are not defamatory, and would not lower a person's reputation in the eyes of others but are embarassing, they may be actionable as an invasion of privacy. Whether or not the disclosures should be recognized as actionable, however, is a question of policy.[1] Generally our courts seem to be reluctant to restrict freedom of speech in society,[2] and are unlikely to restrict publication of items that are genuinely in the public interest.[3] The utility of an action for invasion of privacy has only during the past 20 years gained momentum in our law[4] and therefore most examples of such disclosures are to be found in defamation cases. Thus it has been held to be defamatory to say that: a person had committed criminal intercourse resulting "in a state of pregnancy";[5] or somebody was the father of a woman's illegitimate child;[6] or a person's daughter was "in the family way" by someone;[7] or a person "keeps a house of ill-fame" and associates with prostitutes;[8] or a woman who claimed to be a spinster was married and lived with her son;[9] or a man was seen "slinking" through a widow's bedroom window at night;[10] or a person had tried to seduce his

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1) See above 170. It should be noted, however, that in privacy cases it is not necessary for the plaintiff to feel ashamed or embarassed. Cf O'Keeffe v Argus Printing & Publishing Co Ltd 1954 (3) SA 244 (C) 248; S v A 1971 (2) SA 293 (T) 298; WA Joubert "Die Persoonlikheidsreg: 'n Belangwekkende Ontwikkeling in die Jongste Regspraak in Duitsland" (1960) 23 THR-HR 23, 39; McQuoid-Mason op cit (1973) 90 SALJ 28.

2) Cf S v Turrell 1973 (1) SA 248 (C) 256; S v Budlender 1973 (1) SA 264 (C) 267f.

3) Cf Prinsloo v SA Associated Newspapers Ltd 1959 (2) SA 693 (W) 696; SA Associated Newspapers Ltd v Schoeman 1962 (2) SA 613 (AD). See below 319.

4) Cf McKerron Delict op cit 54. See above 131.

5) Sparks v Hart (1833) 3 Menz 3; cf Sands v Varkevisser (1885) 2 Buch AC 130.

6) Reyneke v Reyneke (1889) 6 Cape LJ 111.

7) Bloem v Zietsman (1897) 14 SC 361.

8) Fyne v Lee (1900) 17 SC 251. But cf 210 above n 2.

9) Knoesen v Theron (1904) 21 SC 177. See below 292.

10) Frahm v Mangiagalli (1906) 16 CTR 1057.

brother's wife;[1] or a member of a hospital committee who could afford hospital fees obtained free services for his servant;[2] or a White person was Black.[3] On the other hand it has been held not defamatory to state that: a Coloured person had tried to "slip into White cinemas" and collected "slum rent";[4] or a person was an enemy subject eg a German[5] or Austrian[6] or subscribes to unpopular political beliefs;[7] or an attorney was ordered to sit down in court;[8] or a person did not fight during World War II;[9] or a White person had sold his land zoned for Whites to Blacks.[10] It could be argued that if the latter non-defamatory disclosures were not in the public interest some could qualify as invasions of privacy. Why should a person be publicly embarassed by disclosures concerning his nationality or political beliefs or his war record?[11] But it must be remembered that the courts will not provide a remedy merely because a person is annoyed by the disclosure.[12] In order to be actionable the defendant's conduct must usually offend the prevailing boni mores of the community.[13] Where such conduct is offensive

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1) Hayton v Hayton (1936) 53 SALJ 502f. Even though the facts were true they were not in the public interest.

2) Hultzer & Das v Van Gorkom 1909 TS 232, 240.

3) Pitout v Rosenstein 1930 OPD 112, 117; but cf Maskowitz v Pienaar 1957 (4) SA 195 (AD) 197; Taljaard v Rosendorff & Venter 1970 (4) SA 48 (O) 54; DJ McQuoid-Mason "Calling White Black" (1972) 1 NULR 14.

4) Golding v Torch Printing & Publishing Co Ltd 1949 (4) SA 150 (C) 168f.

5) Richter v Mack 1917 AD 201, 206; cf Fichardt Ltd v The Friend Newspapers Ltd 1915 AD 1, 9f.

6) Burger v Leach 1917 CPD 398.

7) Haacke v Deutsche Presse (Pty) Ltd 1934 TPD 191, was decided prior to the Suppression of Communism Act, 44 of 1950, which made being a Communist illegal (s3). See above 91. See also Fichardt Ltd v The Friend Newspapers Ltd supra 6f, 9f, 12f; SA Associated Newspapers Ltd v Schoeman 1962 (2) SA 613 (AD) 617. Cf Saperstein v Unie Volkspers Bpk 1946 WLD 205 (calling a person a notorious "red-baiter".) Cf Botha v Marais 1974 (1) SA 44 (AD) 49f, where it was held not defamatory to say that a politician had been brainwashed with communism.

8) Flanagan v Walton & Co 1934 EDL 138, 141.

9) Good v Smith 1964 (4) SA 374 (N).

10) Ewart v Thirion 1955 (3) SA 115 (SWA), 117.

11) Unless he is a "public figure". See below 319.

12) The courts may for instance apply the de minimus non curat lex principle. McKerron Delict op cit 55f.

13) See above 172f.

the courts have often recognized as defamatory disclosures which are clearly invasions of privacy. Thus in Smith v Elmore,[1] where the plaintiff's name was entered in red (indicating that he had not subscribed) on a list of names of workers who had subscribed to a fellow-employee's tombstone, he was able to recover for defamation.

Difficulties arise where a person is called a police informer or spy. It has been consistently held in our law that to call a person a police spy is not per se defamatory. For instance, in Greenfield v Macaulay[2] the court said the following about police informers:

> "We do not regard them with any great esteem for the work that they undertake, but that is no reason for saying that their conduct is necessarily dishonourable and disreputable, and that they are people of no character at all".[3]

Even though such disclosures are not defamatory do they amount to an invasion of privacy? Could it be argued that the fact that their identity in court cases may be kept secret[4] indicates that it is not in the public interest to make such disclosures? Should the fact that:

> "any right thinking person would /not/ think any the less of a student reporting ... criminal activities" [5]

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1) 1938 TPD 18.

2) 1913 CPD 29; cf Byrne v Dean /1937/ 2 All ER 204 (CA).

3) At 32.

4) Criminal Procedure Act, 51 of 1977, s 202; cf Act 56 of 1955, s 233. An informer is a person who gives "information of a kind prejudicial to others whose emnity he may thereby provoke ... that information must be of a kind which is (or may be) the course of a criminal prosecution, and lastly, it must be given to the officers of justice." R v Van Schalkwyk 1938 AD 543, 548; cf Ed AB Harcourt Swift's Law of Criminal Procedure 2 ed (1969) 419. The rule should only be enforced "where it appears from the circumstances that a disclosure of the State's sources of information may be injurious to the administration of justice and consequently public policy requires them to be kept secret". Ex parte Minister of Justice, in re R v Pillay 1945 AD 653; Swift & Harcourt op cit 419f.

5) Prinsloo v SA Associated Newspapers Ltd 1959 (2) SA 693 (W) 695.

be sufficient to show that objectively such disclosures are not embarassing? It seems trite that a statement that a person who lives in a liberal community opposed to the Government of the day, is an agent for the Bureau for State Security or the Security Police would cause such a person considerable embarassment. The court in Prinsloo v South African Associated Newspapers Ltd[1] rejected an application of an interdict preventing the publication of a report that there was a "blonde spy" allegedly operating for the police on the campus of the university of the Witwatersrand. The matter was only decided on the basis of defamation, as the defendants had not been given notice of the alternative ground of an action for injuria. It is submitted that from a policy point of view to prevent society degenerating into a police-state of faceless informers, the courts should continue to recognize that such disclosures are not actionable.[2] This is particularly so where the police force is concerned with investigating political crimes, and the Executive has invested in it powers which circumvent the Judiciary and over-ride the principles of natural justice.[3]

9. Confidential information: In Dun & Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) Pty Ltd[4] it was held that the English law concept of "breach of confidence"[5] did not form part

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1) Supra. See above 128.

2) But PQR Boberg 1959 Annual Survey 122 suggests that the appellation "spy" is "opprobrious" and should be regarded as defamatory.

3) Cf AS Mathews Law, Order and Liberty in South Africa (1971) 134.

4) 1968 (1) SA 209 (C)

5) See above 75. But the Copyright Act, 63 of 1965, s 44(3) states: "Nothing in this Act shall affect the operation of any rule of equity relating to breaches of trust or confidence". The introduction of this English law terminology could be due to the fact that Act 63 of 1965 was based on the English Copyright Act of 1956. Cf Copeling op cit 4 cf WA Joubert Grondslae van die Persoonlikheidsreg (1953) 147 n 98.

of South African law unless the action could be brought within the general principles of the actio injuriarum or Lex Aquilia.[1] Copeling[2] points out, however, that Dun's case did not refer to Goodman v Von Moltke,[3] and suggests that "breach of confidence" should be recognised in our law particularly in relation to copyright.[4] Goodman's case was concerned with the theft of certain confidential documents from the Jewish Board of Deputies which were in the process of being published by the defendants. The plaintiff's application for an interdict was granted on the basis that:

> "[I]t is actionable to communicate information in breach of an agreement not to do so, and such agreement may be express or may be implied from the fact that the person upon whom it is alleged to be binding is or was in the employ of the plaintiff or in other confidential relationship with him. Furthermore, any person who, knowing of the obligation not to communicate the information, obtains such information from the person upon whom the obligation rests, may also be restrained by injunction from communicating it to any other person".[5]

Van der Merwe and Olivier[6] seem to regard Goodman's case as decided on the basis of contract. Neethling contends that the court recognized the principle that an interdict may be sought for any communication of confidential material which has been stolen - irrespective of whether or not it is to be published.[7] Furthermore Neethling supports Joubert's criticism[8] of the view that an interdict will only be

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1) Dun & Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) Pty Ltd supra 221f; cf Stellenbosch Wine Trust Ltd v Oude Meester Group Ltd 1972 (3) SA 152 (C) 160f. Cf SA Strauss, MJ Strydom & JC Van der Walt Die Suid-Afrikaanse Persreg (1976) 336f. WA Joubert Grondslae van die Persoonlikheidsreg (1953) 148 n 99.

2) Copeling op cit.

3) 1938 CPD 153.

4) Copeling op cit 177.

5) Per Centlivres J in Goodman v Von Moltke supra 157.

6) Van der Merwe & Olivier op cit 393.

7) Neethling Privaatheid op cit 390.

8) Joubert Persoonlikheidsreg op cit 141.

granted where the defendant knew "of the obligation not to communicate the information". For the granting of an interdict fault by the defendant is irrelevant.[1]

(a) Artificial Persons: A factor which appears to have been overlooked by commentators on Goodman's case is that if the action for "breach of confidence" is confined to the actio injuriarum it is most unlikely that an action would lie where the plaintiff is an artificial person, unless the disclosures affected the natural person members.[2] It is true that a trading company may sue for defamation,[3] but it is submitted that it cannot be defamed by words which "would affect the purely personal repute of an individual",[4] for instance, that the company was unchaste or suffered from some other essentially human defect.[5]

> "But it has prestige and standing in the business in which it is engaged, and language which casts an aspersion upon its honesty, credit, efficiency or other business character may be actionable".[6]

Similarly, there is no reason in principle why a non-trading company should not be able to sue for defamation,[7] because even benevolent or charitable organisations,

> "may still be dependent upon the donations or support of the public, and so may still be defamed by attacks which tend to decrease contributions".[8]

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1) See above 195.

2) For instance, a company director has been allowed to emerge from behind the corporate veil to sue in his personal capacity: Bane v Colvin 1959 (1) SA 863 (C) 866; cf Wilson v Die Afrikaanse Pers Publikasies (Edms) Bpk 1971 (3) SA 455 (T) 456. But this does not apply if the members wishing to sue constitute a large class eg shareholders in a company; Goodall v Hoogendoorn Ltd 1926 AD 11, 16.

3) McKerron Delict op cit 181; Van der Merwe & Olivier op cit 348.

4) Prosser Torts op cit 745. Cf Gumede v Bandhla Vukani Bakhiti Ltd 1950 (4) SA 560 (N) 561.

5) Cf Universiteit van Pretoria v Tommie Meyer Films 1977 (4) SA 376 (T) 384: "Defloratie, aanranding, owerspel - om net 'n paar te noem - is skuldoorsake wat uitsluitlik met die menslike persoon geassossier kan word."

6) Prosser Torts op cit 745.

7) Cf McKerron Delict op cit 181; Van der Merwe & Olivier op cit 348. Cf Die Spoorbond v SAR & H 1946 AD 999, 1011; Universiteit van Pretoria v Tommie Meyer Films supra 386.

8) Prosser Torts op cit 745. But it is unnecessary for the plaintiff to prove patrimonial loss.

The same applies to a university. Thus in Universiteit van Pretoria v Tommie Meyer Films [1] Mostert J observed:

> "Myns insiens beskik 'n universiteit as regspersoon oor 'n reg op werfkrag (goodwill). Dit behels die krag wat studente en donateurs tot ondersteuning van 'n universiteit stem en is 'n bate met 'n ekonomiese waarde en geregtig op erkenning as regsobjek met regsbeskerming net soos in die geval van die universiteit se stoflike regsgoed."[2]

It is submitted that the hurt to the university's reputation would affect its student enrolment and an action would lie for defamation,[3] even though it is not necessary for patrimonial loss to be proved.[4] On the other hand if a university is insulted in a manner which does not reflect on its reputation it is submitted that there would not be an action for injuria.[5] Similarly as privacy is essentially a natural human desire[6], which in our law is regarded as an aspect of dignitas, it has been held that a university as a universitas has no right of privacy[8].

Even in the United States where the right to privacy is treated as a separate right its protection has not been extended to artificial persons:

> "Since the right of privacy is primarily designed to protect the feelings and sensibilities of human beings, rather than to safeguard property, business or other pecuniary interests, the courts have denied this right to corporations and institutions, and even to partnerships as such."[9]

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1) 1977 (4) SA 376 (T).

2) At 386.

3) McKerron Delict op cit 182.

4) Cf McKerron Delict op cit 115; Van der Merwe & Olivier op cit 386.

5) Cf Universiteit van Pretoria v Tommie Meyer Films supra 384.

6) See above 1, Cf Universiteit van Pretoria v Tommie Meyer Films supra 384.

7) See above 185. Cf H Patrick Glen "Right to Privacy in Quebec" (1974) 52 Canadian Bar R 297, 299; F De Graaff "The Protection of Privacy in Dutch Law" (1976), 5 Human Rights 177, 184f.

8) Universiteit van Pretoria v Tommie Meyer Films supra 384.

9) J Schiffres "Invasion of Privacy - Use of Plaintiff's Name or Likeness for Non-Advertising Purposes" (1970) 30 ALR 3d, 203, 212 §3. Cf Rosenwasser v Ogoglia (1916) 172 App Div 107, 158 NYS 56 (partnership); Jaccard v RH Macy & Co (1941) 176 Misc 88, 26 NYS 2d 829 (corporation); Assoc for Preservation of Freedom of Choice Inc v Nation Co (1962) 35 Misc 2d 42, 228 NYS 2d 628 (corporation); Assoc for Preservation of Freedom of Choice Inc v Emergency Civil Liberties Committee (1962) 37 Misc 2d 599, 236 NYS 2d 216 (corporation). Cf Universiteit van Pretoria v Tommie Meyer Films supra 384.

It is submitted, therefore, that organisations such as the Jewish Board of Deputies, the Sons of England or the Broederbond could not claim that their privacy has been invaded, unless it affects the privacy of identifiable individual members.[1] In Universiteit van Pretoria v Tommie Meyer Films[2] it was stated:

> "Die universitas beskik, m.i. nie oor persoonlikheidsregte nie en hieruit volg dit dat die actio injuriarum nie vir 'n universitas beskikbaar is nie; net soos hy nie oor 'n corpus beskik wat deur die reg beskerm moet word nie, beskik hy ook nie oor 'n dignitas (in die menslike sin) nie. Hy beskik oor 'n fama, nie in die sin van 'n objek van 'n persoonlikheidsreg nie, maar as factor wat mede-bepalend is vir die werfkrag (of 'goodwill') van 'n universitas"[3]

Therefore it can be argued that the reputation of an artificial person is like "an asset or species of property"[4], unlike privacy which concerns an aspect of human dignity[5].

Anomalies have arisen in the United States where the courts in the "appropriation" cases sometimes refer to the proprietary interests of the plaintiff in his name, image or likeness.[6] This approach makes it difficult to see why in America the proprietary interests of a natural person should be protected, but not those of an artificial person. There seems to be no reason in principle why on analogy with the law of defamation, where the proprietary interests of a corporation are threatened[7] an action for invasion of privacy should not lie. Neethling explains the anomaly by suggesting that the appropriation cases infringe the right to identity rather than privacy[8] - even though the seminal American privacy cases concerned appropriation.[9]

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1) Cf Strauss, Strydom & Van der Walt op cit 165. See above 278.

2) 1977 (4) SA 376 (T).

3) At 385.

4) Cf Die Spoorbond v SAR & H 1946 AD 999, 1010f; RW Parsons "The Bases of the South African Law of Defamation" (1951) THR-HR 192, cf Maisel v Van Naeren 1960 (4) SA 836 (C) 848; McKerron Delict op cit 170; Note "Defamation, Privacy and the First Amendment" 1976 Duke LJ 1016, 1035f.

5) See above 186 n 5.

6) Cf Edison v Edison Polyform Manufacturing Co (1907) 73 NJ Eq 136, 67 Atl 392 (Ch); cf L Brittan "The Right to Privacy in England and the United States" (1963) 37 Tulane LR 233, 251f. See below 304f

7) See above 277.

8) Neethling Privaatheid op cit 295. For "appropriation", see below 300.

9) See above 53f.

In our law, however, appropriation seems to be regarded as an invasion of privacy which impairs the victim's dignitus[1], and an artificial person would have to find some other remedy. It is submitted therefore that all interferences with proprietary rights should be regarded as actionable under the Lex Aquilia.[2] It is true that in such cases the plaintiff will have to prove patrimonial loss, but provided he can prove that he has "a well grounded apprehension of irreparable injury" he will be entitled to an interdict, without proving actual loss.[3]

(b) Professional Persons: In Roman-Dutch law certain professional relationships gave rise to an obligation to confidentiality, for instance, doctor and patient,[4] legal representative and client,[5] and priest and penitent.[6] These principles seem to apply in our law.[7] On the other hand where such persons are required to testify in a court of law communications made to them are not privileged,[8] unless there is a lawyer-client relationship,[9] or "the disclosure was made in confidence for the purpose of litigation, for then the lawyer-client principles would apply".[10]

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1) Cf O'Keeffe v Argus Printing & Publishing Co Ltd 1954 (3) SA 244 (C) 249. See below 304.

2) On the basis of unlawful competition in trade. Cf Dun & Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) Pty Ltd (1968) (1) SA 209 (C) 218; Victor Products (SA) (Pty) Ltd v Lateulere Manufacturing (Pty) Ltd 1975 (1) SA 961 (W) 965. See also McKerron Delict op cit 214f; Van der Merwe & Olivier op cit 330; HJO Van Heerden Grondslae van die Mededingingsreg (1958) 258. Cf Universiteit van Pretoria v Tommie Meyer Films supra 385.

3) See above 194f. 4) De Villiers op cit 108.

5) Voet 22.5.6. 6) Voet 22.5.6.

7) De Villiers op cit 108, 202. Protection of professional confidences is provided for in the Penal Codes of France (Article 369, see above 103; Federal Republic of Germany (Article 300, see above 90); Sweden (International Commission of Jurists "The Legal Protection of Privacy: A Comparative Study of Ten Countries (1972) 24 Int Soc Sci J 568f, see above 113; Switzerland (1972) 24 Int Soc Sci J 571f, see above 113; and the Netherlands (F De Graaf "The Protection of Privacy in Dutch Law" (1976) 5 Human Rights 177, 189f, see above 113.

8) Cf Act 51 of 1977, s 192; cf Act 56 of 1955, s 223, cf Smit v Van Niekerk 1976 (4) SA 293 (AD) 299f.

9) Cf CH Hoffman The South African Law of Evidence 2ed (1970) 185f; CWH Schmidt Die Bewysreg (1972) 412f. Cf Criminal Procedure Act, 51 of 1977, s 201, cf Act 56 of 1955, s 232, cf Smit v Van Niekerk supra 299f.

10) D Zeffert "Confidentiality and the Courts" (1974) 91 SALJ 432, 433.

In our law a medical practitioner can be ordered to give evidence concerning consultations with his patient,[1] and may be compelled by statute to make certain disclosures.[2] The same applies to psychiatrists,[3] even though "secrecy is a sine qua non of /their/ practice".[4] Several countries have introduced a statutory medical privilege,[5] and some American States have also extended a privilege to psychologists, marriage ccunsellors and certified or clinical social workers.[6] A court cannot, however, order a legal representative to disclose what passed between himself and his client - the privilege is absolute and the practitioner may only be released from his duty by the client himself.[7] It has been held that a clergyman does not have an absolute privilege,[8] and it seems

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1) Cf Parkes v Parkes 1916 CPD 702.

2) For instance, in terms of the Public Health Act, 36 of 1916, medical practitioners are required to report "notifiable" (s 20) or venereal diseases (s 55(2)). See above 257f. In other cases the disclosure may be privileged Cf P Stein & J Shand Legal Values in Western Society (1974) 199: "Thus, a doctor may reveal to the parents of a young unmarried patient that she is taking contraceptive pills". Cf AB v CD (1905) 7 Fed 72; Simonsen v Simonsen (1926) 104 Neb 244, 177 NW 831, where "a physician who revealed to the patient's spouse that the patient was suffering from a venereal disease was not held liable". R Slovenko Pyschiatry and the Law (1973) 444.

3) Botha v Botha 1972 (2) SA 559 (N) 560. See generally Zeffert op cit 435ff. The pressures on psychiatrists to make disclosures concerning their patients in the United States have been increased "by the growing complexity of health care and the utilization of computers". R Slovenko "On Confidentiality" (1975) 12 Contemporary Psychoanalysis 109. Thus psychiatrists may be legally required to report the names of drug-dependent patients (Slovenko Psychiatry op cit 436f), but they are frequently requested to give information by the police, colleges, credit rating organisations, the civil service, employers, insurance companies, behavioural science researchers, and parents or other members of the family (Slovenko Psychiatry op cit 442f). "Some psychiatrists, when a release has been given by the patient, provide information if it is 'for the good of the patient'." (Ibid)

4) Zeffert op cit 435.

5) Zeffert op cit 438f: "Newfoundland and Quebec have created such a privilege by statute; so have Tasmania, Victoria ... New Zealand ... Israel ... /and/ many United States jurisdictions ... Of the fifty States and the District of Columbia, only twelve lack privilege for physicians".

6) Zeffert op cit 439.

7) Hoffman op cit 185f; Schmidt op cit 413.

8) Smit v Van Niekerk supra 303. Cf FG Richings "Privilege of Religious Advisers" (1974) 91 SALJ 167; JD Van der Vyver "Die Swygreg van Kerkeleraars" (1977) 40 THR-HR 217.

that the same would apply to journalists, bankers or accountants.[1] In South Africa bankers have a limited privilege in that they do not have to produce their books unless ordered to do so by the Court.[2] It is submitted that in our law there is no magic in the fact that a confidential relationship exists between the parties and that it will only be one of several factors taken into account by the court.[3] The relationship may, however, make the plaintiff's task easier in convincing the court that he has suffered an invasion of his privacy (ie that the defendant's act was wrongful),[4] and may be an aggravating factor when assessing damages.[5] In the United States breach of a confidential relationship has formed the basis of successful injunctions against a psychoanalyst who wrote a book setting out the case history of an identifiable patient,[6] and against the author (an ex-CIA employee) and publisher compelling them to make deletions in a book about the CIA.[7] In England the courts have recognized that disclosures concerning what passed between a husband and wife during a marriage may be actionable,[8] but have refused to enjoin the publication of the memoirs of a deceased Cabinet Minister on the basis that it was not damaging to the public interest.[9]

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1) Zeffert op cit 433, 443.

2) Criminal Procedure Act 51 of 1977, s 236(4); Civil Proceedings Evidence Act 25 of 1965, s 31. See below re banker and client.

3) Cf O'Keeffe v Argus Printing & Publishing Co Ltd 1954 (3) SA 244 (C) 249.

4) See above 170f.

5) See above 194.

6) Doe v Roe (1973) 33 NY 2d 902, 307 NE 2d 823, 352 NY 2d 626; cf A Hill "Defamation and Privacy under the First Amendment" (1976) 76 Columbia LR 1205, 1291; Cf Slovenko Psychiatry op cit 438: "Psychiatrists ... are obliged to disguise their clinical data, even though it is detrimental to the scientific value of the material, in order to avoid the recognition of the patient".

7) Alfred A Knopf Inc v Colby (1975) 509 F 2d 1362 (4th Cir); cf Hill op cit 1291.

8) Argyll v Argyll [1965] 1 All ER 611 (HL) 620; cf McQuoid-Mason op cit (1973) 90 SALJ 23, 31f.

9) Attorney-General v Jonathan Cope Ltd [1975] 3 WLR 606 (QB); cf Hill op cit 1291f.

(c) Public Servants: Public servants who deal with personal information are generally prohibited from making disclosures concerning such information outside the course of their official duties - unless they obtain the consent of their head of department.[1] Similar provisions also apply to persons employed in terms of the South African Reserve Bank Act,[2] the Population Registration Act,[3] the Railways and Harbours Act,[4] the Inspection of Financial Institutions Act,[5] the Income Tax Act,[6] the Post Office Services Act[7] and the Statistics Act.[8] As Neethling observes,[9] there is little doubt that most of these provisions are aimed at protecting the privacy of the individual.

(10) Data Banks: One of the greatest threats to the privacy of individuals in highly technological societies is the use of the computer for the collection and processing of data concerning private individuals.[10] This is largely due to their speed,

> "their capacity to store, combine, retrieve and transfer data, their flexibility, and the low unit cost of the work which they can do".[11]

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1) Public Service Act 54 of 1957, s 17 (m). See generally Neethling Privaatheid op cit 395 n 6.

2) Act 29 of 1944, ss 20, 21(e).

3) Act 30 of 1950, s 17(1). See above 233.

4) Act 22 of 1960, s 19(2).

5) Act 68 of 1962, s 8, 9(f).

6) Act 58 of 1962, s 4(1).

7) Act 66 of 1974, s 23(m).

8) Act 66 of 1976, s 8. See above 231f. Section 15 provides that no entry made by a competent person under the Act in any form, questionnaire, return, notice, book register or other document shall be admissable as evidence in civil or criminal proceedings, except if the latter arise in terms of the Act.

9) Neethling Privaatheid op cit 396. See generally Hoffman op cit 210f; Schmidt op cit 426f.

10) See above 10.

11) HMSO Computers and Privacy (1975 Cmnd 6353) 4, para 6.

It has been pointed out that the implications of computers for privacy are that they: (a) facilitate the maintenance and retention of extensive records; (b) make data easily and quickly accessible from many distant points; (c) make it possible for data to be transferred quickly from different systems; (d) make it possible to combine data in ways otherwise not practicable; and (e) allow data to be stored, possessed and transmitted in unintelligible forms, so that few people know what is in the records and what is happening to them.[1] These factors combine to expose the subject of the information profile to the danger that the information: (a) is inaccurate, incomplete or irrelevant; (b) may be given to persons who should not or need not have it; and (c) may be used for some purposes other than that for which it was collated.[2] Steps have been taken to control data banks in the United States,[3] Canada,[4] and the Federal Republic of Germany[5] (and to a lesser extent in the United Kingdom),[6] and are being considered in several other countries.[7] While it is true that these dangers are also present when traditional methods of data collection are used[8] (for instance, manual or mechanized filing systems), the non-automated personal data systems have a much more restricted ability to store,[9] combine, retrieve and transfer data. The use of

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1) Ibid.

2) Computers and Privacy op cit 4, para 8. Cf C Farki "Computers - Data Banks and the Individual: Is the Problem Privacy?" (1970) 5 Israel LR 542.

3) See above 64.

4) See above 122.

5) See above 93.

6) See above 81.

7) See above 117.

8) Cf HMSO Computers: Safeguards for Privacy (1975) Cmnd 6354) 5, para 13, when discussing inaccuracy: "Information held in computers is no more prone to this kind of error /inaccuracy/ than information in manual records ... Moreover accurate information is far less likely to be transferred incorrectly by a computer than by a human being." Cf P Stein & J Shand Legal Values in Western Society (1974) 202.

9) "Ten reels each containing 1,500 metres of tape 2.5 cm wide could store a twenty page dossier on every man, woman and child in the world". Ed AH Robertson Privacy and Human Rights (1973) 158.

computers in South Africa in both the public and private section will obviously increase, but in the field of private personal information systems appears to be limited.[1] Nonetheless the threat to privacy from traditional data bank storage systems continues and is apparent in the public and private sectors.[2]

(a) Public Records: The statutory provisions concerning invasions of privacy by State agencies in South Africa have already been considered.[3] Apart from the limited protection given in certain of the statutes,[4] unlike in the United States there is no general controlling act regarding the accumulation and use of information gathered by governmental agencies in the Republic.[5] The Population Registration Act[6] poses a particular threat to a person's privacy by the State, as it allows the Secretary for the Interior to furnish information to any government department, local authority or statutory body for any of their purposes, and to any other person (who makes written application and pays the prescribed fee) provided the Secretary is satisfied that it is in the interest of the person registered to furnish the particulars.[7] The person registered is not required to consent to the disclosure nor is he informed as to who has received the information. With the growing use of computers in State departments it is submitted that there is a need for legislation similar to the American Privacy Act of 1974[8] which will control the dissemination

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1) There is apparently only one credit bureau in South Africa which uses a computer and micro-fiche for retrievals. Information supplied by Mr. P. Bartos, Managing Director of Dun & Bradstreet (Pty) Ltd on 17th March 1977.

2) See above 10.

3) See above 231ff. Cf J Neethling Die Reg van Privaatheid (1976) 395f.

4) Cf Population Registration Act, 30 of 1950, s 17(1), see above 232f; Income Tax Act, 58 of 1962, s 4(1), see above 234; Statistics Act, 66 of 1976 s 8, see above 231f.

5) See above. Cf B Fail "Computer Leaks can Aid Fraud", Natal Mercury 25 November 1976.

6) 30 of 1950.

7) Section 17(2). See above 233.

8) Public Law 93-579, s 3418 (December 31, 1974); 5 United Stated Code §552a; Report of the Committee on Government Operations (115 Senate) Protecting Individual Privacy in Federal Gathering, Use and Disclosure of Information Report No 93-1183 (1974). See above 68f.

and accessibility of information stored by government data banks. In particular the individual should be entitled to a copy of his data file, and given the right not only to correct any inaccuracies therein, but also to veto the transmission of his personal information to other persons or bodies. As in the United States exceptions could be made for the purposes of state security and law enforcement,[1] but even if provisions similar to those in the American Privacy Act were promulgated in South Africa in many respects this would be rendered nugatory by the mass of presently existing security legislation.[2]

(b) Private Records: There is little information on the growth or use of such records in South Africa.[3] Most privately compiled data banks are concerned with credit records, and these like in Canada,[4] are usually compiled by credit bureaux from public records, such as judgments in the law courts.[5] Such information cannot be regarded as private and may be freely circulated for a reasonable period of time. Additional personal information is obtained from firms selling on credit[6] and sometimes the newspapers.[7] It is interesting to note that in South Africa although most credit bureaux would probably allow the subject of any inquiry to inspect his file, there is usually an agreement between the user and the agency that the former will not disclose the identity of the latter to the subject.[8]

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1) See above 70 n 1.

2) Cf AS Mathews Law, Order and Liberty in South Africa (1971) 134.

3) There are approximately 30 credit bureaux operating in South Africa, holding 8 million files. See above 285 n 1. The information contained in this section was obtained by the writer during a visit to a credit bureau in Durban.

4) Cf P Burns "The Law and Privacy: The Canadian Experience" (1976) 54 Canadian Bar R 1, 40f. See above 122.

5) Apparently credit bureaux in South Africa usually confine themselves to matters directly concerned with a person's credit-worthiness, and record judgment debts and bankruptcies but not divorces and criminal records.

6) Information is also obtained from shops who have "slow payers", as well as "final notices" and credit reference centres. See above 285 n 1. Credit inquiries from data users are recorded on the subject's card and it would be possible to build up a profile of his credit-spending habits by observing the pattern of inquiries.

7) Cf Neethling Privaatheid op cit 13f. The bureau visited by the writer only used newspaper reports to record the deaths of subjects.

8) This contrasts sharply with legislation in some of the Canadian Provinces which makes any such agreement void. Cf Manitoba Personal Investigations Act, SM, 1971, c 23, s 6; Burns op cit 44. See above 123.

This means that not only is the subject unaware that he may inspect his file but he may also experience difficulty in locating the agency concerned.[1] Access to credit records is often restricted to members,[2] but a tracing service is sometimes available to non-members, primarily attorneys.[3] Information for the latter is usually telephonically gleaned from neighbours and employers, and is confined to the residential or business address of the subject. Details concerning a person's drinking habits, political views, marital life, sexual activities, health, criminal transgressions and the like are not usually recorded by credit bureaux, but are left to the private investigator.[4] Even though the majority of bureaux probably use manual non-automated retrieval systems the service is quick,[5] and the number of files considerable.[6] There is no system of licencing for credit bureaux, although most agencies require their employees to observe a strict code of secrecy concerning the contents of files. Furthermore there is the danger that the information held may be inaccurate because of the difficulty of positively identifying subjects from court records, credit inquiries and newspaper reports.[7] In short members of the public have no control over the nature of the information gathered about them, the accuracy of such information nor its accessibility, and may not even know that a particular agency has a dossier on them. At common law the subject of a file would have to

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1) In Durban there is only one credit bureau, but it would be more difficult to locate the correct agency in say Johannesburg or Cape Town.

2) Some firms require their customers to enter into a contract not to use the information for purposes other than credit reference. See above 286 n 3.

3) The tracing service is often run as an adjunct to the credit referral business and does not extent to field work which appears to be the domain of private detectives.

4) The manager of the bureau visited by the writer was horrified to hear of the detailed investigations carried out in the United States and Canada. Cf EF Ryan "Privacy, Orthodoxy and Democracy" (1973) 51 Canadian Bar R 84, 88f; Farki op cit 544; J Swanton "Protection of Privacy" (1974) 48 Aust LJ 91, 100f.

5) The retrieval rates at the bureau visited by the writer were approximately 3 minutes for Whites, 5 minutes for Indians and 1½ minutes for Blacks. The names of Indians which were filed alphabetically (like those of Whites) took longer to locate because of the use of several alternative names, while those of Blacks were found more quickly because they were filed numerically according to identity numbers.

6) Cf The advertisement by the Natal Credit Bureau which claims that it has files on over 800,000 customers, with access to a further 3 million. (1976) 11 The Credit Manager, No 9, 9.

7) Cf Neethling Privaatheid op cit 13. Such sources seldom include the subject's date of birth or identity number and therefore confusion can arise where persons have the same names and occupations

bring an action for invasion of privacy under the actio injuriarum[1] or lex Aquilia,[2] and in several instances the disclosures may be regarded as privileged.[3]

Conclusion: It has been said that in the United States more than half of the adult population is on file with credit rating agencies.[4] The proportion for South Africa is probably lower,[5] but the increasing use of credit buying and the growth of the credit card system[6] are likely to make serious inroads into the individual's right to privacy in the future. The continuing curtailment of civil liberties by the State[7] makes it unlikely that steps will be taken to safeguard privacy in the public sector, but there is no reason why steps should not be taken to control private data bank systems.[8] The present non-automative methods of data collection already pose a threat to privacy

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1) See above 147. An action might also lie for defamation. Pickard v SA Trade Protection Society (1905) 22 SC 89.

2) In which case the subject would have to prove patrimonial loss. See below 362f. It has been pointed out that in the United States one drawback of the Fair Credit Reporting Act (see above) is that the plaintiff must prove actual damages and that "denial of credit does not give rise, ordinarily, to any appreciable damages". DP Rothschild & DW Carroll Consumer Protection: Text and Materials (1973) 274; cf Note "The Fair Trade Reporting Act" (1971) 23 U Maine LR 253, 263f.

3) For instance communications between a credit bureau and a prospective seller or lender. See below 324.

4) Jones op cit 149. Cf R Slovenko Psychiatry and Law (1973) 443: "Present technology will permit, within a very small space, a consolidation and storage of data equivalent to a 300-page book on every person in the country".

5) In 1976 Dun and Bradstreet (Pty) Ltd claimed to have over 6 million files (ie for approximately 25% of South Africa's population). (1976) 11 The Credit Manager No 1, 9, 10.

6) Cf C Smith "Credit Cards and the Law" (1975) 39 THR-HR 107, 109.

7) Cf Mathews Law, Order and Liberty op cit 134.

8) Cf Neethling Privaatheid op cit 406. Similar legislation could be introduced to control the activities of private investigators as is the case in Rhodesia: Private Investigators and Security Guards (Control) Act, 23 of 1977. See above 216f.

and it is submitted that the proposed Credit Agreements Bill,[1] like its English counterpart,[2] should include provisions to ensure that a data subject is: (i) notified that an agency is holding his personal file; (ii) informed by any user of a credity agency as to the latter's name and address; (iii) given the right to inspect, correct and update his file; (iv) notified by the agency each time his data is released and to whom; and (v) given the right to inquire of any credit agency if they hold a file on him. Control of credit bureaux would be facilitated if they were subject to a system of licensing and civil and criminal penalties were imposed for breaches of the relative statutory provisions.[3] It is conceded that the above safeguards would not be adequate in the long term, but it is submitted that at this stage they would not impose undue hardship on credit agencies required to implement them.[4]

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1) B 85 - '77 (1977).

2) Consumer Credit Act of 1974; cf AG Guest & MG Lloyd The Consumer Credit Act 1974 (1975) 158f.

3) The Manitoba Personal Investigations Act, SM, 1971, c 23 (Burns op cit 42ff), would serve as a useful model for these recommendations.

4) Swanton op cit 101f, has alluded to the problems involved enacting premature omnibus legislation to control data banks. "These include such questions as (1) whether the legislation should apply to all data banks or only those which are computerized; (2) when does a collection of information become a 'data bank'; (3) whether data banks should be registered or licensed; (4) whether the power to impose restrictions on the type of data which can be collected, the uses to which it can be put, and the method of storage should be conferred on a Registrar or other administrative officer; (5) whether the subject of a dossier is to have a right of access to his file or to a computer print-out, and if so who is to pay and when does the right accrue; (6) whether certain types of record such as police or security files should be exempted from an obligation of disclosure; (7) whether different considerations apply to the public and private sectors, and whether the services of an ombudsman or similar functionary could be employed; (8) how much regard should be paid to the claim of the information holder to the privacy of his files; (9) how to ensure correction of errors and inaccuracies in the files; (10) whether civil or criminal penalties should be imposed, or norms of conduct established and whether civil liability should be absolute; (11) whether in some cases it would be damaging to an individual to be informed of the contents of his file; (12) what technical controls to protect privacy should be imposed on the operators of computerized data banks and by whom; and (13) whether there are to be privileges against defamation if the files are opened". The answers to many of these questions are to be found in the legislation promulgated in the United States (see above 64), the United Kingdom (see above 81), the Federal Republic of Germany (see above 93) and Canada (see above 122).

C. PLACING A PERSON IN A FALSE LIGHT[1]

In the United States where a person is exposed to publicity which, even though it is not defamatory, places him in a false light in the public eye, such exposure may be actionable as an invasion of privacy.[2] Prosser suggests that the action was probably first recognized in 1816 when Lord Byron successfully enjoined the circulation of a badly written poem attributed to him,[3] and gives several other examples gleaned from the cases. For instance:

> "publicly attributing to the plaintiff some opinion or utterance such as spurious books or articles, or the unauthorized use of his name on a petition, or as a candidate for office, to advertise for witnesses to an accident, or the entry of an actor, without his consent, in a popularity contest of an embarassing kind".[4]

In many instances, however, such cases have been decided on the basis of defamation. A good example is Zbysko v New York American Inc.[5] where a photograph of the plaintiff, a celebrated wrestler, had been used, without his consent, to illustrate an educational article referring to the close structural resemblance between man and gorilla. There were two photographs: one of a gorilla captioned "A Hideous-looking Gorilla", and the other of the plaintiff in a wrestling pose captioned "Stanislaus Zbysko, the Wrestler, not Fundamentally Different from the Gorilla in Physique". The plaintiff's claim for defamation succeeded when the court accepted his evidence that he:

> "enjoyed an international reputation for dignity, fine traits of human character, kindliness, intelligence and culture ... /and that/ many worthy persons /had/ treated and received him on the basis of equality both physically and intellectually".[6]

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1) J Neethling Die Reg of Privaatheid (1976) 295, regards the "false light" cases as relating not to privacy, but to "identity".

2) WL Prosser Law of Torts 4 ed (1971) 812. Cf Ed AH Robertson Privacy and Human Rights (1973) 103f. See above 58.

3) Lord Byron v Johnston (1816) 2 Mer 29, 35 Eng Rep 851; cf Prosser Torts op cit 812.

4) Prosser Torts op cit 812.

5) (1930) 239 NY Supp 411; cf RE Megarry Miscellany-at-Law (1969) 200.

6) Ibid.

It is submitted that even if the photograph had not been captioned in a defamatory manner, the plaintiff would have recovered for invasion of privacy, both in the United States,[1] and in South Africa.[2] The courts in England have also decided these cases on the basis of defamation.[3] In Youssoupoff v MGM Pictures Ltd,[4] plaintiff was a member of the Russian Imperial family who had fled to England from Russia with her brother Prince Youssoupoff during the Revolution. Prior to their flight plaintiff and her husband (to whom she was betrothed at the time) had clashed with Rasputin the "Mad Monk". Defendants made a film called "Rasputin the Mad Monk" which included characters identical to the plaintiff and her husband. The film implied that Rasputin had seduced or raped the woman alleged to be the plaintiff, and the person protraying her husband was shown as one of Rasputin's murderers. The court awarded £25,000 damages for defamation. Greer LJ said inter alia:

> "If anyone printed and published the following words, 'The lady who was engaged to Prince Youssoupoff had had sexual relations with the mad monk Rasputin' nobody could suggest that that was not a libel which ought to meet with serious consequences".[5]

There is a world of difference, however, between saying that a person has "had sexual relations" with a "mad monk", and that a person was "raped" by him, as in the latter case there is no moral blameworthiness attributable to the victim.[6] Therefore it is submitted that Slesser LJ looked at the matter more realistically when he said:

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1) Cf Barber v Time Inc (1942) 348 Mo 119, 159 SW 2d 291; L Brittan "The Rights of Privacy in England and the United States" (1963) 37 Tulane LR 235, 248.

2) In the United States such publication would constitute "appropriation". See below 246.

3) See above 76.

4) (1934) 50 TLR 581 (CA). The plaintiff's brother brought an unsuccessful action for privacy in the United States. Youssoupoff v Columbia Broadcasting System (1963) 19 App Div 2d 865 (3); cf Hofstadter & Horowitz op cit 140.

5) At 585.

6) It is true, however, that the implication of moral blameworthiness is not necessarily a criterion for defamation. In our law a statement may be defamatory even if it excites sympathy for the plaintiff, eg to say that he is insane; cf Rutland v Jordan 1953 (3) SA 806 (C).

> "One may, I think, take judicial notice of the fact that a lady of whom it is said that she has been ravished, albeit against her will, has suffered in social reputation and in opportunity of receiving respectful consideratinn from the world. It is to shut one's eyes to realities to make these nice distinctions".[1)]

Early cases in our law also appear to have been decided on the basis of defamation. In Knoesen v Theron[2)] the plaintiff who passed herself off as a spinster was said to be married and the mother of a child. The court held that such a statement, if false, would be defamatory:

> "If the defendant knew that she /plaintiff/ passed as an unmarried woman it is clear that the defendant imputed either unchastity or imputed that the plaintiff was sailing under false colours in that, being a married woman she passed herself off as an unmarried woman. The statement in regard to an unmarried woman that she has a child in itself implies unchastity and the mere fact that it is coupled with the statement that she had been married does not excuse the person who utters these words".[3)]

The last portion of De Villiers CJ's judgment is however difficult to understand. One wonders how it could be defamatory to say of a woman who professes to be unmarried that she has been married and is in fact the mother of a child. Surely such a statement would not lower her in the eyes of right-thinking members of society, unless there is an innuendo that she is a liar. It is submitted that the better action in such a case would be for invasion of privacy. The defendant in Mangaroo v Toolsee,[4)] another defamation case, said of the plaintiff who was a Brahmin:

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1) At 587.

2) (1904) 21 SC 177, 181. Cf Dippenaar v Hauman (1878) 8 Buch 135, where the defendant dominee went further and falsely accused the plaintiff of giving birth to an illegitimate child, concealment of its birth, and infanticide. Such allegations were clearly defamatory.

3) At 181.

4) (1927) 48 NLR 100.

> "You are not a Brahmin [the highest caste], you are a Thakur [second in rank]'."[1]

The plaintiff succeeded because there was an innuendo of bastardy,[2] but it is submitted that if there was no such innuendo, and the court was satisfied that the circumstances justified it, an action for invasion of privacy could have been brought. An action for defamation also succeeded where a credit bureau falsely published to 3,000 contributors to a trade protection magazine that a person had had a provisional judgment taken against him.[3] On the other hand in Smith v Lawrence[4] the defendant had said in the presence of the plaintiff (a friend accompanying him) and one of the employees of defendant's firm:

> "I have taken judgment against you, and you can do what you like".

The court, however, held that:

> "[T]hough the words complained of are untrue and also capable of a defamatory meaning the respondent did not discharge the burden which rested upon him of establishing that they conveyed a defamatory meaning to anyone who heard them or any injurious consequences to him from the effect of their publication".[5]

It seems irrelevant, however, to determine whether the words had such harmful consequences, as the plaintiff does not have to prove actual damages. In defamation the court is concerned with the plaintiff's reputation in the eyes of others, not the subjective effect of the statement on his dignity.[6] The court found that the words could have had a defamatory meaning, but that the listeners did not regard them as defamatory.[7]

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1) At 101.

2) At 104.

3) Pickard v SA Trade Protection Society (1905) 22 SC 89.

4) (1929) 50 NLR 132.

5) Per Mathews J at 141. (My italics).

6) Cf Movramatis v Douglas 1971 (2) SA 520 (R) 521.

7) "In other words he did not establish that the appellant's utterance defamed him in his good name, credit and business reputation". Per Mathews J in Smith v Lawrence supra at 141.

The learned judge was clearly influenced by the degree of publication as he had previously said:

> "In the circumstances proved the probabilities of any such injurious consequences are very different from those which exist when an erroneous statement of like nature has been made in a trade journal circulating amongst those whose interest it is to ascertain the names of persons against whom judgments for debts have been recorded".[1)]

Mathews J, however, could hardly have meant to suggest that our law follows the American approach that such publication must be made to the public at large.[2)] For instance, in Dauberman v Blumenfel,[3)] it was held on exception that it may be defamatory for a person to write to another's superior informing him that the latter had not paid his debts.[4)] It is submitted that had the plaintiff in Smith's case sued on the basis of privacy the court would have come to another conclusion because in privacy cases it is the effect on the plaintiff's dignitas which is important,[5)] and not the effect on the plaintiff's reputation in the eyes of others.

In Van Zyl v African Theatres (Pty) Ltd[6)] the plaintiff was a professional singer who claimed damages arising from a false advertisement in a newspaper that he would be singing at a particular function. No contract had been negotiated between plaintiff and defendant although there had been some preliminary negotiations. Defendants subsequently screened an advertisement which falsely stated that the Plaintiff could not appear "because he was indisposed".[7)] Inexplicably the plaintiff confined his action to the newspaper advertisement alleging that

> "defendant 'maliciously' inserted the advertisement with the intention of injuring the plaintiff, and with the intention of using the plaintiff's name for their benefit".[8)]

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1) At 141.

2) See above 196f. In the United States it has been held that "the single publication rule applies to privacy as well as defamation". Prosser Torts op cit 814.

3) 1934 NPD 314.

4) At 320.

5) See above 181f.

6) 1931 CPD 61.

7) At 64.

8) Ibid.

The court held that there was no evidence of animus injuriandi on the part of the defendant,[1] and that in any event the plaintiff had not proved "actual loss".[2] It is submitted that the latter dictum is untenable as the plaintiff was suing under the actio injuriarum not the lex Aquilia.[3] Watermeyer J, however, seems to have regarded himself bound by Fichardt Ltd v The Friend Newspapers Ltd,[4] where the appeal court had stated that a plaintiff must prove (a) animus injuriandi and (b) damages, before he could recover.[5] The court in Fichardt's case appears to have regarded the action for injurious falsehood as lying under the actio injuriarum,[6] but because the plaintiff is suing for patrimonial loss and not sentimental damages, the better view is that it falls under the lex Aquilia.[7] It is submitted that had the plaintiff in Van Zyl's case sued for invasion of privacy he may have been more successful.[8] In Van Zyl's case the court stated that the plaintiff may have succeeded had he sued for the false excuse concerning his non-appearance,

> "because it was that which might have led some people to think that he was an artist who could not be relied on to fulfil his engagements".[9]

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1) At 67f.

2) At 68.

3) See below 362f.

4) 1916 AD 1.

5) At 7, 11. Van Zyl v African Theatres (Pty) Ltd supra 64f.

6) Fichardt Ltd v The Friend Newspapers Ltd supra 7, 11; cf Wessels v Bosman 1918 TPD 431, 435; Carelse v Van der Schyff 1928 CPD 91, 94.

7) Cf Bredell v Pienaar 1924 GPD 203, 213; Geary & Son (Pty) Ltd v Gove 1964 (1) SA 434 (AD) 441; Dun & Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau 1968 (1) SA 209 (C) 218. Cf RG McKerron The Law of Delict 7 ed (1971) 214 n 37. Universiteit van Pretoria v Tommie Meyer Films 1977 (4) SA 376 (T) 385.

8) It is conceded that the plaintiff failed in Van Zyl's case because animus injuriandi was not proved. Quaere: could be argued that as the publication was in a newspaper (admittedly of limited circulation) the matter should have been treated as publication by the press? See above 157f.

9) Van Zyl v African Theatres (Pty) Ltd supra 69.

Presumably he would have recovered sentimental damages, and it seems that there is no reason in principle why he should not have been awarded similar damages for being falsely represented as appearing at a concert for which he had not contracted. The false excuse may have been defamatory, but it is submitted that the false publicity was an invasion of privacy in the sense of not only placing him in a false light but also as an appropriation of his name for advertising.[1)]

A classic illustration of a South African case where the plaintiff was put in a false light is Kidson v SA Associated Newspapers Ltd.[2)] Here the plaintiffs, one of whom was marred and two engaged, had consented to the publication of their photograph in a nursing journal. The photograph however, was used to illustrate an appeal for the construction of a recreation centre for nurses at the hospital where they worked. The photograph was captioned and couched in language which implied that the three plaintiffs desired to meet unattached young men. The court held that the publication was not defamatory, but allowed the married woman to recover for contumelia on the ground that:

> "/T/he publication of the alleged desire to meet persons of the opposite sex (and this was stressed in the headlines) because she was lonely when off duty, was an insult or contumelia ... /and/ would not only cause her embarrassment, but the happiness of her married life would be thrown into doubt".[3)]

The two engaged nurses failed in their action because they had not alleged that they were engaged to be married. As has been pointed out above, all three plaintiffs should have recovered on the basis that their private lives had been falsely exposed to the glare of publicity which per se amounted to an invasion of their privacy.[4)] Although many of the "false light" cases could be decided on the grounds

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1) See below 300.

2) 1957 (3) SA 461 (W). Cf Martin v Johnson Pub Co (1956) Sup Ct 157 NYS 2d 409, which went further by describing plaintiffs as "'man hungry' women"; Prosser Torts op cit 813 n 19.

3) At 468.

4) See above 129f.

of defamation, Kidson's case is a good example of a case where the disclosures were not defamatory.[1] It is unfortunate that the judge in Kidson's case emphasized the contumelia aspect, which implied that he regarded it simply as an injuria rather than an invasion of privacy.[2] An earlier "false light" case where the court also awarded damages for injuria was Katzenellenbogen v Katzenellenbogen & Joseph,[3] where the plaintiff was coerced into signing a false statement that she had been found in adultery and was unfit to have the custody of her baby girl. The court held:

> "I cannot doubt that this is an insult which would cause a deep and abiding wound to her dignity and self-respect, and lead her to feel that she has been classed as an abandoned and dissolute person".[4]

This case is perhaps distinguishable from the usual privacy situation in that here it is the plaintiff who makes the false statement (albeit under duress) whereas in the privacy cases, defendant makes the statement. Nonetheless, it could be argued that as the statement is made under duress it is the defendant's will and not that of the plaintiff which is being exercised.[5] Once again the fact that the false statement was not published to the world at large is irrelevant - here the document was signed in front of plaintiff's counsel and her husband's attorney and counsel.

Prosser emphasizes that the "false light" cases are similar to defamation and that there is a danger that they will swallow up the latter,[6] Bloustein on the other hand,[7] submits that Prosser places too much emphasis on the protection of reputation:

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1) The same is true of Van Zyl v African Theatres (Pty) Ltd supra. See above 294.

2) See above 130; Cf Neethling Privaatheid op cit 399.

3) 1947 (1) SA 622 (W).

4) Per Blackwell J at 629f.

5) Cf Spies NO v Smith 1957 (1) SA 539 (AD) 547.

6) Prosser Torts op cit 813. See above 62f.

7) EJ Bloustein "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39 NY ULR 962.

> "I agree with Dean Prosser, that all of these cases involve reputation, but I am persuaded, as he is not, that they also involve an assault on individual personality and dignity which is characteristic of all other privacy cases. The slur on reputation is an aspect of the violation of individual integrity".[1)]

In defamation cases in our law, where a person's fama is assailed, the effect on his dignitas is irrelevant,[2)] although the fact that the plaintiff suffered humiliation may be taken into account when assessing damages.[3)] The plaintiff is given a solatium for the loss of his reputation, even though the effect on his dignitas may be minimal.[4)] Conversely in the 'false light' cases he is compensated for the hurt to his feelings brought about by the unauthorized and false publication of some aspect of his private life.

It is submitted, therefore, that provided the false disclosures are published intentionally[5)] and cause the plaintiff to suffer impairment of his dignitas[6)] and are offensive to the prevailing mores of society[7)] - such disclosures will ground an action for invasion of privacy. But the courts will not protect the hypersensitive individual and will apply the de minimus non curat lex doctrine to minor

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1) Bloustein op cit (1964) 39 NYULR 991. Cf TL Yang "Privacy: A Comparative Study of English and American Law" (1966) 15 ICLQ 175, 185.

2) Cf Mathews v Van Rooyen 1972 (1) PH J 17 (NC); but cf Movramatis v Douglas 1971 (2) SA 520 (R) 521.

3) See above 194.

4) Cf CF Amerasinghe Aspects of the Actio Injuriarum in Roman-Dutch Law (1966) 190 "A statement which affects reputation will necessarily, on the other hand, be an impairment of dignitas". Note "Defamation Privacy and the First Amendment" 1976 Duke LJ 1016, 1036: "The plaintiff may think differently of himself as a result of the defamatory utterance. He may suffer harm to dignity, pride and self-esteem".

5) See above 147.

6) See above 181.

7) See above 170.

errors and inaccuracies concerning the plaintiff.[1] In any event it is likely that our courts would be reluctant to hold a non-defamatory news item objectionable, and as in the United States, it would only be in serious cases of invasion of privacy that the courts will grant relief.[2] It could be argued that this is what influenced the court in refusing relief to the two engaged plaintiffs in Kidson v SA Associated Newspapers Ltd.[3] The court indicated that had they alleged that they were engaged it might have entertained their claim. It is submitted, however, that in the circumstances even though such an allegation was not made, the invasion per se was sufficiently reprehensible to ground an action.[4] A factor that would militate against invasion of privacy usurping defamation as a delict, is the likelihood that the damages awarded in a defamation action will be much larger. The main value of the recognition of an action for invasion of privacy in "false light" cases would be the right to interdict the publication of such false statements,[5] and the recovery of damages in situations similar to those experienced by the plaintiffs in Kidson's case (ie where the publication is not defamatory).

In Universiteit van Pretoria v Tommie Meyer Films[6] the court mentioned Neethling's reference to the "torts" of "false light" and "appropriation" as examples of infringements of identity rights.[7] Although Mostert J observed that these "torts" could be used as guidelines for determining wrongfulness,[8] he did not consider whether they would be regarded as invasions of privacy in our law. In any event the court found that on the facts the university had not been placed in a false light.[9] It is submitted however, that even if the university had been placed in a false light - short of defamation - or had suffered an "invasion" of its "privacy", as an artificial person it would have not been able to recover.[10] On the other hand if the university was placed in a false light and had suffered damages, or was likely to suffer damages, it could sue for injurious falsehood under the lex Aquilia.[11]

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1) Prosser Torts op cit 813; Amerasinghe Actio Injuriarum op cit 182f. Cf Sievers v Bonthuys 1911 EDL 525, 531; Neethling Privaatheid op cit 59, 259, 298.

2) Cf Yang op cit 185; SD Warren & LD Brandeis "The Right to Privacy" (1890) 4 Harvard LR 193, 216.

3) 1957 (3) SA 461 (W). 4) See above 130 5) See above 194f.

6) 1977 (4) SA 376 (T). 7) At 386. 8) At 386f.

9) At 387. 10) See above 278f. 11) See below 361.

APPROPRIATION: USE OF A PERSON'S IMAGE, NAME OR LIKENESS[1)]

This form of invasion occurs when the defendant for his own benefit or advantage appropriates the plaintiff's image, name or likeness without the latter's consent.[2)] The early privacy cases in the United States concerned "appropriation",[3)] while in England they have been accommodated primarily under defamation.[4)] In our law such cases have also overlapped with defamation and passing-off, for instance, in Reyneke v Reyneke[5)] it was held to be defamatory to give out that a plaintiff was the father of a woman's child, while in Combrinck v De Kock[6)] damages were awarded where the defendant passed himself off as the plaintiff's agent and thereby deprived the plaintiff of business. There is a similarity between the "false light" and "appropriation" cases in that in both instances, the plaintiff is exposed to publicity by having his image, name or likeness used by another. It is the misuse of such image, name or likeness which constitutes an affront to his dignitas and entitles him to an action for invasion of privacy.[7)] A person's image, name or likeness can be misused in a number of ways, for instance, in: (i) advertisements; (ii) films; (iii) printed matter and photographs, and (iv) radio and television.

1. Advertisements: The policy considerations behind this type of invasion appear to be that the plaintiff is being deprived of proprietary rights by such unauthorized use of his name or likeness for commercial exploitation.[8)] There are, however, other considerations

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1) J Neethling Die Reg op Privaatheid (1976) 295, does not regard the "appropriation" cases as applying to privacy, but rather to an invasion of the right to "identity".

2) WL Prosser Law of Torts 4 ed (1971) 804; TL Yang "Privacy: A Comparative Study of English and American Law" (1966) 15 ICLQ 175, 186.

3) See above 53f.

4) See above 76.

5) (1889) 6 Cape LJ 111; cf Vanderbilt v Mitchell (1907) 72 NJ Eq 910, 67 A 97. Before the name of an illegitimate child's father can be entered in the Register of Births his consent in writing must be obtained. Section 10, Births, Marriages and Deaths Registration Act, 81 of 1963.

6) (1887) 5 SC 405. Cf In the United States where the defendant passed as plaintiff to obtain credit or secret information. Goodyear Tire & Rubber Co v Vandergriff (1936) 52 Ga App 662, 184 SE 452; Prosser Torts op cit 805.

7) EJ Bloustein "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39 NYULR 962, 993.

8) Prosser Torts op cit 807.

which should be taken into account and the position has been summarized as follows:

> "The interest which a person has in the prevention of the publication of his picture without his consent may be of three sorts: (1) the desire to preserve his mental peace and comfort from disturbances by distasteful publicity; (2) the possible profit he may make from his photograph, if it has commercial value; and (3) the interest in his reputation, the loss of which by the false implication that he has sold the privilege of using his picture for advertising purposes - if such implication does in fact arise from the use of it - may cause him mental distress or may prevent his entering into desirable social or business relations with other persons".[1)]

Although Prosser concedes that "the element of protection of the plaintiff's personal feelings is obviously not to be ignored",[2)] he stresses the fact that the appropriation cases:

> "recognize or create an exclusive right in the individual plaintiff to a species of trade name, his own, and a kind of trade mark in his likeness ... it is a right of value upon which the plaintiff can capitalize by selling licenses".[3)]

In many instances, however, (except perhaps where the plaintiff is a well-known figure) the aggression on the plaintiff's dignitas will outweigh any prospective pecuniary loss. It is interesting to note that in Tolley v Fry[4)] the English court appears to have been influenced by the third interest mentioned above - presumably because there was no common law tort of invasion of privacy.[5)] Notwithstanding that the plaintiff was a well-known amateur golfer, there was no reference to any loss of prospective profits which he might have suffered had he decided to abandon his amateur status and desired to engage in commercial advertising. He recovered simply on the basis

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1) "Moving Pictures and the Right to Privacy" (1919) 36 SALJ 180, 181. (Reprint from Yale LJ).

2) Prosser Torts op cit 807.

3) Ibid; Cf Neethling Privaatheid op cit 295, who sees it as concerning "identity" not privacy.

4) [1931] All ER 131 (HL).

5) See above 72f.

that there was a defamatory innuendo that he had prostituted his amateur status.[1] If he had wished to recover for loss of prospective profits he would have had to prove special damages which would have been difficult to establish.[2] Similarly in our law on the facts in Tolley's case the plaintiff would have recovered general damages for invasion of privacy arising from the impairment of his dignitas,[3] but any loss of potential profits would have had to be proved as special damages.[4] This would have been impossible on the facts. Another English case which stressed the courts' concern for the reputation (and dignity) of the plaintiff rather than his loss of potential profits was Plumb v Jeyes Sanitary Compound Co.[5] A photograph of a policeman wiping his brow on point duty, which had been taken several years previously, was used to advertise the defendant's product without the former's consent. The picture had been captioned as follows:

> "Phew! I am going to get my feet into a Jeyes fluid foot-bath".[6]

The court held that the innuendo concerning the condition of the policeman's feet was sufficient to constitute defamation. The emphasis in the United States on the loss prospective commercial gains has caused one writer to suggest that the "appropriation" advertising cases are more concerned with the plaintiff's "right to publicity" than his right to privacy.[7] Thus in the American case of Munden v Harris[8] a photograph of a five year old child had been published with a caption stating:

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1) Tolley v Fry supra 136, 139.

2) Cf PH Winfield & JA Jolowicz Winfield and Jolowicz on Torts 9 ed (1971) 250.

3) Cf O'Keeffe v Argus Printing & Publishing Co Ltd 1954 (3) SA 244 (C).

4) Cf International Tobacco Co (SA) Ltd v United Tobacco Co (South) Ltd. 1955 (2) SA 1 (W) 25ff.

5) (1937) The Times 15 April, 4; cf RE Megarry Miscellany-at-Law (1969) 200.

6) Ibid.

7) MB Nimmer "The Right to Publicity" (1954) 19 Law & Contemp Problems 203; Hofstadter & Horowitz op cit 66; Prosser Torts op cit 807.

8) (1911) Mo App 652, 134 SW 1076; cf L Brittan "The Right to Privacy in England and the United States" (1963) 37 Tulane LR 233, 251.

> "Papa is going to buy Mama an Elgin watch for a present and someone (I mustn't tell who) is going to buy my big sister a diamond ring. So don't you think you ought to buy me something?"[1)]

It was held that although the plaintiff's right to privacy had been invaded, it was in terms of an interference with the plaintiff's exclusive property right of material profit to be derived from the photograph.[2)] The same principle applied in Kunz v Allen,[3)] where a movie of plaintiff taken while she was shopping, was used as part of an advertisement for the defendant's shop. On other other hand in Olan Mills Inc v Dodd[4)] the court appeared to take cognisance of the plaintiff's sentimental feelings rather than her loss of prospective commercial gains. The plaintiff had employed the defendant to photograph her for an agreed price. Three years after she had received and paid for the photographs, without her knowledge or consent, the defendant mailed 150,000 post cards reflecting her photograph throughout the state as part of an advertising campaign. In addition enlargements were made and carried from door to door to solicit orders. The plaintiff's name was not used, but her friends recognized her. In assessing damages the court took into account "her humiliation, her embarrassment, mental anguish /ānd/ loss of weight from worry and lack of sleep".[5)]

In the South African case of Van Zyl v African Theatres (Pty) Ltd[6)] the defendants falsely advertised that the plaintiff would be singing at one of their functions.[7)] The court interpreted the plaintiff's claim to mean that defendants "intended to fill their own pockets by the misuse of the plaintiff's name",[8)] but found that animus

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1) Ibid.

2) Brittan op cit 251.

3) (1918) 102 Kan 883, 172 Pac 532; cf (1919) 36 SALJ 181; cf Foster-Milburn Co v Chinn (1909) 134 Ky 424, (1909) 134 Ky 424, 120 SW 364; Edison v Edison Poly Form Mfg Co (1907) 73 NJ Eq 136, 67 Atl 392; Brittan op cit 251.

4) (1961) 353 Ark SW 2d 22; Hofstadter & Horowitz op cit 202f.

5) Hofstadter & Horowitz op cit 202f.

6) 1931 CPD 61.

7) See above 294.

8) At 64.

injuriandi had not been proved[1] and that the plaintiff had not proved actual damages.[2] It is submitted that the court referred to the defendant's "pockets" because the claim was for injurious falsehood which requires the plaintiff to prove patrimonial loss.[3] If the plaintiff had proceeded on the basis of invasion of privacy and had established animus injuriandi he would have succeeded.[4] A classic case involving the unauthorized use of a plaintiff's photograph for advertising purposes was O'Keeffe v Argus Printing & Publishing Co Ltd.[5] The plaintiff, a SABC radio broadcaster, had consented to her photograph being used to illustrate a news story, but it was subsequently used in an advertisement. The issue of prospective commercial exploitation was not raised, and indeed such a claim could not have succeeded as the plaintiff's employers (the SABC) did not allow its employees to advertise.[6] The court experienced no difficulty in holding that:

> "The unauthorized publication of a person's photograph and name for advertising purposes is in my view capable of constituting an aggression upon that person's dignitas".[7]

This dictum contrasts sharply with that of the court in Edison v Edison Polyform Manufacturing Co[8] where the name and photograph of the famous inventor were used to advertise a product which he had patented and sold to defendants:

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1) At 67f.

2) At 68.

3) RG McKerron The Law of Delict 7 ed (1971) 213f. See below 361. Cf McKerron Delict op cit 214 n 37: "the wrong is said to be an injuria and the remedy the actio injuriarum, /b/ut it is clear that this is incorrect and that the remedy is an action under the lex Aquilia based on dolus".

4) See above 295 n 8.

5) 1954 (3) SA 244 (C). See above 141.

6) At 247.

7) Per Watermeyer AJ at 249. But cf Neethling Privaatheid op cit 376.

8) Supra.

> "It is difficult to understand why the peculiar case of one's features is not also one's property, and why its pecuniary value, if it has one, does not belong to its owner rather than to the person seeking to make an unauthorized use of it".[1)]

The latter case can perhaps be distinguished on the basis that the plaintiff was a well-known inventor and that there was a link between him and the product sold. It is not necessary, however, for the plaintiff's name to appear on the advertisement.[2)] The New York courts have gone further when interpreting the state statute[3)] by giving a broad meaning to what constitutes advertising purposes.[4)] Where some surgeons carried out a delicate operation on the plaintiff's nose and photographs were taken at the time and later used to illustrate an article by the physicians entitled "The Saddle Nose" the court rejected the defendant's plea that the photographs were not published for advertising purposes:

> "An article even in a scientific publication may be nothing more than someone's advertisement in disguise ... That the article ... with its accompanying photographs of plaintiff was published ... to advertise the defendant physicians and their handiwork /is/ a fair inference ... from the ... complaint".[5)]

On the other hand if it was only the plaintiff's nose which appeared in the photographs without anything to identify the plaintiff himself there could be no action for invasion of privacy.[6)] The courts have also adopted a similar wide interpretation of publications made for trade purposes. In Semler v Ultem Publications[7)] where a photograph of a professional model in a negligée appeared in a sex magazine it was held that the picture was for the purpose of trade as it sold the magazine as well as the stories published therein. The same principle

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1) Cf Brittan op cit 251f.

2) Olan Mills Inc v Dodd supra.

3) NY Sess Laws 1903 Ch 132, ss 1-2. See above 53f.

4) Hofstadter & Horowitz op cit 206f.

5) Griffin v Medical Society (1939) 11 NYS 2d 109; cf Hofstadter & Horowitz op cit 207f.

6) Cf Prosser Torts op cit 806. See above 258.

7) (1938) 170 Misc 551, 9 NYS 2d 319 (NY City Court Queen Co); cf Hofstadter & Horowitz op cit 207f.

was applied where the name and likeness of the plaintiff a famous bicycle rider was published in a booklet sold at bicycle races.[1] Although he was a public figure it was held that the publication was for the purposes of trade and advertising and not merely "news".[2] Likewise to publish in a periodical devoted to the art of photography the nude photograph of a professional model without her consent was held to be "for the purposes of trade".[3] It is submitted, however, that such publication will only be for the purposes of trade where the person whose image or likeness is used is a public figure or someone whose activities will excite public interest.[4] For instance, it seems that plaintiff in Mhlongo v Bailey[5] would have experienced difficulty in showing that his photograph was used for business purposes, whereas the plaintiff in Coetzee v CNA[6] would have succeeded as his story had received advance publicity in the magazines concerned. In the South African action for invasion of privacy the monetary value of the plaintiff's likeness is generally irrelevant, as the courts are concerned with compensating the plaintiff for the aggression on his dignitas.[7]

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1) Miller v Madison Square Garden (1941) 176 Misc 714, 28 NYS 2d 811 (Sup Ct). Plaintiff had, however, given oral consent, although the statute stated written consent must be given, and so nominal damages of six cents were awarded. Hofstadter & Horowitz op cit 208f. For public figures see below 315.

2) Hofstadter & Horowitz op cit 208.

3) Myers v US Camera Pub Co (1957) 9 Misc 2d 765, 167 NYS 2d 771. Plaintiff admitted that she had posed in the nude in the past but only if "her face was cropped or she was partially covered so as to be unrecognizable". Hofstadter & Horowitz op cit 209.

4) Thus the unauthorized publication of photographs of a naked Miss World taken while she was relaxing in private may well have been actionable as an appropriation case. Cf J Neethling in Rapport, 4 April 1976, 21. Similarly the use, without her consent, of a photograph of a topless Miss South Africa on a record album would also be actionable. Cf Rapport, 9 October 1977. See below In Henderson v Radio Corporation (Pty) Ltd (1960) SR (NSW) 576, an Australian court found that the plaintiff had "a commercially saleable reputation"; cf H Storey "Infringement of Privacy and its Remedies" (1973) 47 Aust LJ 498, 505.

5) 1958 (1) SA 370 (W). See above 127.

6) 1953 (1) SA 449 (W). See above 270f.

7) See above 185.

2. Films: The making of a film about a person's life has given rise to such famous cases as Melvin v Reid,[1] and Stryker v Republic Pictures[2] in the United States, and Youssoupoff v MGM Pictures Ltd[3] in England. Such use of a person's image or likeness is clearly for business purposes, although it seems that a distinction will be made between newsreels and feature films. Thus in Redmond v Columbia Pictures Corp[4] plaintiff, a golfer, had allowed his trick shot exhibition to be filmed as a newsreel by Fox Movietone. Defendant purchased the film from Fox and used it without plaintiff's consent in a short feature distributed throughout the United States entitled "Golfing Rhythm". Plaintiff was able to recover for invasion of privacy.[5] On the other hand where a person appears incidentally in a newsreel eg in a crowd scene,[6] or as a bystander in a police raid,[7] such invasions are unlikely to be actionable.[8] Where, however, the news film specifically singles out the plaintiff for portrayal or comment, and he is not a public figure, such a film may be actionable as an invasion of privacy.[9] Even if a person is a public figure, the unauthorized use of his image or likeness will give rise to an action. In Sharkey v National Broadcasting Co,[10] the former world heavyweight boxing champion of the world sued the NBC for screening a motion picture about him in a programme entitled "Greatest Fights of the Century" without his consent. One of the claims in his successful action was that the use of his name and pictures for the purposes of trade and advertising had made his name and likeness less valuable to him in his professional activities.[11] Where, however, the film is based on a

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1) (1931) 112 Cal App 285, 297 Pac 91. See above 174.

2) (1951) 108 Cal App 2d 191, 238 P 2d 670. See above 174.

3) (1934) 50 TLR 581 (CA). See above 291.

4) (1938) 277 NY 707, 14 NE 2d 636.

5) Cf Hofstadter & Horowitz op cit 233.

6) Cook v 20th Century Fox Film Corp (1936) Supp Ct 59 NYLF 2200 71. Cf Hofstadter & Horowitz op cit 232.

7) Jacova v Southern Radio & Telev Co (1955) 83 So 2d 34; cf Hofstadter & Horowitz op cit 232.

8) Hofstadter & Horowitz op cit 231; Prosser Torts op cit 807; cf Neethling Privaatheid op cit 200. Cf Universiteit van Pretoria v Tommie Meyer Films 1977 (4) SA 376 (T) 387, where the plaintiffs could not recover in any event because they were a universitas. See above 278.

9) Blumenthal v Picture Classics (1933) 261 NY 504.

10) (1950) 93 Fed Supp 986 (DCNY).

11) Hofstadter & Horowitz op cit 238.

fiction and the plaintiff is not identifiable no action will lie.[1] But if a person can be identified he will have an action even though the producer purported to disclaim liability eg by stating that the characters and events are fictitious and that any references to persons living or dead are purely coincidental.[2] It is submitted that the same principles will apply in our law.[3]

3. Printed Matter and Photographs: One of the most common forms of commercial exploitation occurs where a person is exposed to publicity in a book, magazine or newspaper, whether his image or private life is used to satisfy the interests of history, science, education or the prurient tastes of the masses. If could perhaps have been argued that in Mhlongo v Bailey[4] the article was of the type which would boost the sales of the magazine at the expense of the plaintiff's hurt feelings[5] but this is not clear from the record. Similarly in Kidson v SA Associated Newspapers Ltd[6] the flavour of the article about the nurses was also designed to stimulate interest in the newspaper and increase its circulation. Hofstadter and Horowitz[7] give a number of examples under the New York statute where the courts have held that the publication falls outside the "purposes of trade":

> "the use of a prominent pugilist's picture in connection with his biography appearing in a newspaper;[8] the single use of the photograph of an actress in connection with a magazine article on burlesque;[9] the use of the name in a novel once

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1) Cf Levey v Warner Bros Pictures (1944) 57 Red Supp 40 (DCNY); Bernstein v NBC (1955) 129 Fed Supp 817 (plaintiff acquitted of murder, portrayed fictionally as having been convicted - but not identifiable); Miller v NBC (1957) Del 157 Fed Supp 240 (re-enactment of bank robbery by plaintiff, using fictitious name); cf Hofstadter & Horowitz op cit 235.

2) Hofstadter & Horowitz op cit 235f.

3) Cf above 265.

4) 1958 (1) SA 370 (W).

5) At 373.

6) 1957 (3) SA 461 (W).

7) Hofstadter & Horowitz op cit 210f.

8) Jeffries v NY Evening Journal Pub Co (1910) 67 Misc 570.

9) Colyer v Fox Pub Co (1914) 122 App Div 297.

> in 398 pages;[1] the picture of an alleged strike-breaker on the frontispiece of a book, and the use of the name four times in the 314 pages of the same book, detailing a history of professional strikebreaking;[2] the use of an uncommon surname in a comic cartoon,[3] with no sufficient parallel of the character to show intent to portray; the false use of a reputable author's name as author of an absurd adventure story (although it constituted libel);[4] the publication of a minor's picture in a magazine article portraying her in a night club smoking and drinking intoxicating beverages".[5]

It is submitted, however, that apart from the incidental reference to the plaintiff in Damron's case, and the use of the plaintiff's surname in Nebb's case the other uses could well have been interpreted as being for "the purposes of trade".[6] In any event in our law it is not necessary to decide whether or not such use was for "purposes of trade" as it is the hurt to the plaintiff's sentimental feelings which is important.[7]

4. Radio and Television: The same principles apply to the use of a person's image or likeness or reference to him on radio or television programmes. It has been suggested however that references to individuals on sponsored programmes should not be regarded as for "advertising purposes":

> "The unique economic necessities of radio and television ... require that, in large part, programs (sic) appear under the sponsorship of commercial advertisers. To hold that the mere fact of sponsorship makes the unauthorized use of an individual's

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1) Damron v Doubleday, Doran & Co (1929) 226 App Div 796.

2) Kline v McBride & Co (1939) 170 Misc 974.

3) Nebb v Bell Syndicate (1941) 41 Fed Supp 429 (DCNY); cf the English case of Blennerhasset v Novelty Sales Services Ltd (1933) The Times May 19, 4; cf Megarry op cit 201.

4) D'Altomonte v NY Herald Co (1913) 154 App Div 453.

5) Callas v Whisper Inc (1951) 278 App Div 974.

6) See above 59.

7) See above 179. Cf Time Inc v Hill (1967) 385 US 374.

> name or picture on radio or television a use 'for advertising purposes' would materially weaken the informative and education potentials of the still developing media".[1)]

In our law the criteria is whether or not such unauthorized use constitutes an aggression on the plaintiff's dignitas. Should the latter also wish to recover for pecuniary loss, he would have to prove actual loss resulting from the invasion.[2)] An interesting case outside the field of advertising but concerning commercial gain, and regarded by one eminent writer as relating to privacy,[3)] is the Australian case of Victoria Park Racing Co Ltd v Taylor.[4)] Defendants had on their own property erected a high platform overlooking plaintiff's race-course. The erection was ignored until the defendants hired the platform out to a broadcasting company, whose announcer was so skilled that many people preferred to remain at home and listen to the broadcast, rather than pay admission to the course. Plaintiff proceeded against both the announcer and the broadcasting company but the Privy Council refused leave to appeal because it found there was no precedent for plaintiff's action, as it fell outside nuisance, abuse of property rights or copyright.[5)] Paton suggests that it could probably have been accommodated as an invasion of privacy.[6)] It is submitted that in South Africa the case could have been decided on the basis of unfair competition[7)] under the lex Aquilia. In any event the plaintiffs constituted an artificial person which is unable to sue for invasion of privacy.[8)] In order to succeed in an action

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1) Gautier v Pro-Football Inc (1951) 30 NY 354.

2) See below 362f.

3) G Paton "Broadcasting and Privacy" (1938) 16 Canadian Bar R 425; cf (1938) 55 SALJ 449, 460.

4) (1937) 58 CLR 479; cf Paton op cit (1938) 55 SALJ 449f.

5) Cf Paton op cit (1938) 55 SALJ 449.

6) Paton op cit (1938) 55 SALJ 460.

7) Cf Dun & Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape)(Pty) Ltd 1968 (1) SA 209 (C) 218: "[T]he basis of a plaintiff's action for wrongful interference by a competitor with his rights as a trader is clearly stated to be Aquilian. The significance of this is that it means that, while such an action must satisfy all the requirements of Aquilian liability, the broad and ample basis of the Lex Aquilia is available in this field for the recognition of rights of action even where there is no direct precedent in our law".

8) Cf Universiteit van Pretoria v Tommie Meyer Films 1977 (4) SA 376 (T) 384. See above 277f.

for unlawful competition the plaintiff would have to prove patrimonial loss or a reasonable apprehension of such loss.[1] It has been argued, however, that all claims for patrimonial loss should be brought under the Aquilian action even though the wrong is also an injuria eg defamation.[2]

Conclusion: In short it appears that in our law there is little need to distinguish the appropriation cases from any other invasion of privacy, as the South African courts are in general concerned with the aggression on the plaintiff's dignitas, rather than the effect on his patrimony.[3] Where, however, patrimonial loss does arise, whether it results from an intrusion, public disclosure or a "false light" situation the plaintiff may bring a "rolled-up" action for the hurt to his sentimental feelings and the pecuniary loss suffered by him.[4]

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1) For the requirements of an interdict, see above 194f.

2) Gelb v Hawkins 1959 (2) PH J 20 (W), contra McKerron Delict op cit 11 n 37. See below 365. Cf Universiteit van Pretoria v Tommie Meyer Films supra 385.

But cf the American approach in Prosser Torts op cit 815; "If there is evidence of special damages, such as resulting illness, or unjust enrichment of the defendant, or harm to the plaintiff's own commercial interests, it can be recovered."

3) See above 304. But contra Neethling Privaatheid op cit 295, who regards the appropriation cases as referring to the "right of identity".

4) Mathews v Young 1922 AD 492, 505. See below 365.

CHAPTER SEVEN

DEFENCES

A. INTRODUCTION

Academic writers have suggested that the defences of privilege, fair comment and consent which are applicable in cases of defamation should be available as defences to actions for invasion of privacy,[1] as well as the special defences of necessity and private defence.[2] The South African courts have stated that the success of an action for invasion of privacy will depend:

> "upon the circumstances of each particular case, the nature of the [publication], the personality of the plaintiff, his station in life, his previous habits with reference to publicity and the like".[3]

The Rhodesian Court appears to have approved this flexible approach in S v I[4] where Beadle ACJ refused to label the specific defence open to the appellant.[5] Nonetheless it is useful to determine which defences are available to a defendant faced with an action for invasion of privacy. It is submitted that most of the traditional defences to actions under the actio injuriarum will be applicable to invasions of privacy causing sentimental loss.[6] These defences can be divided into those which negative wrongfulness and those which rebut

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1) CF Amerasinghe The Actio Injuriarum in Roman-Dutch Law (1966) 197; TL Yang "Privacy: A Comparative Study of English and American Law" (1966) 15 ICLQ 175, 187; B Neill "The Protection of Privacy" (1962) 25 Modern LR 393, 394. Contra DE Brown "The Invasion of Defamation by Privacy" (1971) 23 Stanford LR 547, 560.

2) J Neethling Die Reg op Privaatheid (1976) 332, 335.

3) O'Keeffe v Argus Printing & Publishing Co Ltd 1954 (3) SA 244 (C) 248; Mhlongo v Bailey 1958 (1) SA 370 (W) 371f; cf Restatement of Torts, (1939) §867, Comment D: "[L]iability only exists if the defendant's conduct was such that he should have realized that it would be offensive to persons of ordinary sensitivities ... [F]or determining liability, the knowledge and motives of the defendant, the sex, station in life, previous habits of the plaintiff with reference to publicity, and other similar matters are considered". See above 154ff.

4) 1976 (1) SA 781 (RAD).

5) At 789.

6) S v I supra 784. Cf Fayd'herbe v Zammit 1977 (3) SA 711 (D) 719.

fault.[1] The list in each case, however, is not exhaustive.[2]

B. DEFENCES NEGATIVING WRONGFULNESS

The defences which rebut the wrongfulness of the defendant's conduct under the actio injuriarum and could be used to defeat a claim for invasion of privacy include the following: (i) justification; (ii) privilege; (iii) fair comment; (iv) consent; (v) necessity; (vi) self-defence; and (vii) statutory authority.[3]

1. Justification: It should be noted that justification as a defence to invasion of privacy will usually, but not necessarily be the same as justification in defamation where the elements are truth and public interest.[4] Whether or not the invasion is justified is a matter of policy which must be decided by weighing up the conflicting interests.[5] There is no closed list of situations which would justify a defendant's action,[6] and in the wide sense the defence applies to cases where although the defendant has the intention to injure and has invaded the plaintiff's privacy, the law does not recognize such invasion as wrongful. Thus the defence of justification only concerns the question of lawfulness.[7]

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1) For the distinction between wrongfulness and fault see above 150.

2) Cf Jordaan v Biljon 1962 (1) SA 286 (AD) 294; Muller v SA Associated Newspapers Ltd 1972 (2) SA 589 (C) 592.

3) It is conceded that the first three are usually associated with defamation, but it is submitted that they can be applied to invasion of privacy. Cf Fayd'herbe v Zammit supra 719. But cf Matiwane v Cecil, Nathan, Beatie & Co. 1972 (1) SA 222 (N) 227.

4) Cf Sutter v Brown 1926 AD 155, 172; Johnson v Rand Daily Mail 1928 AD 190, 204; Mahomed v Kassim 1973 (2) SA 1 (RAD) 9. Cf Neethling Privaatheid op cit 351: "Die verweer waarheid en openbare belang kom nie in hierdie verbond ter sprake nie aangesien, soos reeds aangevoer, privaatheid slegs deur die kennismedeling van ware private feite geskend kan word". Neethling Privaatheid op cit 295, does not regard the false light cases as falling under privacy. It is submitted that the defence of justification in privacy cases generally means "truth and public interest", but that "public interest" is the overriding consideration. Cf Fayd'herbe v Zammit supra 719. See below 319.

5) S v I 1976 (1) SA 781 (RAD 786.

6) S v I supra 784 f.

7) S v I supra 784: "The sole issue in this case ... is whether, in the circumstances, the appellants were justified in peeping through the window. Again put another way, were they justified in invading the complainant's privacy in the manner in which they did? If they were so justified, the fact that as a necessary consequence of this invasion of privacy the complainant's dignitas was injured is an irrelevant consideration".

In S v I[1] where the complainant was suspected of committing adultery with the appellant's husband it was held that the appellant was entitled to invade the former's privacy when seeking evidence of such adultery, provided such "invasion /was/ no more than was reasonably necessary for the purpose of obtaining that evidence".[2] Beadle ACJ observed however that:

> "there may be other circumstances, such as the reprehensible conduct of the complainant, which the modes of thought prevalent in the community might consider sufficient to justify the invasion of privacy even where the invasion was not a trivial one".[3]

A similar approach had been adopted by the court in Rhodesian Printing and Publishing Co Ltd v Duggan[4] where the respondents had unlawfully abducted the minor children of their previous marriages and taken them from the United States to Rhodesia.[5] It was held that although the respondents could interdict the publication of the story by the appellants on behalf of their children,[6] in respect of their own application the disclosures would have been justified.[7] The overriding consideration for whether or not the invasion is justified is often the fact that it is "in the public interest". This may sometimes arise because a person is either a public figure or disclosures concerning him are in the public interest.[8]

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1) Supra.

2) At 787. See above 218f.

3) At 784f.

4) 1975 (1) SA 590 (RAD).

5) See above 128.

6) At 595f.

7) At 593f.

8) Cf the Canadian case of Deschamps v Automobiles Renault Canada Ltée (1972) SC Mtl, unreported: "Clearly there are instances, such as the reporting of news and discussion of public issues and public figures, where the public interest may override private rights". Cf H Patrick Glenn "Right to Privacy in Quebec" (1974) 52 Canadian Bar R 297, 298. The South African Press Council Code of Conduct para 4 (b), provides that the press should: "exercise exceptional care and consideration in matters involving the private lives and concerns of individuals, bearing in mind that the right to privacy may be overridden by a legitimate public interest". (my italics) Cf K W Stuart The Newspaperman's Guide to the Law 2 ed (1977) 267.

(a) Public Figures: In spite of the courts' reluctance to allow people to publish facts concerning a person's private life, if the person happens to be a public figure such publication may be justified.

> "A public figure has been defined as a person who, by his accomplishments, fame, or mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs, and his character, has become a 'public personage'."[1)]

Where a person's way of life is directed to seeking publicity and he is regarded by the society in which he lives as a celebrity, for instance, an actor, entertainer, professional sportsman, politician or war hero, he is considered, to a certain extent, to have forfeited his right to privacy.[2)] Prosser suggests that there are three reasons for this approach: (i) such people have sought publicity and consented to it so they cannot object when they receive it; (ii) their personalities and affairs have already become public, and can no longer be regarded as their own private business; and (iii) the Press has a privilege to inform the public about them.[3)] But the fact that a person is a public figure does not entitle the public to know everything about him. For instance, a film star is entitled to be left alone while at home,[4)] an actress is entitled to privacy

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1) WL Prosser Law of Torts 4 ed (1971) 823; SH Hofstadter & G Horowitz The Right to Privacy (1964) 48, who fail to distinguish a "public figure" from a person who is catapulted into the news. Prosser Torts op cit 827, suggests that "the 'public figure' must have achieved that stature before there can be any privilege arising out of it, and that the defendant, by directing attention to one who is obscure and unknown, cannot himself create a public picture, or make him news". Cf Gertz v Robert Welch Inc (1974) 418 US 323, 345: "Public figures /assume/ roles of especial prominence in the affairs of society ... /and/ thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved". Cf A Hill "Defamation and Privacy under the First Amendment" (1976) 76 Columbia LR 1205, 1212f: Note 1976 Duke LJ 1016, 1018.

2) Prosser Torts op cit 824; cf Ed AH Robertson Privacy and Human Rights (1973) 49f.

3) Prosser Torts op cit 824.

4) Cf Bernard Blier v Societe 'France Editions et Publications' (1966) 2 JCP 14875, see above 10C.

concerning her intimate sexual relationships,[1] and the Press would have no right to pry into the private bank account of a famous sportsman or war hero.[2] Thus the unauthorized publication of a photograph of the Prime Minister or a Cabinet Minister in his private pool, or of a famous rugby player or racing driver relaxing in his home, would be regarded as an invasion but not if the Prime Minister of Cabinet Minister was carrying out a public duty or the sportsman or driver was engaged in his sporting activities.[3] The degree of such protection, however, varies from country to country.

In Italy the publication of the likeness of a famous person or historical event is permitted,[4] and the same applies in Germany in respect of portraits of persons "belonging to contemporary history".[5] The Swiss have a similar approach to the Germans,[6] while the French on the other hand, allow public figures the same right to privacy as anyone else, except that their sphere of privacy is less extensive.[7] In the words of the Paris Court of Appeal:

> "A person's right to his likeness is not subject to exception where stars and public personages are concerned, apart from the question of consent for the publication of a representation of their features: while such consent is presumed when the publication relates to the public life or professional activity of

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1) Cf Trintignan v Societe 'La France Continue' (1966) Dalloz 749; cf Robertson op cit 31. See above 100f.

2) DJ McQuoid-Mason "Invasion of Potency?" (1973) 90 SALJ 23, 29.

3) Cf SA Strauss, MJ Strydom & JC Van der Walt Die Suid-Afrikaanse Persreg (1976) 291.

4) Section 97, Italian Copyright Act; cf Robertson op cit 50.

5) Robertson op cit 50; cf Neethling Privaatheid op cit 88f.

6) Cf A Lögdberg "The Right in a Person's Own Likeness" (1967) 11 Scandinavian Studies in Law 213, 220.

7) Robertson op cit 50f; cf Neethling Privaatheid op cit 147.

> such a person, by reason of his tacit but unequivocal acceptance thereof by making himself an object of public interest, the same does not apply when the reproduction relates to his private life".[1)]

Furthermore, although this form of defence may sometimes avail where a public figure's privacy has been intruded upon or disclosures have been made concerning his private life, it will not succeed where such a person has been placed in a false light or his personality or likeness has been appropriated. Consequently the defence has failed in the so-called "advertising" cases.[2)] For instance, even the Emperor of Austria was given the right to prevent his name being used by an insurance company,[3)] and Count Zeppelin successfully objected to the registration of his name and portrait as a trademark for a certain brand of cigars and cigarettes.[4)]

It is submitted that the limiting factor for invasion of the privacy of "public figures" is whether or not such invasions are for the "public benefit or interest".[5)] Difficulties arise, however, where a previously publicly active person withdraws from public life. The American Restatement[6)] states that "public figures" and "persons thrust into the public limelight":[7)]

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1) Brigitte Bardot v Société de Presse Marcel Dassault (1967) Dalloz 450; Robertson op cit 51. (Robertson's translation)

2) Prosser Torts op cit 827.

3) Von Thodorovich v Franz Josef Beneficial Assoc (1907) 154 F 911 (ED Pa); Prosser Torts op cit 827.

4) Cited by HC Gutteridge "Comparative Law of the Right to Privacy" (1931) 47 LQR 203, 209. Cf the "Herrenreiter" case in Germany, (1958) 26 BGHZ 349, see above 87. Contra the English case of Clark v Freeman (1848) Ch 11 Beav 112, 83 Rev Rep 527. See above 75.

5) See below 319.

6) Restatement of Torts (1939) §867; Comment F; cf Mr & Mrs 'X' v Rhodesian Printing & Publishing Co Ltd 1974 (4) SA 508 (R) 513; Rhodesian Printing & Publishing Co Ltd v Duggan 1975 (1) SA 590 (RAD) 593.

7) See below 319f.

> "are the object of legitimate public interest during a period of time after their conduct or misfortune has brought them to public attention; until they have reverted to the lawful and unexciting life led by the great bulk of the community, they are subject to the privilege which publishers have to satisfy the curiosity of the public as to their leaders, heroes, villains and victims".[1)]

It follows from the above that once a person has resigned from public life, or once a hero or victim has retreated into the anonymity of his community, or a wrongdoer has made reparation, or a criminal has paid his debt to society and has been rehabilitated, the "veil of privacy" should be restored.[2)] This raises the difficult question of determining when disclosures concerning such persons cease to be in the public interest. Our courts adopt the attitude that generally it is not in the public interest to "rake up the ashes of the dead past",[3)] unless a person's current behaviour justifies such disclosures,[4)] but difficulties arise in respect of "news items" and matters of educational interest. Where should the courts draw the line?

> "One troublesome question ... is that of the effect of lapse of time, during which the plaintiff has returned to obscurity. There can be no doubt that one quite legitimate function of the press is that of educating or reminding the public as to past history, and that the recall of former public figures, the revival of past events that once were news, can properly be a matter of present public interest".[5)]

In the United States it seems that the courts are reluctant to bury the past if the disclosures about the plaintiff do not concern scandalous, immoral or criminal conduct by him. Where the plaintiff's

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1) My italics. See above 315 n 1. Cf Prosser Torts op cit 825.

2) Cf DJ McQuoid-Mason "Public Interest and Privacy" (1975) 92 SALJ 252, 254.

3) Graham v Ker (1892) 9 SC 185, 187; Lyon v Steyn 1931 TPD 247, 254. See above 268.

4) Yusaf v Bailey 1964 (4) SA 117 (W) 127. See above 270.

5) Prosser Torts op cit 827.

previous conduct was meritorious or praiseworthy the courts appear to treat the disclosures as in the public interest. This can be the only explanation for such decisions as Sidis v FR Publishing Corp.[1] and Stryker v Republican Pictures.[2]

In short it is submitted that the test for whether a person is a public figure should be: has he by his personality, status or conduct exposed himself to such a degree of publicity as to justify intrusion into, or a public disclosure of, certain aspects of his private life? However, non-actionable intrusions on his privacy should be limited to those that are in the public interest or for the public benefit, so that unjustified prying into personal affairs, unrelated to the person's public life, may be prevented.[3]

(b) Public Interest : Even though a person is not a public figure, disclosures concerning him may well be in the public interest.[4] These cases where a person is catapulted into the public eye, often

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1) (1940) 113 F 2d 806 (2 Cir). See above 174.

2) (1951) 108 Cal App 2d 191, 238 P 2d 670. See above 174. In Time Inc v Hill (1967) 385 US 374, the court held that in all "matters of public interest" in order to recover in cases of false light privacy the plaintiff must prove "actual malice" by the defendant (at 387f). Furthermore the distinction between "public" and "private" figures in such cases was irrelevant (at 391). See above 62f.

3) McQuoid-Mason op cit (1973) 90 SALJ 29. It is submitted that Hofstadter & Horowitz op cit 76, go too far by stating: "When a person becomes a celebrity or a public figure, he is a legitimate object of public interest and of news with respect both to his public life and his private affairs". (My italics) The latter can only refer to "private affairs" which touch on his "public life". See also Neethling Privaatheid op cit 341f. Cf Gertz v Robert Welch Inc (1974) 418 US 323, 352: "an individual should not be deemed a public personality for all aspects of his life".

4) See generally Neethling Privaatheid op cit 341f. "Public interest" is also a defence in certain Canadian provinces. It is a defence in Saskatchewan if the disclosure is reasonably believed to be of public interest (Saskatchewan Privacy Act, SS, 1974 c 80, s 2(a)); in Manitoba the belief must relate to publication in the public interest (Manitoba Privacy Act, SM 1970, c 74, s 5(f)(1)), while in British Columbia it will only be a defence if it is of public interest - irrespective of the defendant's belief (British Columbia Privacy Act, SBC 1968, c 39). See generally P Burns "The Law and Privacy : The Canadian Experience" (1976) 54 Canadian Bar R 1, 38. It is submitted that in our law as the defence of justification refers to lawfulness the reasonableness or otherwise of the defendant's belief is irrelevant. See above 313.

against his will, anf finds himself regarded as an instant celebrity or a legitimate subject for a "new item".[1] No matter how passively a person has lived in a society, he may suddenly find himself the innocent victim of some natural catastrophe, public scandal, or even a criminal attack, for instance, a woman who has been raped or indecently assaulted, or a bank manager who has been robbed by armed gangsters.[2] It could be argued that to a limited extent such people invite a degree of publicity (particularly in the case of a complainant in a criminal case),[3] but this is not true in respect of the victims of natural disasters or the relatives of both the victims and the wrongdoers. It is perhaps ironic that our law prohibits (except with the permission of the Minister of Police) the publication of photographs of a prisoner in custody to prevent "the humiliation of the prisoner, or his friends and relatives, while he is in prison",[4] although the relatives and friends themselves may be exposed to full publicity. In any event when should a disclosure be regarded as a valid "news item"? One approach is for the courts to insist that such items should be related to current events, and this has led to the difficulties mentioned above.[5] The same difficulty was recognized in England, and one of the provisions of Lord Mancroft's ill-fated Right of Privacy Bill[6] stated that, for an invasion of privacy

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1) Prosser Torts op cit 825: "Public figures for a season". Cf Neethling Privaatheid op cit 217.

2) Cf McQuoid-Mason op cit (1973) 90 SALJ 29f.

3) A certain measure of protection is given in the Criminal Procedure Act 51 of 1977. The court may direct any criminal proceedings to be held behind closed doors where it appears to be in the interests of State security, good order, good morals or the administration of justice (s 153(1)), or where there is "a likelihood that harm might result to any person other than the accused" (s 153(2)). Victims of indecent assaults, the procuration of indecent acts, and extortion or other similar statutory offence (or persons subjected to attempts to commit such offences) may request the court to be cleared (s 153(3)). In any event where the accused or a witness is under the age of 18 years the court will be cleared (s 153(4), s 153(5)). Where the court has directed the hearing to be behind closed doors it may prohibit the publication of certain information relating to the proceedings (s 154. Cf Act 56 of 1955, s 64(5), s 386(1), where the accused could give his consent to such publication). Information concerning such proceedings may however be published in a bona fide law report (s 154 (4)).

4) S v SA Associated Newspapers Ltd 1962 (3) SA 396 (T) 397; cf s 44(e)(ii) of Act 8 of 1959.

5) See above 318.

6) See above 79.

to be in the public interest, it had to be shown, inter alia, that at the time of publication the plaintiff was "the subject of reasonable public interest by reason of some contemporary event directly involving /him/ personally".[1] Such a provision would ensure, for example, that the relatives of a criminal or his victim would not be harassed by the press. In deciding whether a particular statement is for the public benefit our courts will consider not only the subject matter of the statement, but also all the circumstances surrounding the publication, and in particular "the time, manner and the occasion of the publication".[2] The contemporaneity approach however, cannot be satisfactorily applied to matters dealing with:

> "information or education, or even entertainment and amusement, by books, articles, pictures, films and broadcasts concerning interesting places of human activity in general, as well as the reproduction of the public scene in newsreels and travelogues".[3]

In such instances the courts will have to adopt the criterion of the particular society's prevailing boni mores in order to determine whether the publication is sufficiently offensive to be actionable.[4] Therefore where a defendant has appropriated the plaintiff's likeness for the purposes of art, education,[5] newsreels or travelogues, in some cases such appropriation may be regarded as being for the public benefit. Thus in the United States the courts have allowed a picture of a strike-breaker to illustrate a book on strike-breaking,[6] and that of a Hindu illusionist to illustrate an article on the Indian rope-trick,[7] where such pictures were "appropriate and pertinent" to the publications.[8] It is submitted that our courts should adopt a

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1) (1961) 229 House of Lords Debates 616; L Brittan "The Right of Privacy in England and the United States" (1963) 37 Tulane LR 235, 262; cf JE Juta "Some Comments on the Privacy of Public Figures in England and the United States" (1972) 1 NULR 21, 25.

2) Patterson v Engelenburg 1917 TPD 350, 361.

3) Prosser Torts op cit 825. See above 318.

4) See above 172; Cf Universiteit van Pretoria v Tommie Meyer Films 1977 (4) SA 576 (T) 387.

5) See Neethling Privaatheid op cit 347f, on scientific and artistic interests. Cf Universiteit van Pretoria v Tommie Meyer Films supra 388.

6) Kline v Robert M McBride & Co (1939) 170 Misc 974, 11 NYS 2d 674; cf Prosser Torts op cit 826.

7) Sarat Lahiri v Daily Mirror (1937) 162 Misc 776, 295 NYS 382, cf Prosser Torts op cit 826.

8) Prosser Torts op cit 826.

more cautious approach and only recognize such publications as being in the public interest where the subject is a public figure, or is thrust into the public limelight, or incidentally forms part of a group photograph or a newsreel crowd. Where, however, a person who has lived a quiet life (albeit having previously engaged in public affairs) is exposed to the glare of publicity without his consent, such a person should be allowed an action for invasion of privacy. Although the readers of the magazine may have been interested in the past life of the African artiste in Mhlongo v Bailey,[1] the plaintiff's interest in his privacy overrode the former's curiosity. Similarly while it was in the public interest to know about the need for recreation facilities at the hospital in Kidson v SA Associated Newspapers Ltd[2] such interest could not override the plaintiff's right to privacy.[3]

The defence of justification, however, is likely to overlap with several of the other defences which negate the wrongfulness of the defendants' conduct. It is submitted that the defence may be raised to defeat all forms of invasion of privacy.

2. Privilege: It is submitted that privilege as a defence to invasion of privacy should be treated on analogy with privilege in defamation.[4] Thus where the defendant can prove that he invaded the plaintiff's privacy on an occasion when he was entitled to in the exercise of a right or in discharge of a duty it will be a good defence.[5]

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1) 1958 (1) SA 370 (W). See above 127. An aggravating factor was that the defendants had deliberately published the photograph against the plaintiff's wishes (at 372). See above 168.

2) 1957 (3) SA 461 (W).

3) See above 130. Cf Brown op cit 556.

4) Cf SD Warren & LD Brandeis "The Right to Privacy" (1890) 4 Harvard LR 193, 216; Prosser Torts op cit 817; Hofstadter & Horowitz op cit 256; Yang op cit 187; Amerasinghe Actio Injuriarum 174. Cf Lord Mancroft's Bill in England, Neill op cit 393.

5) Cf RH Christie "Invasion of Privacy" (1971) 11 Rhod LJ 15, 16f; G Feltoe "Private Lives and Public Sins" (1976) 16 Rhod LJ 21, 30f.

> "[T]he basis in law of a defence of privilege is that it is for the common weal of society that in certain circumstances a person should be free to speak out, even if another is thereby defamed".[1)]

The defence includes both absolute privilege[2)] and qualified privilege.[3)]

(a) Absolute Privilege: If the defendant can show that the invasion was made on an occasion subject to an absolute privilege he will not be liable - even though he acted maliciously. Absolute privilege attaches to the following:

(i) Statements made in the course of any debate of proceedings before Parliament,[4)] the provincial councils,[5)] or the legislative assemblies in the "Bantu homelands",[6)] and South West Africa.[7)]

(ii) Statements made in the course of any debate or proceedings before the Coloured Persons Representative Council,[8)] or the South African Indian Council,[9)] other than statements concerning the Senate, the House of Assembly, a provincial council, a court of law, a statutory body of member thereof, or an officer of the public service.

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1) Per Holmes JA in Benson v Robinson & Co Ltd 1967 (1) SA 420 (AD) 433.

2) Cf RG McKerron The Law of Delict 7ed (1971) 189; NJ Van der Merwe & PJJ Olivier Die Onregmatige Daad in die Suid-Afrikaanse Reg 2ed (1970) 353f.

3) Cf McKerron Delict op cit 189f; Van der Merwe & Olivier op cit 354f.

4) Powers and Privileges of Parliament Act, 91 of 1963, ss 2, 8.

5) Powers and Privileges of Provincial Councils Act, 16 of 1948, sIA.

6) Cf Bantu Homelands Constitution Act, 21 of 1971, s 3A.

7) South West African Constitution Act, 39 of 1968, s 18(7); Development of Self-government for Native Nations in South West Africa Act, 54 of 1968, s 5B.

8) Coloured Persons Representative Council Act, 49 of 1964, s 16(3); cf Leon v Sanders NO 1972 (4) SA 637 (O) 641.

9) South African Indian Council Act, 31 of 1968, s 8(3).

(iii) Statements published by order or under authority of Parliament[1] or a Provincial Council[2] concerning any of its reports, papers, minutes, votes or proceedings.

Any invasion of privacy made within the scope of the above limitations will be absolutely privileged.

(b) Qualified Privilege: As with justification[3] this defence is also linked to public interest or benefit. For instance, often in the case of newspaper reports the press is merely exercising its public duty by publishing reports in the public interest on occasions protected by qualified privilege. Many defamation cases defended on the basis of privilege have facts similar to invasions of privacy. They have included the following: a prospective employer obtaining a character reference concerning an employee from an ex-employee;[4] a trader seeking a credit rating;[5] a relative advising another close relative about the character of the latter's daughter's suitor;[6] a parishioner informing the vestry of immoral conduct by the curate;[7] a person calling the police to interview another on a reasonable suspicion.[8] The main categories of qualified privilege are statements made: (i) in discharge of a moral or legal duty; (ii) in futherance of a legitimate interest; (iii) in the course of judicial proceedings; and (iv) in reports of parliamentary and judicial proceedings.[9]

(i) "Duty: In order for the defence to succeed the defendant must have a legal, moral or social duty to speak or a legitimate interest to protect and the listener must have a corresponding interest to receive

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1) Powers and Privileges of Parliament Act, 91 of 1963, s 29.
2) Powers and Privileges of Provincial Councils Act, 16 of 1948, s 9.
3) See above 313.
4) Monckten v BSA Co Ltd 1920 AD 324, 331.
5) Cf Morar v Casajee 1911 EDL 171, 180.
6) Fick v Watermeyer (1874) 4 Buch 86, 91. Cf Tromp v Macdonald 1920 AD 1, 4.
7) Davies v Davies (1883) 3 EDC 160, 165; cf De Waal v Ziervogel 1938 AD 112, 123.
8) Kleinhans v Usmar 1929 AD 121, 127; M De Villiers The Roman and Roman-Dutch Law of Injuries (1899) 208f.
9) See generally McKerron Delict op cit 189ff; Van der Merwe & Olivier op cit 355ff.

it.[1] Thus in Lappan v Corporation of Grahamstown[2] the defendants were required by the Grahamstown Municipal Act[3] to publish a list of names of ratepayers whose town and water rates were in arrears, and of the properties in respect of which they were due. Plaintiff's name appeared on the list, and although the payments were due, the corporation had omitted to demand payment from him for a number of years. As the statement was true and in fulfilment of a statutory duty it was held to be privileged.[4] It could also be argued that as most of the members of the public to whom the publication was made were ratepayers they had a legitimate interest in the publication. Similarly where the police in carrying out their duties invade the privacy of a person provided they are acting on a reasonable suspicion such an invasion will be privileged.[5] On the other hand in Mentor v Union Govt[6] where the police had legitimately employed dogs to assist in the investigation of a crime, and a dog had indicated the plaintiff by placing its paws on his shoulders and barking, it was held not to constitute an injuria on the basis that the measures used were reasonable and the dog had been mistaken in its identification.[7]

(ii) Interest: In the United States privilege has succeeded as a defence to invasions of privacy on occasions when the defendant has been protecting or furthering his own legitimate interests.[8] The courts have allowed: a telephone company to monitor calls on its own telephones;[9] filming to be used by a time and motion study organisation to raise the efficiency of its employees;[10] non-copyrighted

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1) Ehmke v Grunewald 1921 AD 575, 581.
2) 1906 EDL 41.
3) Act 18 of 1902, s 97.
4) Lappan v Corporation of Grahamstown supra 45.
5) See above 202f.
6) 1927 CPD 11.
7) At 15. The "mistake" on the part of the dog would appear to be irrelevant provided the measures used were reasonable.
8) Cf Hofstadter & Horowitz op cit 256.
9) People v Appelbaum (1950) 301 NY 738, 95 NE 2d 410; cf Prosser Torts op cit 818 n 74.
10) Thomas v General Electric Co (1962) WD Ky 207 F Supp 792; cf Prosser Torts op cit 818 n 74.

literature to be published by defendant, using the plaintiff's name to indicate its authorship;[1] and, defendants to disclose in their advertisements that plaintiff had designed certain dresses for them.[2] In S v I[3] the appellant could have been regarded as furthering her legitimate interest of obtaining evidence of her husband's adultery, but the court declined to label the defence as privilege, and seemed to prefer the broad basis of justification.

> "It was argued in the instant case that where the limitation to the right to privacy is based on the reprehensible behaviour of the complainant, the invasion of privacy is justified because the occasion is 'privileged'. The defence of 'privilege', however, is one that has developed when dealing with injuries to fama rather than with injuries to dignitas and had often caused great confusion in that branch of the law ... and I can see no virtue in trying to find a label for, and much less for plastering the label 'privilege' on, those occasions where the modes of thought of the community considers that, because of the reprehensible conduct of the complainant, the invasion of his privacy is justified in the particular circumstances of the case".[4]

It is submitted, however, that privileges is a suitable defence for situations where the defendant's statement is protected because of the occasion on which it is given. This applies particularly where the defendant is furthering an interest.[5] For instance, where a former employer gives a reference to a prospective employer concerning his erstwhile servant, and includes in such reference injurious and false statements about the latter's private life. Such statements would only be protected if they were germane to the inquiry[6] and not made maliciously.[7] Amerasinghe gives as an example of qualified privilege:

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1) Shostakovitch v Twentieth-Century Fox Film Corp (1949) 275 App Div 692, 87 NYS 2d 430; cf Prosser Torts op cit 818.

2) Brociner v Radio Wire Television Inc (1959) 15 Misc 2d 843, 183 NYS 2d 743; Prosser Torts op cit 818.

3) 1976 (1) SA 781 (RAD).

4) S v I supra 788f.

5) Christie op cit 16f; Feltoe op cit 30f.

6) De Waal v Ziervogel 1938 AD 112, 122; cf Pogrund v Yutar 1967 (2) SA 564 (AD) 570.

7) Basner v Trigger 1946 AD 83, 93f; cf PR MacMillan "Animus Injuriandi and Privilege" (1975) 92 SALJ 144, 158 who submits that "dolus directus" rather than "malice" defeats the defence of privilege.

> "the case of a creditor who writes to the employer of the plaintiff making statements about the plaintiff's private life which are injurious and false, though not defamatory, in order to collect a debt from the plaintiff. If such statements are not made 'maliciously' a qualified privilege would operate in the creditor's favour".[1)]

This statement appears to go too far, and it is submitted that in our law such an occasion would not be privileged. In Daubermann v Blumenfeld[2)] where the defendant wrote a letter to the plaintiff's superior stating that the latter's debts had not been paid it was held that the letter was defamatory.[3)] It is conceded, however, that the exception hinged on whether or not the contents of the letter were defamatory and the question of privilege was not raised. In general disclosures about another's debts can be regarded as invasions of privacy.[4)]

(iii) Judicial Proceedings: Statements made in the of judicial and quasi-judicial proceedings, provided they are relevant to the matter in issue, are also privileged. This applies to disclosures made in the pleadings or during a trial by parties to the suit,[5)] witnesses,[6)] advocates,[7)] attorneys,[8)] magistrates,[9)] or judges,[10)] provided they are germane to the issue and have some foundation in the evidence or circumstances surrounding the trial.[11)] It is submitted

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1) Amerasinghe Actio Injuriarum op cit 197.
2) 1934 NPD 314.
3) At 319.
4) See above 255.
5) Cf Basner v Trigger supra 107; Blumenthal v Shore 1948 (3) SA 671 (AD) 684f; Penn v Fiddel 1954 (4) SA 498 (C) 500.
6) Cf Preston v Luyt 1911 EDL 298, 330.
7) Basner v Trigger supra 105f; Pogrund v Yutar supra 570; cf Moolman v Slovo 1964 (1) SA 760 (W) 761f.
8) Ibid; cf Findlay v Knight 1935 AD 58, 70f; cf Gluckman v Schneider 1936 AD 151, 161.
9) Cf Preston v Luyt 1911 EDL 298, 330.
10) Ibid.
11) Pogrund v Yutar supra 570.

that in Nelson & Meurant v Quin & Co[1] the court could have based its decision on privilege in that any correspondence which is produced at a judicial inquiry is privileged provided it satisfies the above requirements.[2]

(iv) Reports of Parliamentary[3] or Judicial Proceedings:[4] Fair and accurate reports by newspapers, television or radio of such proceedings are regarded as being in the public interest and privileged[5] even though they contain defamatory matter and it is submitted that the same applies to invasions of privacy. Prosser explains the policy in the United States behind such a privilege as follows:

> "The privilege rests upon the idea that any member of the public, if he were present might see and hear for himself, so that the reporter is merely a substitute for the public eye - this, together with the obvious public interest in having public affairs made known to all".[6]

The same would seem to apply in our law. For instance it has been held that such privilege does not apply to the publication of documents

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1) (1874) 4 SC 46.

2) See above 327.

3) Hearson v Natal Witness Ltd 1935 NPD 603, 605. Furthermore the publication of any extract from, or abstract of, any report or paper ordered by Parliament to be published is subject to qualified privilege. Powers & Privileges or Parliament Act, 91 of 1963, s 30.

4) Webb v Sheffield (1883) 3 EDC 254, 258; Siffman v Weakley 1909 TS 1095, 1099; Van Leggelo v Argus Printing & Publishing Co Ltd 1935 TPD 230, 237ff; cf Murdock v Ellis 1956 (1) SA 528 (N).

5) McKerron Delict op cit 194; Van der Merwe & Olivier op cit 366f.

6) Prosser Torts op cit 830. Prosser Torts op cit 819 discusses the question under the heading of "Constitutional Privilege" which is guaranteed by the First Amendment. In Time Inc v Hill (1967) 385 US 374, the Supreme Court extended such constitutional privilege to privacy; cf Prosser Torts op cit 823.

filed in pending legal proceedings but not produced in open court.[1] It has also been suggested that privilege does not extend to matters heard in camera,[2] but where only portion of the hearing is in camera and the contents of the evidence heard in open court are published it has been held that what was heard in camera cannot be ignored.[3] Furthermore once a report of such proceedings has been published it seems that it cannot be continually exhumed, except by writers of law books or other learned works.[4] The privilege also attached to reports of proceedings of quasi-judicial bodies[5] and statutory bodies charged with carrying our public duties.[6] Prosser mentions that some states in America extend the privilege to public meetings where matters of public concern are discussed,[7] but this is not the case in our law,[8] and it is submitted that in such instances the better defence is justification.[9]

Although the case law referred to above concerns defamation it is submitted that the same principles apply to reports which incorporate disclosures concerning a person's private life. In many instances the defence of privilege will overlap with justification and it has been suggested that it be used sparingly.[10] In any event if

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1) Kingswell v Robinson 1913 WLD 129; Transvaal Chronicle v Roberts 1915 TPD 188; but contra Kavanagh v Argus Printing & Publishing Co 1939 WLD 284; cf Prosser Torts op cit 831f.

2) Van der Merwe & Olivier op cit 367.

3) Murdock v Ellis 1956 (1) SA 528 (N); 1956 (2) PHJ 16 (AD).

4) Cf McKerron Delict op cit 194 n 92.

5) Cf Penn v Fiddel 1954 (4) SA 498 (C) 500 (Rent Board).

6) Smith & Co v SA Newspaper Co (1906) 23 SC 310, 317; cf Benson v Robinson & Co (Pty) Ltd supra 426f.

7) Prosser Torts op cit 830.

8) Carbonel v Robinson & Co (Pty) Ltd 1965 (1) SA 134 (D) 151; cf Smith & Co v SA Associated Newspapers Co supra 318.

9) Cf MA Millner "Unbridled Privilege" (1958) 75 SALJ 133. See above 313

10) PH Winfield "Privacy" (1931) 47 LQR 23, 41f.

the plaintiff can show that the defendant was actuated by an improper motive the privilege will be forfeited.[1] It is interesting to note that a similar principle applies in the United States where the defence of Constitutional privilege can be defeated by "the plaintiff's proof of knowledge of falsity or reckless disregard of the truth".[2] It has been suggested, however, that this only applies to the false light cases.[3]

It is submitted that the defence of privilege can be raised where the invasion of privacy takes the form of either an intrusion[4] or publicity.[5]

3. Fair Comment: Warren and Brandeis advocated fair comment as one of the defences to invasion of privacy in their seminal article,[6] and Prosser points out that it has been subsumed under the head of "constitutional privilege" in the United States.[7] Amerasinghe also favours the defence in a privacy action,[8] while Winfield again cautions against its use for fear that it may lead to abuse of the freedom of the press.[9] For the defence to succeed the defendant would have to prove: (a) the statement is one of comment not of fact;[10] (b) the comment is fair;[11] and (c) the facts commented on were true, accurately stated and of public interest.[12] The defence would seem

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1) See above 156.

2) Prosser Torts op cit 821. Such knowledge is sometimes termed "actual malice" New York Times Co v Sullivan (1964) 376 US 254, 279f.

3) Brown op cit (1971) 23 Stanford LR 558.

4) See above 198.

5) See above 246.

6) Warren & Brandeis op cit 193ff. See above 52.

7) Prosser Torts op cit 822.

8) Amerasinghe Actio Injuriarum op cit 197.

9) Winfield op cit (1931) 47 LQR 41f.

10) Crawford v Albu 1917 AD 102, 114; cf Vorster v Strydpers Bpk 1973 (3) SA 482 (T) 486.

11) Ibid; Waring v Mervis 1969 (4) SA 542 (W) 546f.

12) Golding v Torch Printing & Publishing Co Ltd 1948 (3) SA 1067 (C) 1082f; Carbonel v Robinson & Co (Pty) Ltd supra 147f.

to apply to the publicity and false light cases,[1] and would fail if the plaintiff can prove spite or ill-will by the defendant.[2]

4. Consent: This is a valid defence to an action for invasion of privacy provided the invasion takes the form consented to.[3] Therefore in the case of publication of a person's photograph with his authority, if the form of publication does not comply with the plaintiff's consent, there is no defence. In O'Keeffe v Argus Printing & Publishing Co Ltd[4] the plaintiff had consented to her photograph being used to illustrate a news item, but not as an advertisement.[5] Similarly in Kidson v SA Associated Newspapers Ltd[6] the plaintiffs consented to their photographs being used to illustrate a nursing journal, but not in a nation-wide appeal for funds in a popular Sunday newspaper.[7] In any event the defence is volenti not scienti and will only avail where the plaintiff had "knowledge, appreciation and consent"[8] concerning the invasion. It has been suggested however that in some instances consent may be implied from the defen-

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1) Cf Prosser Torts op cit 827.

2) In which case the comment would no longer be fair. Cf Golding v Torch Printing & Publishing Co Ltd supra 1082f; Waring v Mervis supra 546; Prosser regrets the use of the term "malice" by the United States Supreme Court and suggests that the term "scienter" is a better one. Prosser Torts op cit 821.

3) Cf Amerasinghe Actio Injuriarum op cit 184f; Neethling Privaatheid op cit 34.

4) 1954 (3) SA 244 (C).

5) At 247.

6) 1957 (3) SA 461 (W).

7) At 464.

8) Cf Waring & Gillow Ltd v Sherborne 1904 TS 340, 344; SANTAM v Vorster 1973 (4) SA 764 (AD) 779f. This principle has been applied in defamation cases Jordaan v Delarey 1958 (1) SA 638 (T) 639; cf RG McKerron "Defamation: Defence of Volenti Non Fit Injuria" (1958) 75 SALJ 271. It has been suggested, however, that the defence of consent should not avail where the consent takes the form of a "dare" (ie there is a condition implied in the consent or if the defendant persists in the defamatory allegations he will be sued by the plaintiff). PQR Boberg "The Defence of Consent in a Defamation Action" (1961) 78 SALJ 54, 61.

dant's conduct.[1]

> "As iemand afgeneem word deur 'n fotograaf wat volgens sy kennis 'n persfotograaf is, en die omstandighede is so dat die gefotografeerde geredelik beswaar kan maak teen die afneem, kan mens nouliks tot 'n ander gevolgtrekking kom as dat hy tot so wel fotografering as publikasie toegestem het".[2]

It could be argued that the necessary knowledge, appreciation and consent is presumed in these circumstances, but this would not be the case if the person did not know that the person was a press photographer.[3]

It is submitted that in general our courts will require strict compliance with the requirements of knowledge, appreciation and

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1) In France, for instance, photographs of private persons taken in public places without their consent may not be actionable unless it places the subject in a false light or exposes them to ridicule. Cf Villard v Roches (1965) 2 JCP 14305; G Lyon-Caen "The Right to Privacy or New Scenes from Private Life" (1967) 14 Rev of Contemp Law 69, 75. Contra (1971) 4 JCP 16734; Patrick Glenn op cit 302 n 27. See above 89. It has been suggested that the defence of implied consent was impliedly rejected in two Quebec cases, Patrick Glenn op cit 302: In Deschamps v Automobiles Renault Canada Ltée [1972] SC Mtl, unreported, the court rejected the contention that because the petitioner had been careless in allowing 18 photographs to be taken without specifying their purpose he had impliedly consented to their publication. Similarly it seems implicit in the judgment in Field v United Amusement Corporation [1971] SC 283, that the petitioner by frolicking naked in front of the crowd at the Woodstock Festival had impliedly consented to observation by those in the vicinity, but not publication to the world at large. Patrick Glen op cit 302. See above 107f.

2) Strauss, Strydom & Van der Walt op cit 292.

3) But in the United States it has been held that consent to publication in one form may be interpreted as implied consent to publication in another form. In Johnson v Boeing Airplane Co (1953) 175 Kansas 275, 262 P 2d 808, where the plaintiff had consented to the publication of his photograph to illustrate a news article, and it was used by defendants to illustrate an advertisement, it was held that the plaintiff could not recover. (Cf. RG McKerron "Law of Delict" 1954 Annual Survey 126; Hofstadter & Horowitz op cit 85f. Contra the position in South African law: O'Keeffe v Argus Printing & Publishing Co supra 267). On the other hand where such consent is based on contract the terms and conditions thereof must be observed (Prosser Torts op cit 817). Where, however, such consent is given gratuitously it can be revoked at any time before the invasion of privacy occurs (Hofstadter & Horowitz op cit 73; Prosser Torts op cit 817). Furthermore those states with statutory provisions require the consent to be given in writing. (New York, Utah, Virginia, and Oklahoma; cf Hofstadter & Horowitz op cit 86).

consent,[1] before they will hold that the plaintiff consented to the invasion.[2] Furthermore there can be no consent where the plaintiff agrees under duress,[3] or in the case of clandestine tape recordings, even if one party agrees to such recordings.[4] In such cases the defence of consent cannot avail against the unconsenting party, and the defence of statutory authority[5] would have to be relied upon. Consent would appear to be a good defence to all forms of invasions: intrusions,[6] publication of private facts,[7] false light cases[8] and appropriation.[9] It has been suggested in the United States that "waiver" by public figures is not really consent as such persons have

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1) In Jordaan v Delarey 1958 (1) SA 638 (T) 639, it was held that where the plaintiff had asked the defendant to repeat a defamatory statement in the presence of the police he had consented thereto. It has been argued, however, that such consent was conditional. Cf Boberg op cit (1961) 78 SALJ 61. A strict interpretation of "informed consent" has been applied in Quebec (Rebeiro v Shawinigan Chemicals (1969) Ltd /1973/ SC 389, 390; cf Patrick Glenn op cit 302), and the defence of consent is also provided for in the privacy legislation of British Columbia (Privacy Act, SBC, 1968, c 39 s 3; Burns op cit 32) and Manitoba (Privacy Act SM 1970 c 74, s 5; Burns op cit 36).

2) Cf SANTAM v Vorster supra 779f. It may, however, be sufficient if in addition to knowledge and appreciation that his privacy may be invaded the plaintiff forsaw the risk of such invasion - provided the particular invasion which caused him harm fell within the ambit of the forseen risk. SANTAM v Vorster supra 780f.

3) Cf Spies NO v Smith 1957 (1) SA 539 (AD) 545.

4) Consent by one party cannot mean consent by the other. Neethling Privaatheid op cit 208. Cf CS Fishman "The Interception of Communications without a Court Order: Title III, Consent, and the Expectation of Privacy" (1976) 51 St John's LR 41. See above 213.

5) See below 337.

6) See above 198. Neethling Privaatheid op cit 383, submits that De Fourd v Cape Town Council (1898) 15 SC 399, 402 impliedly recognized consent as a defence to an invasion of privacy. See above 124.

7) See above 247. Cf Mhlongo v Bailey 1958 (1) SA 370 (W); see above 127.

8) See above 290. Cf Kidson v SA Associated Newspapers Ltd 1957(3) SA 461 (W); see above 129.

9) See above 300. Cf O'Keeffe v Argus Printing & Publishing Co Ltd 1954 (3) SA 244 (C); see above 131.

no right of privacy in regard to their "public lives",[1] but that in regard to their private lives the usual defences would prevail. It is submitted, however, that even in their public lives such public figures are entitled to protection against being placed in a false light or having their image or likeness appropriated without their consent.

5. Necessity. Where a defendant has acted of necessity to prevent a threat of greater harm to the person or property of himself,[2] or another,[3] arising from force of nature or conduct unconnected with the plaintiff[4] he will not be liable for injury caused to the plaintiff, provided his action was reasonably justified.[5][6] Neethling under the influence of German law submits that necessity may be a good defence to an action for invasion of privacy.[7] He gives the examples of: a person entering another's home to shelter from a storm or a riot; a doctor examining an unconscious person; and a father advertising for personal information concerning his missing son who is suffering from amnesia.[8] Other examples might be:

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1) Hofstadter & Horowitz op cit 76. Cf Neethling Privaatheid op cit 207. In France, however, it seems that a public figure attending a public function in his private capacity may forbid publicity thereof, although generally if he does not object to the publication he is presumed to have consented. Justice Report Privacy and the Law (1970) 20, para 90; cf "Current Legal Developments" (1966) 15 ICLQ 581; see above 101.

2) Voet 9.2.28.

3) Cf Stoffberg v Elliott 1923 CPD 148, 150.

4) Cf S v Goliath 1972 (3) SA 1 (AD) 10.

5) Cf Stoffberg v Elliott supra 150; S v Goliath supra 22.

6) E Newman & DJ McQuoid-Mason SA Law of Obligations (1978). Cf McKerron Delict op cit 74; Van der Merwe & Olivier op cit 80.

7) Neethling Privaatheid op cit 332f.

8) Neethling Privaatheid op cit 333.

searching through letters and other personal documents of an unconscious man to ascertain his identity or address; entering the room of a critically ill person to render assistance; or where a post office official discloses the contents of a "suicide" telegram or telephone conversation to a "suicides anonymous" or "lifeline" organisation in order that they may send help. The defence would seem to apply to both intrusions and publicity.

In several instances, however, cases of so-called necessity are also covered by the defences of privilege or justification. Neethling's examples of an employer seeking additional personal information concerning a prospective employee and in insurer obtaining similar data about a client[1] could be regarded as privileged. It could also be argued that where an employer protects his business interests by monitoring non-business telephone calls by his employees or uses a concealed television camera to detect thefts[2] his conduct would be protected by the defence of justification rather than necessity.

6. Private Defence. Where a defendant uses reasonable force to repel an immediate and unlawful attack on his personality or property of himself or another, by the plaintiff or his property, such defendant will not be liable to the plaintiff for any damage arising therefrom.[3] Neethling concedes that such a situation may seldom arise in matters of privacy, but suggests that it might occur where a private detective[4]

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1) Neethling Privaatheid op cit 334.

2) Neethling Privaatheid op cit 334f, who submits that continuous and intensive monitoring of telephone calls would be unlawful. The same would apply to the installation of television cameras in the toilets of workers. Neethling Privaatheid op cit 334 n 6. It is a question of what society regards as repugnant. See above 156. Cf P Stein & J Shand Legal Values in Western Society (1974) 197: "A supermarket may install cameras to reduce stock loss by pilfering ... Similarly the demands of consumer research may fully justify the installation by petrol companies of hidden cameras to observe the operations of a self-service pump system unfamiliar to the public ... /but/ one may well feel revulsion at ... similar use being made of such cameras to test secretly the reaction of the bereaved in a funeral parlour".

3) Newman & McQuoid-Mason op cit. Cf McKerron Delict op cit 74; Van der Merwe & Olivier op cit 69f.

4) As to private detectives see above 217.

is employed by a married woman to obtain evidence of her husband's extra-marital activities[1] or her fiancee's deceptions, or a person tape records abusive or insulting language used about him by another.[2] In all these cases the defendant is furthering or protecting his own interests and it is submitted that the better defence would be privilege.[3] Private defence could be applicable, however, where for instance: a woman publishes certain details concerning her previous marriage and her ex-husband publishes his version which includes additional personal information about his ex-wife; an unmarried woman falsely represents that a man is the father of her child and the putative father publishes facts concerning her private life which indicate that someone else may be the father; a person tape records his private conversation with another and the latter also records the conversation; or a woman discloses embarassing excerpts from private letters written by her ex-lover and he responds by publishing similar details from letters written by her. The defendants counter-action, however, must not exceed the bounds of what is reasonable in the circumstances.[4]

The defence of private or self-defence (noodweer) would seem to apply to both intrusions and publicity cases. The defence appears to overlap with compensatio or retorsion although McKerron doubts whether the defence of compensatio exists in our law apart from rixa or self-defence on a privileged occasion.[6] Nonetheless there is some authority for the recognition of the defence of compensatio in South African law[7] and there seems to be no reason either on principle or authority why it should not be recognized.

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1) Neethling Privaatheid op cit 335.

2) Neethling Privaatheid op cit 336.

3) See above 324.

4) Cf Rhodes University College v Field 1947 (3) SA 437 (AD) 463: "a man whose character or reputation or conduct has been assailed can say what is reasonably necessary to defend it and some latitude should be allowed in deciding what is reasonably necessary; he cannot, however, make unfounded charges against the plaintiff which are irrelevant for the purpose of his defence". Cf PQR Boberg "Law of Delict" 1968 Annual Survey 169f.

5) Digest 24.3.39; Voet 47.10.20; McKerron Delict op cit 205.

6) McKerron Delict op cit 205.

7) Cf Rabie v Fourie 1914 TPD 99, 101; Strydom v Fenner-Solomon 1953 (1) SA 519 (E) 540f.

7. Statutory Authority. Certain statutes may legalize invasions of privacy which would otherwise be unlawful. This is particularly true in South Africa where a person's racial classification[1] and political beliefs[2] may have a far-reaching effect on the degree of interference in his private life by the State. In most Western countries there is some provision for compulsory medical tests in certain circumstances[3] as well as the obligation to notify certain diseases[4] and to complete certain statistical[5] and revenue returns.[6] South Africa goes further, however, because of the State's policy of separate development. Therefore in this country the State interferes with a person's choice as to: his marriage[7] and sexual partners;[8] his school[9] or university;[10] his place of residence;[11] his entertainment;[12] and his political party.[13] Furthermore the

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1) Cf HR Hahlo & E Kahn South Africa: The Development of its Laws and Constitution (1960) 797; JD Van der Vyver Die Beskerming van Mensregte in Suid-Afrika (1975) 84ff. See above 12.

2) For instance where a person is a "listed" communist. Cf Internal Security Act, 44 of 1950, s 17 bis. See above 177

3) See above 237 n 1, 238 n 9.

4) See above 257.

5) Cf Statistics Act, 66 of 1976. See above 231.

6) Cf Income Tax Act, 58 of 1962. See above 234. Cf Stein & Shand op cit 198. See above 230 n 6.

7) Prohibition of Mixed Marriages Act, 55 of 1949, s 1. See above 128 n 1.

8) Immorality Act, 23 of 1957, s 16. See above 178 n 1.

9) Each race group must attend its own schools. Education for Whites is controlled by the Provincial Councils, Republic of South Africa Constitution Act, 32 of 1961, s 84(1)(c). Education for other races is controlled by the central government. Cf Bantu Education Act, 47 of 1953; Coloured Person's Education Act, 47 of 1963; and Indian Education Act, 61 of 1965.

10) Extension of University Education Act 45 of 1959, s 17, s 31. See above 178 n 1.

11) Group Areas Act, 36 of 1966, s 13. See above 178 n 1. Cf also Bantu Land Act, 27 of 1913; Bantu Trust and Land Act, 18 of 1936; Coloured Person's Settlement Act, 7 of 1946; Rural Coloured Areas Act, 24 of 1963.

12) Publications Act, 42 of 1974, s 8(1)(d). See above 241.

13) Prohibition of Political Interference Act, 51 of 1968, s 2. See above 178 n 1.

police are given wide powers of search[1] and detention without trial[2] and have the right to intercept postal communications[3] and telephone conversations.[4] In addition a person who is "listed" as a Communist is denied a remedy should the fact that he holds these unpopular political beliefs be made public.[5]

It is submitted that in general where the statutory authority is abused, as in the case of other defences which rebut the unlawfulness of the defendant's conduct, an action may lie for invasion of privacy. But even though a defendant's action is objectively unlawful he may still escape liability (unless the matter refers to a publication by the press[6]), by showing that he did not have animus injuriandi.[7]

C. DEFENCES REBUTTING ANIMUS INJURIANDI.

The defences which may be used to rebut animus injuriandi on the part of the defendant are not closed,[8] and may include mistake,[9] rixa,[10] jest,[11] and any other defence which shows that subjectively the defendant did not have the intention to injure like insanity[12] or intoxication.[13][14]

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1) Cf Criminal Procedure Act 51 of 1977, s 22. See above 203.

2) Cf Criminal Procedure Act 51 of 1977, s 185; Terrorism Act, 83 of 1967. See above 241.

3) Post Office Act, 44 of 1958, s 118A. See above 207.

4) Post Office Act, 44 of 1958, s 118A(2)(b). See above 212.

5) Internal Security Act, 44 of 1950, s 17 bis. See above 177.

6) See above 157.

7) Ibid.

8) Cf Jordaan v Van Biljon 1962 (1) SA 286 (AD) 294; Muller v SA Associated Newspapers Ltd 1972 (2) SA 589 (C) 592.

9) See below 339.

10) See below 345.

11) See below 345.

12) Cf Wilhelm v Beamish (1894) 11 SC 13, 15: Muller v SA Associated Newspapers Ltd 1972 (2) SA 589 (C) 592. But if the defendant's mental affliction is such that he appreciates the nature and effect of his act he will still be liable. Vaughan v Ford 1953 (4) SA 486 (R) 488f.

13) Cf Geyser v Pont 1968 (4) SA 67 (W) 72f; Muller v SA Associated Newspapers Ltd supra 592.

14) Geyser v Pont supra 72f: "Waarskynlik moet 'n verskil getrek word tussen verwere (a) wat slegs op die subjektiewe afwesigheid van animus injuriandi berus, en (b) wat op 'n objektiewe deur die reg geoorloofde verdedigingsgrond berus. Waarskynlik is (a) beperk tot gevalle soos skerts, vergissing, rixa, kranksinnigheid, dronkenskap, ens." (Per Trollip J)

1. Mistake: This defence is closely linked with the concept of animus injuriandi.[1] If the traditional approach is adopted,[2] there would be no defence to an action for invasion of privacy unless in addition to showing that he had no intention to injure, the defendant was also not negligent in his action.[3] The best examples of such mistakes are to be found in defamation. In Levy v Von Moltke[4] defendant had published a scurrilous anti-semetic pamphlet, signed "Rabbi" purporting to disclose the plans of the Jews in South Africa to destroy the country's traditional way of life with assistance from Moscow. Plaintiff was able to prove that non-Jewish people in Port Elizabeth knew him as "Rabbi" and attributed the document to him. It was held that lack of intention to refer to him was no defence.[5] Hassen v Post Newspapers (Pty) Ltd[6] on the other hand was a case of mistaken identity. Defendants had published a photograph purporting to be of a notorious Asian gangster "Lord Latib", taken outside the court where he was appearing on a charge for attempting to defeat the ends of justice. In fact the photograph was of plaintiff, a respectable and well-known Indian businessman, who successfully sued for defamation. Colman J after an exhaustive review of the authorities, concluded that a bona fide mistake may be a good defence:

> "only if the mistake is not attributable to the recklessness or negligence of the defendant or those for whose acts or omissions he is responsible".[7]

Hassen's case is criticized by Van der Merwe and Olivier[8] for negating the concept of consciousness of wrongfulness as an essential

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1) See above 147.

2) See above 148f.

3) Cf Norton v Ginsberg 1953 (4) SA 537 (AD) 550f; Hassen v Post Newspapers (Pty) Ltd 1965 (3) SA 562 (W) 576; Smith NO & Lardner-Burke NO v Wonesayi 1972 (3) SA 289 (RAD) 314f.

4) 1934 EDL 296.

5) Levy v Van Moltke supra 318. Cf Nasionale Pers v Long 1930 AD 87, 100. The court appeared to follow the traditional English approach. See above 148f.

6) Supra.

7) Hassen v Post Newspapers (Pty) Ltd supra 576. But contra SAUK v O'Malley 1977 (3) SA 394 (AD) 407.

8) Van der Merwe & Olivier op cit 382.

element of animus injuriandi as held in Maisel v Van Naeren,[1] but they appear to have overlooked the fact that Hassen's case involved defamation by the press.[2] Maisel's case held, inter alia, that animus injuriandi was an essential element of defamation[3] and that a bona fide mistake of fact was a good defence,[4] but was not concerned with publications by newspapers. The views expressed in Maisel's case were subsequently approved by the Appellate Division.[5]

If the subjective approach to animus injuriandi in defamation is extended by analogy to actions for invasion of privacy, there are two possibilities:

(i) Where the defendant is unaware that he is invading the plaintiff's privacy he cannot be said to have the intention to injure.

(ii) If the defendant bona fide believed that the invasion was made with a lawful purpose he is not conscious of the wrongfulness of his act.[6]

In either instance it would seem that mistake would be a good defence, although it is submitted that in the former case the court may infer dolus eventualis if the defendant knew that he was invading somebody's privacy but was reckless as to whether or not it was that of the particular plaintiff.[7] The defence of mistake can be applied to the following hypothetical examples:

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1) 1960 (4) SA 836 (C).

2) See above 157 n 3.

3) At 842.

4) At 850f.

5) Jordaan v Van Biljon 1962 (1) SA 286 (AD) 296; Craig v Voortrekkerpers Bpk 1963 (1) SA 149 (AD) 156f; Nydoo v Vengtas 1965 (1) SA 1 (AD) 14f; SAUK V O'Malley supra 403.

6) Maisel v Van Naeren supra 850f. See above 151.

7) Cf Digest 47.10.18.3. See above 156. Cf EM Burchell & PMA Hunt South African Criminal Law and Procedure (1970) I 141 who point out that it is no defence if the mistake is "non-essential". An example would be: where the defendant "merely mistakes the identity of the subject matter .. or of his victim". Burchell & Hunt op cit 252.

(a) A hotel guest carelessly mistaking the room to be his own opens the door of Mr and Mrs P who are staying at the hotel.[1] The defence of mistake is available to the guest as he had neither the intention to injure anyone nor was he aware that his act was wrongful.[2]

(b) Mrs S suspects that her husband is committing adultery with Miss P, and while mistaking the room to be Miss P's she carelessly opens the door of the respectable Mr and Mrs P who are in bed together.[3] The defence of mistake is available to Mrs S as although she intended to invade somebody's privacy (ie that of Miss P), she was not conscious of the wrongfulness of her act which was to obtain evidence of her husband's adultery.[4] If, however, her intention was not to obtain evidence of such adultery, but to assault her husband's paramour, she would be conscious of the unlawfulness of her act and the defence would fail.[5] The test for intention is subjective and therefore whether or not the mistake is reasonable is irrelevant.[6] Thus in criminal law if Mrs S is unreasonable but bona fide in her suspicions concerning her husband's adultery, or as

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1) Cf S v I 1976 (1) SA 781 (RAD) 788.

2) Amerasinghe Actio Injuriarum op cit 187, states that such conduct amounts to a mistake of fact.

3) Amicus Curiae "Criminal Injuria and the Jealous Wife" (1971) 88 SALJ 403; S v I supra 788.

4) Beadle ACJ in S v I at 786 seems to regard an invasion to prove adultery as lawful provided it is carried out in a reasonable manner: "How is an adulterous spouse who denies his adultery to be brought to book if he is not kept under observation and his privacy invaded? In the interests of society a balance must be struck".

5) Cf Johnstone v Stewart 1968 SASR 142. Cf S v I supra 787. See above 222.

6) Burchell & Hunt 256; cf JM Burchell "Is the Adulterer's Home their Castle? A Case of Criminal Injuria" (1976) 93 SALJ 265, 270. Burchell & Hunt seem to suggest that the consciousness of wrongfulness requirement applies to a mistake of fact, not of law (Burchell & Hunt op cit 134f). This principle also seems to apply in defamation cases. SAUK v O'Malley 1977 (3) SA 394 (AD) 407: "Dit moet bevestig word dat nalatigheid in ons reg geen aksie weens laster kan fundeer."

to the identity of the hotel room, she may escape liability because the mistake is one of fact[1] and reasonableness is not a requirement.[2] Furthermore, even where the mistake is one of law[3] (for instance, Mrs S did not know that it was unlawful to invade another's privacy), she could still succeed in her defence by showing that although she knew that usually her act would be wrongful, in the particular circumstances she bona fide mistakenly believed that she had a right to act as she did[4] (ie to invade the privacy of her husband's paramour in order to obtain evidence of adultery). It is submitted that similar principles apply in the law of delict.[5] In any event in Roman and Roman-Dutch law the defendant could rebut the presumption of animus injuriandi by proving that he had a bona fide belief that he was entitled to commit the act.[6] The reasonableness of the defendant's conduct is irrelevant except if it is so grossly unreasonable or reckless that dolus directus[7] or dolus eventualis[8] may be inferred. Misgivings have been expressed concerning the fact that a person may escape liability because of a mistake of law:[9]

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1) Burchell & Hunt op cit 140f, 250f; cf S v I supra 788. Cf Amerasinghe Actio Injuriarum op cit 187.

2) Burchell & Hunt op cit 253f. But contra Hassen v Post Newspapers (Pty) Ltd 1965 (3) 562 (W) 576. It is submitted, however, that Hassen's case concerned defamation by the Press where the defences are limited to those rebutting wrongfulness and that it was unnecessary for the court to consider the defences rebutting animus injuriandi. Cf SAUK v O'Malley supra 407. See above 157f.

3) Burchell & Hunt op cit 132f, 260f.

4) Burchell & Hunt op cit 265: "the defence of claim of right is nothing but the defence of ignorance or mistake of law in a different guise". Cf Canadian provincial legislation which states inter alia that the invasion must be "without claim of right" British Columbia Privacy Act SBC, 1968, c39, s 2(1); Maritoba Privacy Act SM, 1970, c74, s 2(1); Saskatchewan Privacy Act, SS, 1974, c80, s 2. See generally M Manning The Protection of Privacy Act (1974) 175ff.

5) Cf Van der Merwe & Olivier op cit 116.

6) McKerron Delict op cit 56f; De Villiers op cit 195f. See above 148

7) Cf Burchell & Hunt op cit 116. See above 164 n 1. Cf Van der Merwe & Olivier op cit 116: "Waar A 'n bepaalde gevolg beoog en veroorsaak, maar nie seker is of die veroorsaking van die gevolg onregmatig is nie, maar slegs die moontlikheid dat die gevolg onregmatig kan wees voorsien, is die verwyt wat hom van regsweë tog seker die van dolus directus en nie eventualis nie".

8) Cf Burchell & Hunt op cit 116. See above 156.

9) Cf Smith NO & Lardner-Burke NO v Wonesayi 1972 (3) SA 289 (RAD) 312. But cf S v De Blom 1977(3)SA 513 (AD) 529: "die opvatting 'ignorance of the law is no excuse' regtens nie van toepassing kan wees nie in die lig van die hedendaagse skuldbegrip in ons reg."

> "/P/olicy precludes acceptance of a universal proposition that mistake excludes dolus. There seems no good reason at all why everyone's reputation should be perpetually vulnerable to attack with impunity by every idiot or busybody well-informed as to calumny and ill-versed in elementary law. Moreover, in delict where the object of proceedings is repersecutory instead of penal and where it can seldom be called for to inflict an injuria upon another without due pause for the proper ascertainment of fact and law, there is even less reason than in criminal law to give full rein to what must surely be the most highly refined form of intention ever conceived - whatever the old authorities may say. Finally it is no accident that the overwhelming preponderance of our case law - albeit influenced by misconception and technicality - is in substance against the thesis that error always excuses".[1)]

It could be argued that similar considerations apply to invasions of privacy as the latter are also concerned with aspects of personality rights. It is submitted, however, that should scandalmongers and gossips carelessly pry into a person's private life, they may experience difficulty in convincing a court that they were genuinely mistaken and that they were not conscious of the wrongfulness of their acts. Nonetheless, if they are not conscious of the wrongfulness of their acts, they cannot be held liable.[2)] Where, however, they bona fide and mistakenly believe that although the act is prima facie wrongful they were entitled to act under "claim of right"[3)], it is submitted that they should not be held liable. Therefore in Maisel v Van Naeren[4)] it was held that a mistaken belief that a defendant's statement was privileged was a good defence,[5)] though it has been pointed out that this is the only case which has taken such a stand.[6)] An adoption of the principle in Maisel's case would mean that a mistaken belief that a person was a

1) PQR Boberg "Animus Injuriandi and Mistake" (1971) 88 SALJ 57, 68.
2) See above 150f.
3) See above 342 n 4.
4) 1960 (4) SA 836 (C).
5) At 850f.
6) McKerron Delict op cit 203 n 63a.

public figure, or that the invasion was in the public interest, or that the plaintiff had given his consent, or that invasion was justified, or that the occasion was privileged, or that the invasion amounted to fair comment, would be a defence, irrespective of the reasonableness of such belief.

The defence of mistake, however, would not apply where the disclosure was made by the press, as here the defences are restricted to those which rebut wrongfulness.[1] On this basis, therefore, the defendant in Hassen v Post Newspapers (Pty) Ltd[2] could not have escaped liability, and it is submitted that the same would have applied had the "Tobacco King" in SA Associated Newspapers Ltd v Schoeman[3] decided to sue for invasion of privacy. The fact that the defence of mistake cannot be raised by the press in "media" cases protects privacy at the expense of freedom of speech, whereas in "non-media" cases the converse is true. These competing interests, however, are to a certain extent balanced by the additional requirements of proof of wrongfulness[4] and impairment of personality.[5] The defence of mistake would apply whether the invasion of privacy takes the form of an intrusion or publicity.[6]

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1) See above 158. Cf Hassen v Post Newspapers (Pty) Ltd 1965 (3) SA 562 (W) 576f; Muller v SA Associated Newspapers Ltd 1972 (2) SA 589 (C) 593.

2) Supra.

3) 1962 (2) SA 613 (AD).

4) See above 170.

5) See above 181.

6) In the United States it seems that a defendant may escape liability in false light privacy cases involving "matters of public interest" by proving absence of "actual malice" in the case of disclosures concerning "public figures" (cf Time Inc v Hill (1967) 385 US 374) and lack of "fault" in respect of private individuals (cf Gertz v Robert Welch Inc (1974) 418 US 323). See above 62f. In Canada the Manitoba Privacy Act, SM, 1970 c 74, s 5(b), "makes it a defence for the defendant to show that he neither knew nor reasonably should have known that his act, conduct or publication constituting a violation of privacy would have violated the privacy of any person". Burns op cit 36. Thus the Manitoba Act requires the defendant to show that his mistake was not due to negligence. On the other hand the British Columbia Privacy Act, SBC, 1968, c 39, and the Saskatchewan Privacy Act, 1974, c 80 exclude negligence as a basis for liability. Burns op cit 37.

2. Rixa: A defendant will not be liable under the actio injuriarum where he acts without premeditation, in sudden anger or provocation by the plaintiff and did not subsequently persist in his conduct.[1] This principle has been applied in defamation cases[2] and it is submitted that it can also be raised against an action for invasion of privacy. The defence could apply, for instance, where after provocation during a quarrel somebody bursts into another's room or makes embarassing disclosures concerning his argumentative opponent's private life. If, however, the defendant persists in his conduct the court may draw an inference that he had the requisite animus injuriandi and the defence will fail.

3. Jest: In Roman and Roman-Dutch law it was a good defence to an action under the actio injuriarum that the words or conduct complained of were used by way of a "legitimate jest".[3] This applied in Roman law where a person persistently followed another[4] in order to play a game,[5] or made disclosures about another's "physical defect[6] ... without any intention of injuring but by way of fun and a joke during friendly intercourse".[7] The same applied in Roman-Dutch law,[8] and

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1) Kirkpatrick v Bezuidenhout 1934 TPD 155, 158; cf Peck v Katz 1957 (2) SA 567 (T) 573. McKerron Delict op cit 204.

2) Fradd v Jacquelin (1882) 3 NLR 144, 149; Kirkpatrick v Bezuidenhout supra 158; Wood NO v Branson 1952 (3) SA 369 (T) 373; Peck v Katz supra 573. The view in Peck v Katz supra 573 that rixa applies where the words are "meaningless abuse" cannot be correct as in such a case the words themselves are not defamatory. But cf Strauss, Strydom & Van der Walt op cit 284 n 84, who suggests that if the words are defamatory, rixa is not a defence, but should be taken into account when assessing damages. They do however concede that "Woede of toorn kan nie in sigself animus injuriandi uitsluit nie, behalwe as dit van so 'n ernstige graad was dat die verweerder ontoerekeningsvatbaar was, in welke geval opset onbestaanbaar is". Cf Van der Merwe & Olivier op cit 383. McKerron Delict op cit 205, submits that if the hearers "were unaware of the provocation under which they were uttered" the defendant would be liable. It is submitted, however, that if the defendant's anger was such as to make him "unconscious of any intention to defame" he should escape liability. Wood NO v Branson supra 373.

3) De Villiers op cit 195.

4) See above 33.

5) Digest 47.10.15.23.

6) See above 33.

7) De Villiers op cit 86f.

8) Voet 47.10.8.

it is submitted that these examples could be regarded as invasions of privacy in modern law.[1] It would not be a legitimate jest, however, where the defendant must have known that in the circumstances the words or conduct would be insulting, offensive or degrading.[2] Thus where a person tells a joke about the private life of one of a group of close friends who are exchanging jokes at a party jest may be a good defence, but not if the joke is told to a group of strangers. Similarly it may be acceptable for very close friends or relatives to hide in a person's bedroom as a joke, but not if the intruders are strangers.

McKerron submits that in the modern law of defamation the defence of jest will only succeed where it is apparent that the words "were not intended, and could not reasonably be understood, to be used in a defamatory sense".[3] Strauss, Strydom and Van der Walt suggest that as in the case of rixa[4] jest is not a defence but a factor to be taken into account when assessing damages,[5] while Van der Merwe and Olivier submit that if the joke could be misunderstood by reasonable bystanders an inference of dolus eventualis[6] may be drawn.[7] It is submitted that with the subjective approach to animus injuriandi[8] it can be argued that a legitimate jest does exclude intention,[9] and that whether or not the jest is legitimate depends upon the circumstances of each case. If the joke is illegitimate the defendant may not succeed in rebutting the presumption of animus injuriandi. The defence has been referred to by the courts in defamation cases[10] and there is no reason in principle why it should not apply to invasions of privacy.

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1) See above 32ff, 44ff.

2) De Villiers op cit 195.

3) McKerron Delict op cit 204.

4) See above 345 n 2.

5) Strauss, Strydom & Van der Walt op cit 285 n 88.

6) See above 156.

7) Van der Merwe & Olivier op cit 384.

8) See above 152.

9) Cf Geyser v Pont 1968 (4) SA 67 (W) 72f, where jest was referred to as one of the defences which rested upon the subjective absence of animus injuriandi.

10) Masch v Leask 1916 TPD 114, 116; Peck v Katz 1957 (2) SA 567 (T) 572f.

CHAPTER EIGHT

UTILITY AND FUTURE DEVELOPMENTS

A. UTILITY

The reason for the development of the recognition of a right to privacy was to combat the pressures exerted on an individual as the price he must pay for living in a technologically advanced society.[1] In common law countries new torts have had to be created to cope with the modern threats to privacy,[2] whereas civil law systems have extended existing principles of delictual liability.[3] Both jurisdictions have introduced statutory criminal penalties for certain invasions of privacy,[4] and in some legislation has been introduced[5] (or contemplated)[6] to protect the individual against misuse of information stored in data banks. In South Africa the utility of a common law action for invasion of privacy has not been fully realized,[7] and it is submitted that there are several instances where the action may be brought as an alternative to both widely accepted and doubtful delictual remedies.

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1) See above 7f.

2) Cf. United States, See above 52; British Columbia, Manitoba and Saskatchewan in Canada, see above 121.

3) Cf. Federal Republic of Germany, see above 86f; France, see above 97f; Canadian province of Quebec, see above 121f; South Africa, see above 123f.

4) Cf. United States, see above 64; United Kingdom, see above 78; Federal Republic of Germany, see above 89f; France, see above 98f; Canada, see above 124.

5) Cf. United States, see above 64; Federal Republic of Germany, see above 94; Canada, see above 124.

6) Cf. United Kingdom, see above 81f; France, see above 107.

7) For instance, a photograph of a naked Miss World, 1976, taken on a private occasion was published in a newspaper without her consent and she was advised not to sue. Cf. Rapport, 4 April 1976. A similar situation has arisen in the case of photographs of a topless Miss South Africa taken for private purposes and subsequently used on a record album. Rapport, 9 October 1977.

1. As an Alternative to Defamation.

Whereas defamation is an attack on the reputation of another, invasion of privacy affects the individuality of a person,[1] i.e. his dignitas.[2] Therefore an action for invasion of privacy is particularly useful where the plaintiff is unlikely to succeed in proving that the statement or action was defamatory, or that there was a defamatory innuendo attached to the words or conduct used, or that there was publication.

(a) Defamatory statements: Generally a defamatory statement is one which is calculated to expose the plaintiff to contempt, ridicule, hatred or diminished esteem in the eyes of others.[3] In the past one of the factors taken into account by the courts was that the statement was likely to cause the plaintiff to be shunned or avoided by his fellow-men,[4] but this view has now been rejected by the courts.[5] For instance in S A Associated Newspapers Ltd v Schoeman[6] Steyn CJ said:-

> "Vir sover omgang met medemense beskermde regsgoed is, is die beskerming nie van absolute aard nie, en vir sover dit deur 'n lasteraksie verleen word, is dit beperk." 7)

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1) H Patrick Glenn "Right to Privacy in Quebec" (1974) 52 Canadian Bar R 297, 299; cf F de Graaff "The Protection of Privacy in Dutch Law" (1976) 5 Human Rights 177, 184f: "In the case of /defamation/ ... the wrong is in the fact that someone's reputation is hurt ... In the case of /public disclosure of private facts/ ... it is not reputation which is at stake ... but rather the protection of someone's personal thoughts and feelings". See above. In defamation cases the plaintiff's fama is assailed and the effect on his dignitas is irrelevant. Mathews v Van Rooyen 1972(1) PH J17 (NC). See above 298.

2) See above 181.

3) RGM McKerron The Law of Delict 7 ed (1971) 171; Pitout v Rosenstein 1930 OPD 112, 115; JG Fleming Law of Torts 4 ed (1971) 468.

4) Marruchi v Harris 1943 OPD 15, 21; Jonker v Davis 1953 (2) SA 726 (GW) 730; Hassen v Post Newspapers (Pty) Ltd 1965 (3) SA 562 (W) 565; Omarjee v PostNewspapers (Pty)Ltd 1967 (2) PH J 33 (D).

5) SA Associated Newspapers Ltd v Schoeman 1962(2) SA 613 (AD) 616f; cf PQR Boberg "Defamation Per Consequentias" (1962) 79 SALJ 261, 262f. JM Burchell "The Criteria of Defamation" (1974) 91 SALJ 178, 200.

6) Supra.

7) SA Associated Newspapers Ltd v Schoeman supra 616f.

Thus if non-defamatory disclosures are made concerning the health of the plaintiff's children,[1] his religious beliefs, or his political affiliations in circumstances when he is not a public figure, and the disclosures are not in the public interest,[2] it is submitted that he could well succeed on a claim for invasion of privacy - as such disclosures or intrusions *per se* (except if they refer to his children)[3] would constitute an infringement of his *dignitas*.[4] Similarly in *Richter* v *Mack*,[5] although it was not defamatory for the defendants to mention that the plaintiff was a German, it may have amounted to an invasion of privacy.[6] A person who is a member of the Progressive Federal Party in a National Party stronghold or *vice versa*, may be embarrassed by non-defamatory disclosures concerning his membership. If he is not politically active why should his political preferences, which are in any event protected by the Legislature in a secret ballot,[7] be exposed to the public limelight?[8] The answer probably lies in the fact that such a disclosure would not be regarded as offending the prevailing *mores* of society, but it is submitted that there is no good reason why the political affiliations of a shy sensitive person who shuns any form of publicity should be made known to the public. It may no longer be defamatory to call a White

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1) See above 256. Unless such diseases were notifiable in terms of the Public Health Act, 36 of 1919, ss 19, 20. See above 257f.

2) In France such disclosures have been held actionable even though the plaintiff is a public figure; cf *Anne Philipe* v *Societé 'France Editions et Publications'* (1966) 2 JCP 14222 (health of child of famous actor); *Brigitte Bardot* v *Societé 'France Editions et Publications'* (1968) JCP 2136 (philosophical or religious convictions); See above 101

3) See below 356.

4) See above 181f.

5) 1917 AD 201, 206; cf *Burger* v *Leach* 1917 CPD 398, 400, 402. It seems however that the company in *Trichardt* v *The Friend Newspapers Ltd* 1916 AD could not sue for invasion of privacy, because a company cannot have *dignitas*. See above 166.

6) The disclosure itself, however, would have to be offensive to the prevailing *mores* of society eg. by the defendant stating that people should boycott the plaintiff's business because he is an 'enemy subject' and should be interned; cf *Richter* v *Mack* supra 206, 208. In any event should the plaintiff suffer pecuniary loss as a result of such a statement he may be able to recover for such loss, *Fichardt Ltd* v *The Friend Ltd* supra 7, 11, 13; *Richter* v *Mack* supra 206, 208. The court in *Fichardt's* case, however, erred by stating that such patrimonial loss was recoverable under the *actio injuriarum*. Ibid.

7) Electoral Consolidation Act, 46 of 1946, ss 58(1), 95, 171.

8) Cf *Fichardt Ltd* v *The Friend Ltd* supra 6f, 9f, 12f.

person Black,[1] but it could be argued that such a statement or the converse may constitute an invasion of privacy, where the person concerned is put in a false light or exposed to unaccustomed publicity.[2] It is not defamatory to say that a man has a "psychological block" about wanting to have intercourse with his ex-wife during their marriage,[3] but such a statement is clearly an invasion of privacy.[4]

(b) Defamatory innuendo: Where the onus is on the plaintiff to prove that words prima facie innocent have a defamatory meaning,[5] and he is unlikely to succeed in such proof, he may still be able to show that the words constituted an invasion of his privacy. Thus although there was no defamatory innuendo attached to saying that the plaintiffs in Kidson v SA Associated Newspapers Ltd[6] desired to meet members of the opposite sex, they should have been able to recover for the invasion of their privacy.[7] It is submitted that the same principle could have been applied in Good v Smith[8] where the court found that to chide a person for not joining up during World War II did not give rise to an innuendo that the plaintiff was a coward or sympathized with the Nazi cause.[9] Similarly in Botha v Shaw[10] the term "psychological block about wanting her" could not be understood to mean that a woman's husband suffered from impotency.[11] If the plaintiffs in Good's case and Botha's case had sued in the alternative for invasion of privacy they may well have succeeded in their actions.

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1) Maskowitz v Pienaar 1957(4) SA 195 (AD) 197; Taljaard v Rosendorf & Venter 1970 (4) SA 48 (O) 54; DJ McQuoid-Mason "Calling White Black" (1972) 1 NULR 14.

2) See above 273.

3) Botha v Shaw 1972 (1) SA 257 (O) 260.

4) J Neethling "'n Geval van Privaatheidskending?" (1972) 35 THR-HR 370, 374; DJ McQuoid-Mason "Invasion of Potency?" (1973) 90 SALJ 23, 31.

5) Cf Leslie v African Life Assurance Soc 1927 WLD 248, 252; Wallachs Ltd v Marsh 1928 TPD 531, 534, 544. Unie Volkspers Bpk v Rossouw 1943 AD 519, 524; Basner v Trigger 1945 AD 22, 32. McKerron Delict op cit 174f.

6) 1957 (3) SA 461 (W).

7) See above 130.

8) 1964 (4) SA 374 (N).

9) Good v Smith supra 377.

10) 1972 (1) SA 257 (O).

11) Botha v Shaw supra 260.

(c) Publication: In cases where the plaintiff is unable to successfully prove publication of a defamatory statement,[1] if the statement itself constituted an invasion of privacy the plaintiff may succeed on the latter basis.[2] Often such statements are actionable as injuriae or insults.[3] Even though communications between spouses do not constitute publication for defamation purposes,[4] they may amount to an invasion of privacy. For instance, if A tells his wife that B is suffering from venereal disease - it is submitted that this would be an invasion of B's right to privacy. Likewise it would be an invasion of privacy where defendant has intruded into plaintiff's private life, but has not disclosed what was discovered to third parties.[5]

Finally where a statement is not defamatory because it would only be so in the eyes of a particular section of society, rather than in the eyes of right-thinking members of society as a whole,[6] it may be advisable for a plaintiff to allege invasion of privacy as an alternative. It is conceded, however, that in order for the alternative allegation to succeed the defendants' conduct must be offensive to the prevailing mores of society,[7] which in many instances may coincide with the views of "right-thinking" members of society.

2. As an Alternative to Injuria Per Consequentias

In Roman[8] and Roman-Dutch law[9] a distinction was drawn

1) See above 348.

2) Ibid.

3) Cf Whittington v Bowles 1934 EDL 142, 151f; Brenner v Botha 1956 (3) SA 257 (T) 261f.

4) Whittington v Bowles supra 145.

5) Cf R v Holliday 1927 CPD 395. See above 199f.

6) Cf Fichardt Ltd v The Friend Newspapers Ltd supra 9; Conroy v Nicol 1951 (1) SA 653 (AD) 662; SA Associated Newspapers Ltd v Schoeman supra 617; Gayre v SA Associated Newspapers Ltd 1963 (3) SA 376 (T) 380.

7) See above 172f.

8) Digest 47.10.1.3; Institutes 4.4.2; CF Amerasinghe Aspects of the Actio Injuriarum in Roman Dutch Law (1966) 203.

9) Grotius 3.35.6; Voet 47.10.6; M de Villiers The Roman and Roman Dutch Law of Injuries (1899) 72. See above 47.

between a direct injuria to a third person flowing from the implication contained in the words used by the offender to someone else (eg. A calls B a bastard - implying that B's parents were not lawfully married),[1] and an injuria per consequentias for which a third person can sue, not because of an implied injuria to himself, but because of a close family tie with the person directly insulted (eg. A calls B's daughter a prostitute).[2] In many instances, however, the distinction is more apparent than real.[3] For instance, where a person calls another's wife a prostitute, is this a direct insult to the husband or does the latter's hurt arise from his relationship to his wife? In Banks v Ayres[4] a husband was allowed to recover for insult from a person who had written letters containing improper overtures to his late wife, while in Jacobs v Macdonald[5] a husband succeeded in a claim for insult from a person who had called his wife a prostitute. Boberg suggests that injuria per consequentias is no longer part of our law,[6] and that the examples in the case law are in fact based on the idea that the insult complained of is a direct reflection on the fama or dignitas of the plaintiff, as well as that of the relative so insulted.[7] This view is supported by the decision in Spendiff v East London Daily Despatch Ltd.[8] where the defendants published an article headed: "The Rand 1922 Strike Fund for Murderer's Dependants. Compulsory Levy on Labour members". The article mentioned the setting up of a fund by the Labour Party and there was an editor's footnote

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1) Miller v Abrahams 1918 CPD 50, 51, which failed on the pleadings as there was no allegation that it reflected on plaintiff personally. Cf Sudu Banda v Punchirala (1951) 52 New L R 512, 515; Amerasinghe Actio Injuriarum op cit 200.

2) Amerasinghe Actio Injuriarum op cit 203f.

3) Amerasinghe Actio Injuriarum op cit 201f.

4) (1888) 9 NLR 34, 39.

5) 1909 TS 442, 443. Cf RG McKerron The Law of Delict 7 ed (1971) 55 n 23: It should be noted that the basis of the decision was not that the words complained of were per consequentias defamatory of the plaintiff, but that by necessary implication they constituted an impairment of his dignitas.

6) PQR Boberg "Defamation Per Consequentias" (1962) 79 SALJ 261,263.

7) Cf HR Hahlo & E Kahn South Africa: The Development of Its Laws and Constitution (1960) 525.

8) 1929 EDL 113.

stating: "The men mentioned were convicted of murder and executed." Plaintiffs who were the widow and children of one of the deceased strikers sued for defamation. Van der Riet J assumed that:

> "the action no longer rests upon the Roman Law of injury 'per consequentias' but upon a direct injury to the status of the plaintiff".[1)]

The learned judge then went on to say:

> "It is almost unthinkable that the sons of any person caluminously referred to as a criminal should have an action as well as their father if he only be mentioned (whatever may be their rights if they themselves are maliciously and falsely referred to as the sons of a convicted criminal). Although therefore it may be natural that a son may be wounded in his self-esteem if his father be so referred to, I think that under our law he has no right of action unless he himself was directly referred to and the false statement concerning his father was therefore an actual attack upon himself."[2)]

McKerron suggests that the principle of actio injuriarum per consequentias should be confined to the husband and wife relationship on the basis that it is "the most intimate of human relationships",[3)] but it is submitted that an argument can also be made for extending it to a parent and child relationship where the latter are "subject to his power or who are the objects of his natural affection".[4)] Notwithstanding Boberg's contention that the insults to the husbands in Bank's case and Jacobs' case constituted

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1) Spendiff v East London Daily Desptach Ltd supra 129f. It has been suggested that Van der Riet J (at 132) and Pitman J (at 137) accepted that to say a man was a "murderer" "was also slanderous of his wife and minor sons" Amerasinghe Actio Injuriarum op cit 200.

2) Spendiff v East London Daily Despatch Ltd supra 131; cf Goodall v Hoogendoorn Ltd 1926 AD 11, 15; Whittington v Bowles supra 151 (which misinterpreted Spendiff's case); Pike v Wesson 1938 EDL 373, 376.

3) McKerron Delict op cit 55.

4) Voet 47.10.6. It is conceded, that the word "power" should not be given the meaning of patria potestas, but rather that of legal control over a dependant minor. Cf Amerasinghe Actio Injuriarum op cit 209.

a direct insult to each of them,[1] the court in Banks' case appeared to recognize the existence of the per consequentias action:

> "Now without going so far as to say that this doctrine ought to apply to all cases of injuriae, I think there are cases in which an insult to a wife is also an insult to her husband though it might not be directly levelled against him. There are certain things which, if said of a man's wife, imply necessarily contumelia to the man - amount to an impairment of his dignitas, the dignity and freedom from insult which every citizen is entitled to enjoy".[2]

The matter has not yet been settled by the Appellate Division, although in SA Associated Newspapers Ltd v Schoeman[3] counsel for the plaintiff appeared to concede that the action was no longer applicable in modern law.[4] Amerasinghe suggests that the per consequentias action always concerns injury to dignitas and never to fama or corpus.[5] For instance, although a defamatory statement is made concerning a man's wife, e.g. that she is a prostitute, the injury suffered by the husband is to his dignitas not his reputation. It is submitted, however, that in some instances the plaintiff may be able to establish an innuendo which reflects upon his reputation eg. that he is the sort of person who consorts with prostitutes or that he lives off his wife's immoral earnings.

In view of the current uncertainty concerning the recognition of an action for injuria per consequentias there may be situations which in Roman-Dutch law would give rise to such an action, but

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1) Boberg op cit (1962) 79 SALJ 263 states: "The writer goes further, however, and submits that Banks' and Jacobs' cases are not authority for applying the principle even to the husband-and-wife situation, for perusal of these decisions shows that the court regarded the statement made of the wife as a direct reflection upon the fama of the husband as well". Contra Amerasinghe Actio Injuriarum op cit 206.

2) Per Innes CJ in Banks v Ayres supra 443.

3) 1962 (2) SA 613 (AD).

4) SA Associated Newspapers Ltd v Schoeman supra 614. The court granted leave to amend the claim to injuria but unfortunately the plaintiff withdrew his action. Boberg op cit (1962) 79 SALJ 263f.

5) Amerasinghe Actio Injuriarum op cit 206.

which in our law could also be regarded as invasions of privacy. Our courts would be unlikely to recognize an action for defamation of a deceased person,[1] although Roman[2] and Roman-Dutch law[3] allowed an action in favour of the deceased's heirs, widows and children.[4] On the other hand when the plaintiff proceeds against the defendant, not for the injury to the deceased parent, husband or child, but rather to assuage his own hurt feelings, there seems to be no reason in principle why such a plaintiff should not recover. Such an action could arise where unpleasant disclosures or reminders concerning a deceased member of the plaintiff's family are made in such a manner that the plaintiff himself is identified and referred to. This is not, however, identical to the Roman-Dutch per consequentias action as here plaintiff would be claiming for the invasion of his own privacy rather than for the injury to his deceased relative. Therefore if in Spendiff v East London Daily Despatch Ltd[5] the newspaper had published an article about the late Mr. Spendiff, falsely referring to him as a convicted murderer, and mentioning his dependants by name several years after he had been in the public eye, it is submitted that the latter may have recovered for invasion of privacy.[6] Similarly if a newspaper were to publish a report 20 or 30 years after World War II concerning the exploits of certain executed Nazi war criminals, together with a brief account of the present whereabouts and mode of living of their descendants, the report concerning the

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1) McKerron Delict op cit 183; cf Spendiff v East London Daily Despatch Ltd 1929 EDL 113.

2) Digest 47.10.1.4.6

3) Voet 47.10.5.

4) McKerron Delict op cit 182. Cf Netherlands Civil Code, Article 1411; NJ van der Merwe and PJJ Olivier Die Onregmatige Daad in die Suid-Afrikaanse Reg 2 ed (1970) 348 n 75.

5) Supra.

6) It could however be argued that as members of a particular political party were contributing funds to be used to support the dependants of an alleged murderer such a disclosure was in the public interest. See above 319.

atrocities perpetrated by the war criminals would not be an invasion of privacy, even though it opens up old wounds, but the disclosures about their descendants would be. The disclosures concerning the whereabouts of the descendants would in themselves constitute an invasion,[1] and the linking of such descendants with their notorious ancestors would be an aggravating factor. In SA Associated Newspapers Ltd v Schoeman[2] defendants had falsely reported that plaintiff's son had been charged under the Immorality Act.[3] Plaintiff alleged that the report was defamatory, but it was held not defamatory to say of a person that his son has been charged with a crime.[4] Counsel for the plaintiff conceded that injuria per consequentias had no application in modern law,[5] but it is submitted that the plaintiff should have sued in the alternative for invasion of privacy in that he had been placed in a false light in the public eye.[6] It was an unwarranted interference with his privacy to link him with the person alleged to be his son. Even though a person is a prominent business man in the community and is often in the public eye, he is entitled to protection from being placed in a false light.[7] In any event the fact that the "Tobacco King" was mentioned personally did not amount to an injuria per consequentias but was a direct invasion of his privacy. Furthermore on the facts in Schoeman's case there would not have been an action per consequentias in Roman-Dutch law as Voet stated that the action did not apply to emancipated children.[8]

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1) See above 247.
2) 1962 (2) SA 613 (AD).
3) Act 23 of 1957.
4) SA Associated Newspapers Ltd v Schoeman supra 617.
5) Cf McKerron Delict op cit 182 n 94.
6) See above 290.
7) Ibid.
8) Voet 47.10.6.

In the United States similar problems arise in respect of the so-called "relational" right of privacy, where relatives of a deceased or living person attempt to claim for injury caused to their feelings by the publication of disclosures concerning a member of the family.[1] Prosser points out that the general rule is that the plaintiff's right is a personal one which does not extend to his relations unless their own privacy is invaded along with his.[2] Nonetheless the American decisions are conflicting. Thus an action for a "relational" invasion of privacy arising from a publication concerning a deceased relative has failed[3] when brought by: children for false representations that their deceased father was dishonest and guilty of bribing public officials;[4] a husband for publication of a photograph of his wife in a story of her sensational suicide;[5] a sister for a false report that her brother had died as a "dope-sodden derelict";[6] the widow of Jesse James Jr for a television film which wrongfully portrayed the outlaw's life;[7] a mother for the anguish caused by a magazine article on the murder of her son;[8] an administrator of her estate and the deceased's 9 children for a story concerning her rape and murder;[9] a father for the publication of a photograph of his deceased drug-addicted son;[10] a widow for the use of her

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1) IJ Schiffres "Invasion of Privacy by Publication Dealing with One Other than the Plaintiff" (1968) 18 ALR 3d 873, 874f.

2) WL Prosser Law of Torts 4 ed (1971) 814f.

3) See generally Schiffres op cit (1968) 18 ALR 3d 876ff.

4) Gruschus v Curtis Publishing Co (1965) 342 F 2d 775 (CA 10 NM).

5) Metter v Los Angeles Examiner (1939) 35 Cal App 2d 304, 95 P 2d 491.

6) Kelly v Johnson Publishing Co (1958) 160 Cal App 2d 718, 325 P 2d 659.

7) James v Screen Gems Inc (1959) 174 Cal App 2d 650, 344 P 2d 799.

8) Waters v Fleetwood (1956) 212 Ga 161, 91 SE 2d 344; cf Bradley v Cowles Magazine Inc (1960) 26 Ill App 2d 331, 168 NE 2d 64.

9) Carlson v Dell Publishing Co (1965) 65 Ill App 2d 209, 213 NE 2d 39. A claim for commercial exploitation of Al Capone by the administratrix of his estate, his widow and his son, also failed. Maritote v Desilu Productions Inc (1965) 345 F 2d 418 (CA 7 Ill) 18 ALR 3d 863.

10) Rozhon v Triangle Publications Inc (1956) 230 F 2d 359 (CA 7 Ill).

deceased husband's name and likeness on a cigar label;[1] parents for pictures of the mutilated body of their daughter who had been killed in a motor collision;[2] and the great-grandchildren of a composer for a film 100 years after his death depicting him and his sister as insane.[3] On the other hand a "relational" right to privacy appears to have been recognized where: a photograph of the naked body of plaintiff's deceased baby child born with its heart outside was published without their consent;[4] the plaintiff's wife bore Siamese twins joined from the shoulder down who died shortly after birth, and the defendant who had been engaged by the parents to photograph the babies subsequently published the photograph without the parents' consent;[5] and an undertaker took a picture of the body of the plaintiff's deceased husband as it was being moved from an aircraft, and used it for advertising

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1) Atkinson v John E Doherty & Co (1899) 121 Mich 372, 80 NW 285, 46 LRA 219; cf Schuyler v Curtis (1895) 147 NY 434, 42 NE 22, 31 LRA 286; 148 NY 754, 43 NE 989(statue of a "woman reformer"). Both cases, however, were decided before invasion of privacy was generally accepted as a tort in the United States. See above 53f. In France a person's image or likeness may only be used after his death with the consent of his family. Ed AH Robertson Privacy and Human Rights (1973) 49. See also WA Joubert Grondslae van die Persoonlikheidsreg (1953) 58. See above 94. In the Federal Republic of Germany an action based on personality rights to interdict the posthumus publication of Nietzsche's private letters failed, but succeeded on the basis of copyright. HC Gutteridge "Comparative Law of the Right to Privacy" (1931) 47 LQR 203, 205. Cf A Lögdberg "The Right in a Person's Own Likeness" (1967) 11 Scandinavian Studies in Law 213, 216 (death-bed photograph of Bismarck). See above 84.

2) Kelley v Post Publishing Co (1951) 327 Mass 275, 98 NE 2d 286. Cf Milner v Red River Valley Publishing Co (1952) 249. SW 2d 227 (Tex Civ App). Contra Sellers v Henry (1959) 329 SW 2d 214 (Ky).

3) Schumann v Loew's Inc (1955) 144 NYS 2d 27 (Sup).

4) Bazemore v Savannah Hospital (1930) 171 Ga 257, 155 SE 194. See above 262.

5) Douglas v Stokes (1912) 149 Ky 506, 149 SW 849, 850: "The most tender affections of the human heart cluster about the body of one's dead child. A man may recover for any injury or indignity done the body, and it would be a reproach to the law if physical injuries might be recovered for, and not those incorporeal injuries which would cause much greater suffering and humiliation." Douglas' case did not directly refer to invasion of privacy, but it has been suggested that this is the only possible basis for the decision. Brents v Morgan (1927) 221 Ky 765, 299 SW 967, 55 ALR 964. Cf Schiffres op cit (1968) 18 ALR 3d 882 n 13.

purposes.[1] Hofstadter and Horowitz argue that such cases have usually been decided on some ground "other than bare right of privacy, like contract or trust and confidence".[2] The decision in Sellers v Henry,[3] however, appears to recognize a right to privacy in such cases. In Seller's case the defendant, a police officer, had published a photograph of the plaintiff's young daughter taken while she lay dead in a crashed motor car. The court seemed to accept that the publication was an invasion of privacy as it held that it was necessary to clarify the purpose of the publication and whether it was in the public interest.[4] In any event several of the actions for "relational" invasion of privacy have failed because the disclosures were in the public interest.[5] Similarly, "relational" actions arising out of the invasion of privacy of a live relative have also failed. Damages were refused where parents sued for publicity concerning their son's arrest, trial and acquittal on a charge of unlawful assembly which resulted in irreparable harm to the father's accountancy practice,[6] and where a husband sought to recover for an invasion of his wife's privacy.[7]

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1) Fitzsimmons v Olinger Mortuary Assoc. (1932) 91 Colo 544, 17 P 2d 535. In Fitzsimmons' case, however, the advertisement included the names of the plaintiff and the deceased and it could be argued that it was a direct invasion of the former's privacy. The action was grounded, however, on breach of contract.

2) SH Hofstadter & G Horowitz The Right to Privacy (1964) 179.

3) Supra. Contra Kelley v Post Publishing Co Supra. In Oklahoma, Utah and Virginia a "relational" right of privacy is recognized by statute. Prosser Torts op cit 815.

4) Cf Hofstadter & Horowitz op cit 122f.

5) Cf Smith v Doss (1948) 251 Ala 250, 37 So 2d 118, although the court observed that there seemed to be no reason why the right of privacy of daughters could not be impaired by "unwarranted and offensive publicity" concerning their deceased father. Schiffres op cit (1968) 18 ALR 3d 882; Abernathy v Thornton (1955) 263 Ala 496, 83 So 2d 235; Bremmer v Journal-Tribune Publishing Co (1956) 247 Iowa 817, 76 NW 2d 762; Mahaffey v Official Detective Stories Inc (1962) 210 F Supp 251 (DC La). Cf Corliss v EW Walker Co (1894) 64 F 280, 31 LRA 283. Waters v Fleetwood (1956) 212 Ga 161, 91 SE 2d 344. See above.

6) Coverstone v Davies (1952) 38 Cal 2d 315, 239 P 2d 876; 344 US 840, 97 L ed 653, 73 S Ct 50.

7) Cox v Magnum Publications (1955) 285 App Div 1083, 140 NY S 2d 27; Russell v Marboro Books (1959) 18 Misc 2d 166, 183 NYS 2d 8.

A husband was however entitled to recover where a doctor took an unauthorized photograph of his wife while undergoing medical treatment.[1)]

It seems trite that in South African law there can be no action for the invasion of the dead child's privacy,[2)] but can its parents suffer an actionable invasion per consequentias? It is submitted that the publication of a picture of a deceased or deformed child is an invasion of the privacy of its parents who may suffer greatly from the reminder of their misfortune.[3)] Albeit that generally such an action may no longer lie in our law for insult or defamation (except perhaps where there is a husband and wife relationship)[4)] it is submitted that there is scope for an invasion of privacy action where the disclosures concern physical abnormality of, or acute suffering by, a member of a family (eg. a deceased parent or child).[5)] The better view, however, is that the plaintiffs in this a situation are claiming for the direct hurt to their own feelings and that it is not really a per consequentias action. Therefore provided the relative is mentioned in such a way that the plaintiffs themselves are also identified they should succeed in an action for invasion of privacy. Such an approach would not be inconsistent with the decisions in Miller v Abrahams,[6)] Gelfard v Shrock,[7)] and Spendiff v East London Daily Despatch Ltd.[8)]

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1) Clayman v Bernstein (1940) 38 Pa D & C 543. See above 252.

2) Cf McKerron Delict op cit 183. Banks v Ayres (1888) 9 NLR 34, is distinguishable in that the wrong was perpetrated on the plaintiff's wife before she died.

3) See above 358 n 5.

4) See above 353.

5) It is interesting to note that Lord Mancroft's Bill was partly aimed at protecting relatives of criminals or their victims from harrassment by the press, by providing that disclosures concerning them would only be in the public interest if the event: (a) was contemporary, (b) involved the relative personally and (c) it was reasonably necessary to disclose the plaintiff's identity. L Brittan "Right of Privacy in England and the US" (1963) 37 Tulane L R 235, 262f.

6) 1918 CPD 50, where the plaintiff's daughter was called "a dirty black b..." and the plaintiff had failed to allege that it reflected on her eg. by stating that both she and her husband were White (Miller v Abrahams supra 51).

7) 1916 CPD 350, where the plaintiff also failed on the pleadings when he sued for assault and defamation of his wife, defamation of his child and in his personal capacity, but had joined his wife's and child's action as one and had omitted to set out the nature of the injury suffered by himself (Gelfard v Shrock supra 352).

8) 1929 EDL 113.

3. As an Alternative to Injurious Falsehood

A person who knowingly and intentionally publishes a false statement concerning another which causes that other pecuniary loss is liable to an action for damages for injurious falsehood.[1] The requirement of proof of pecuniary loss,[2] indicates that the action falls under the lex Aquilia rather than the actio injuriarum,[3] and therefore the suggestion in Fichardt Ltd v The Friend Newspapers Ltd[4] that the wrong is an injuria and the remedy the actio injuriarum is clearly incorrect.[5] The usual examples of injurious falsehood concern the false denial of another's title to property;[6] the false disparagement of a rival trader's goods;[7] and a trader passing-off of his goods as those of a rival.[8] In all cases the plaintiff must prove either patrimonial loss or a well grounded apprehension of such loss when he applies for an interdict.[9]

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1) E Newman and DJ McQuoid-Mason South African Law of Obligations (1978) ; cf RG McKerron The Law of Delict 7 ed (1971) 213f.

2) Fichard Ltd v The Friend Newspapers Ltd 1916 AD 1, 7, 11; Van Zyl v African Theatres (Pty) Ltd 1931 CPD 61, 64f.

3) Cf Bredell v Pienaar 1924 CPD 203, 213; Geary & Son (Pty) Ltd v Gove 1964(1) SA 434 (AD) 441; Dun & Bradstreet (Pty) Ltd v SA Mercants Combined Credit Bureau 1968 (1) SA 209 (C) 218.

4) Supra.

5) McKerron Delict op cit 214 n 37. Universiteit van Pretoria v Tommie Meyer Films 1977 (4) SA 376 (T) 385.

6) Cf City Deep Ltd v SA Mails Syndicate Ltd 1910 TPD 160, 163, 165.

7) International Tobacco Co (SA) Ltd v United Tobacco Co (South) Ltd (1) 1955 (2) SA 1 (W) 15.

8) Geary and Son (Pty) Ltd v Gove supra 441f; Dun & Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau supra 216f; Stellenbosch Wine Trust Ltd v Oude Meester Group Ltd 1972 (3) SA 152 (C) 161f; Cf McKerron Delict op cit 214; NJ van der Merwe and PJJ Olivier Die Onregmatige Daad in die Suid-Afrikaanse Reg 2 ed (1970) 332f.

9) Cf Setlegelo v Setlegelo 1914 AD 221, 227; McKerron Delict op cit 140f; Van der Merwe and Olivier op cit 387f.

Situations may arise, however, where the plaintiff has been put in a false light but is unable to prove patrimonial loss or the threat of loss, for instance, where falsely: an entertainer is advertised as going to appear at a particular concert;[1] a person is said to belong to an unpopular nationality, religion or political party;[2] or a man is accused of failing to fight for his country during World War II.[3] These disclosures may not be defamatory, but may amount to an invasion of privacy if they are sufficiently offensive to the prevaling mores of the community,[4] and are done intentionally.[5] For an invasion of privacy grounded on an intentional act it is unnecessary to prove patrimonial loss.[6]

B. FUTURE DEVELOPMENTS

1. Negligent Invasions of Privacy?

With the increasing emphasis by the courts on a more subjective approach to animus injuriandi under the actio injuriarum, particularly for defamation,[7] it is likely that the same approach will be followed for invasions of privacy.[8] This means that if it is accepted that generally invasion of privacy falls within the ambit of the actio injuriarum, the victim of a negligent invasion will not be able to succeed under an action for injuria.[9] Nevertheless it seems that in principle there is no reason why such a plaintiff should not recover under the Aquilian action if in addition to fault he proves patrimonial loss.[10] It is true that the courts are reluctant to award compensation for a negligent act resulting

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1) Van Zyl v African Theatres (Pty) Ltd. supra.
2) Cf SA Associated Newspapers Ltd v Schoeman 1962 (2) SA 613 (AD) 617.
3) Cf Good v Smith 1964 (4) SA 374 (N), where the statement was true.
4) See above 172f.
5) See above 152.
6) See above 194.
7) See above 152, except for defamation by the press, see above 157f.
8) See above 165f.
9) Cf Taljaard v Rosendorff & Venter 1970 (4) SA 48 (O) 54; Van der Merwe & Olivier op cit 388. See above 152.
10) See below 366.

in mere pecuniary loss,[1] but it is submitted that this approach is unjustified for the following reasons:

(a) The general trend in Roman and Roman-Dutch law has been to extend the Aquilian action to all forms of damage[2] other than sentimental loss.[3]

(b) Claims for mere economic or pecuniary loss in the past appear to have failed because the plaintiff has been unable to prove that the defendant owed him a duty,[4] or because the particular claim was regarded as an unjustified intrusion into the field of contract,[5] rather than because mere pecuniary damages are not recoverable.[6]

(c) It is illogical to distinguish mere "pecuniary" loss from "patrimonial" loss. As long as the fault element is satisfied it should make no difference whether the defendant acted intentionally or negligently.[7]

> "The control of liability for 'pure' economic loss can be just as effectively achieved by the reasonable man test properly applied as can the control of liability for economic loss associated with injury to, or loss or destruction of, property".[8]

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1) RG McKerron "Liability for Mere Pecuniary Loss in an Action under the Lex Aquilia" (1973) 90 SALJ 5; cf Union Government v Ocean Accident & Guarantee Corp Ltd 1956 (1) SA 577 (AD); Hamman v Moolman 1968 (4) SA 340 (AD).

2) Cf Cape of Good Hope Bank v Fischer (1886) 4 SC 368, 376; Mathews v Young 1922 AD 492, 504; Perlman v Zoutendyk 1934 CPD 151, 155; Van der Merwe & Olivier op cit 197f. Cf Van Zyl v African Theatres (Pty) Ltd 1931 CPD 61, 6: "There is a good deal to be said in favour of liability for negligent statements which cause damage, for being able to recover damages on a wider basis than the accepted one."

3) Union Government v Warneke 1911 AD 657, 662, 665, 673f; Nochomowitz v SANTAM 1972 (1) SA 718 (T) 720f.

4) Herschel v Mrupe 1954 (3) SA 464 (AD) 481, 493, 497.

5) Hamman v Moolman supra 347f; Combrinck Chiro Kliniek (Edms) Bpk v Datsun Motors (Pty) Ltd 1972 (4) SA 185 (T) 192; Latham v Sher 1974 (4) SA 687 (W) 695f.

6) Contra McKerron op cit (1973) 90 SALJ 1.

7) Cf Van der Merwe & Olivier op cit 197f; for instance McKerron Delict op cit 113 states: "Patrimonial damages ... are always damages awarded as compensation for calculable pecuniary loss." It is submitted that in many instances such economic loss is calculable. Surely it is unnecessary to revive a primitive corpore corpori concept? Cf Hedley Byrne & Co v Heller & Partners [1963] 2 All E R 575 (HL) 602f.

8) MA Millner Negligence in Modern Law (1967) 42.

Provided the other essential elements for an action under the Lex Aquilia are present it is submitted that it should make no difference that the loss suffered is purely "economic".

Another problem arises, however, in respect of the "wrongfulness" aspect in the Aquilian action. Assuming that the wrongdoer ought to have foreseen that the person whose privacy is invaded would have been injured by his negligent act, and that the latter has in fact suffered patrimonial loss (eg. emotional shock),[1] is the defendant's act "wrongful"? It is clear that where the plaintiff only suffers sentimental damages his remedy lies under the actio injuriarum in terms of which there can be no liability for negligence.[2] Nonetheless the flexibility of the concept of negligence has been pointed out by both the English[3] and South African courts.[4]

> "The grounds of action may be as various and manifold as human errancy, and the conception of legal responsibility may develop in adaptation to the altering social conditions and standards. The criterion of judgment must adjust and adopt itself to the changing circumstances of life. The categories of negligence are never closed."[5]

The courts must, however, determine which categories of negligence they will recognize:

> "Whatever the scope of moral duty, not to cause foreseeable harm to others in their persons or estates may be, in law this duty is restricted in the interests of the individual's freedom of action and legitimate interest. After all law in a community is a means of effecting a compromise between conflicting interests and it seems to me that according to the principles of Roman-Dutch law the Aquilian action in respect of damnum injuria datum can be instituted by a plaintiff against a defendant only

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1) See below 234.

2) Union Govt v Warneke supra 670; cf Van der Merwe & Olivier op cit 388.

3) Donoghue v Stevenson [1932] All E R Rep 1 (HL).

4) Herschel v Mrupe supra 489f.

5) Per Lord Macmillan in Donoghue v Stevenson supra 30.

> if the latter has made an invasion of rights recognized by the law as pertaining to the plaintiff, apart from that the loss lies where it falls."[1)]

It is submitted that it is trite that a person's right to privacy is recognized by the courts in South Africa,[2)] and that where such a right is intentionally breached an action will lie.[3)] But should the courts recognize liability for a negligent invasion of privacy? In Gelb v Hawkins[4)] Hiemstra J suggested that the developed action for defamation is "an actio ex lege Aquilia and an actio injuriarum rolled into one".[5)]

> "The effect is that damages are assessed under the two heads. Firstly for loss of reputation seen as an economic asset. Then culpa either in the wide or the narrow sense, is an essential element. Secondly to assuage wounded feelings. The animus injuriandi or intent to injure is essential and its extent will profoundly affect the amount awarded".[6)]

From the above it follows that in an action based on culpa the plaintiff can recover patrimonial loss, but not sentimental damages:

> "Waar die eiser nie opset kan bewys nie, maar slegs nalatigheid, kan hy met sy eis om genoegdoening nie slaag nie, maar is nog steeds geregtig op skade-vergoeding".[7)]

It is submitted that Hiemstra J is incorrect when he states that

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1) Per Van den Heever JA in Herschel v Mrupe supra 489f.
2) See above 125ff.
3) Ibid.
4) 1959 (2) PH J 20 (W).
5) Ibid.
6) Ibid.
7) Van der Merwe & Olivier op cit 388f.

damages are assessed for "loss of reputation seen as an economic asset". The damages arising from culpa are awarded for loss of earnings, profits and the like which flow from the defamatory statement i.e. these are special damages which have to be proved,[1] unlike damages for solatium for loss of reputation (which in the abstract may be regarded as an "economic asset")[2] and "wounded feelings" which do not have to be proved.[3] In order to succeed in an action for a defamatory statement made negligently, the plaintiff will only be able to recover those damages which he can prove i.e. patrimonial loss.[4] It is submitted therefore the the same principle may be applied to a negligent invasion of privacy which results in patrimonial loss. In such cases the plaintiff will not be able to recover for any wounded feelings or impairment of dignitas.[5] Recently the concept of patrimonial loss itself has been widened by the recognition of emotional shock as physical injury. This development may have an important bearing on actions for negligent invasions of privacy.

2. Emotional Shock

In the past South African courts were reluctant to allow an action for emotional shock unless the harm was caused intentionally,[6] or negligently under circumstances where the plaintiff could prove: (a) that he had suffered physical "organic" injury,[7] and (b) the

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1) Cf International Tobacco Co (SA) Ltd v United Tobacco Co (South) Ltd. 1955 (2) SA 1 (W) 19.

2) Cf Die Spoorbond v SAR & H 1946 AD 999, 1010f; Maisel v Van Naeren 1960 (4) 836 (C) 848; McKerron Delict op cit 170. Cf Note "Defamation, Privacy and the First Amendment" 1976 Duke L J 1016, 1035: "Reputation thus reflects one's economic relationships as well as one's 'honour'. To the extent that reputation implicates the attitudes of third persons, it is a very tangible notion which can be ascertained with some sophistication by the objective techniques of modern social science (although) these methods (are) infrequently employed in practice".

3) McKerron Delict op cit 115; Van der Merwe & Olivier op cit 386. See above 194.

4) Moaki v Reckett & Colman (Africa) Ltd 1968 (1) SA 702 (W) 704.

5) Van der Merwe & Olivier op cit 388f. The American "appropriation" cases on the other hand regard the plaintiff's image or likeness as an asset and seek to compensate him for the loss of his "property right of material profit". See above 304f.

6) Els v Bruce 1922 EDL 295, 298.

7) Hauman v Malmesbury District Council 1916 CPD 216, 220.

harm was triggered by a fear for his own safety.[1] This outmoded Cartesian distinction[2] has been rejected by our courts, and a plaintiff may now recover for nervous shock wrongfully inflicted provided: (a) the harm was foreseeable[3] and (b) it was not a mere inconsequential shock of short duration.[4] In other words there is no longer a distinction between physical and psychological injury,[5] and a plaintiff will recover if he can prove that he is suffering from a "recognized" psychiatric illness.[6] In English law it is necessary for the defendant to foresee shock,[7] but in our law it seems that the "thin-skull" rule applies,[8] provided some shock (other than merely inconsequential shock of short duration) was reasonably foreseeable.[9] Therefore if a negligent intrusion into a person's private life results in a heart attack or causes the plaintiff to undergo a personality change, such a person should be entitled to recover for any expenses incurred in respect of medical or psychiatric treatment. For instance, where the negligent and unauthorized publication of a photograph of a mother's grossly deformed baby causes her severe nervous shock requiring her to undergo intensive psychiatric treatment, it is submitted that she may recover for both medical treatment and pain and suffering. A claim for this form of "pain and suffering" can

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1) Mulder v South British Insurance 1957 (2) SA 444 (W); cf MA Millner "Liability for Emotional Shock" (1957) 74 SALJ 263.

2) "The Cartesian distinction between mind and matter for a long time had an obdurate influence on man's thinking. The interrelation of mind and body was little understood and often unacknowledged. But this position has given way in medicine and should I think, give way in law" per Windeyer J in Mount Isa Mines Ltd v Pusey (1971) 45 Australian LJR 88, 96.

3) Bester v Commercial Union Versekeringsmaatskappy Bpk 1973 (1) SA 769 (AD) 777.

4) Bester v Commercial Union Versekeringsmaatskapoy Bpk supra 779; cf DJ McQuoid-Mason "Emotional Shock: Shades of Descartes?" (1975) 92 SALJ 18.

5) Bester v Commercial Union Versekeringsmaatskappy Bpk supra 779.

6) Cf DJ McQuoid-Mason "Emotional Shock: Why the Cartesian Distinction?" (1973) 36 THR-HR 124; Louise Tager "Nervous Shock and Mental Illness" (1973) 90 SALJ 123.

7) Fleming Torts op cit 151.

8) Tager op cit (1973) 90 SALJ 123; DJ McQuoid-Mason op cit (1973) 36 THR-HR 137, 175.

9) PQR Boberg "Law of Delict" 1973 Annual Survey 139.

theoretically be distinguished from a claim for sentimental pain and suffering arising out of the anguish caused by the invasion itself. The former is identical to the pain and suffering which accompanies an injury or illness under the Lex Aquilia, while the latter is confined to sentimental damages recoverable under the actio injuriarum as a solatium for wounded feelings. In short if the mental suffering is sufficient to manifest itself in a "psychiatric illness" the plaintiff can recover, otherwise not. In any event the suffering resulting from emotional injury is often greater than that resulting from physical injury.[1] After all the Roman-Dutch jurists were prepared to recognize a claim for pain and suffering for "physical injury"[2] in an age when medical science was still in its infancy, and there is no logical reason for rejecting such a claim in respect of suffering caused by emotional shock in an age when psychiatry is recognized as a skilled profession in which trained persons are able to assess to a considerable degree the mental anguish and psychosis suffered by victims of emotional shock.[3] An invasion of privacy causing emotional shock may also result in claims for loss of earnings and loss of profits. In any event where the defendant's negligence is so great that it amounts to a reckless disregard of the consequences of his act this may be evidence of intention in the form of dolus eventualis.[4]

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1) "The distinction between mental shock and bodily injury was never a scientific one, for mental shock is presumably in all cases the result of, or at least accompanied by some physical disturbance in the sufferer's system, and a mental shock may have consequences more serious than those resulting from physical impact" per Lord Macmillan in Bourhill v Young (1942) 2 All E R 396 (HL) 402.

2) Hoffa NO v SA Mutual Fire & General Insurance Co Ltd 1965 (2) SA 944 (C) 951f.

3) McQuoid-Mason op cit (1973) 36 THR-HR 138.

4) "If a man acts recklessly, not heeding whether he will or will not injure another, he cannot be heard to say that he did not intend to hurt" per Wessels JA in Nasionale Pers v Long 1930 AD 87, 100; cf Hassen v Post Newspapers (Pty) Ltd 1965 (3) SA 562 (W) 574f. See above 156.

3. A Hybrid Action?

Certain writers have argued for the recognition of invasion of privacy as an independent delict, but seem to concede that it must fall within the provisions of the actio injuriarum and the lex Aquilia.[1] It is not satisfactory, however, simply to take over the American action in toto or to argue that the concept has been recognized in certain European countries and should be accepted in South Africa.[2] The South African law of delict is based on the broad principles of the actio injuriarum and the lex Aquilia,[3] plus several sui generis wrongs.[4] It is submitted that there is no need to create a new wrong,[5] because apart from the threat to privacy by data banks,[6] the Roman-Dutch law as adapted by South African law, is flexible enough to cope with many modern day invasions of privacy. In most cases an action for invasion of privacy will be based primarily on the actio injuriarum, with an occasional subsiduary claim under the lex Aquilia. Although it is no longer necessary to bring separate actions under the actio injuriarum and lex Aquilia,[7] our courts still apply the principle that any claim for solatium (other than pain and suffering)[8] must be brought under the actio injuriarum.[9]

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1) Van der Merwe & Olivier op cit 393; J Neethling "Grondslag vir die Erkenning van 'n Selfstandige Persoonlikheidsreg op Privaatheid in die Suid-Afrikaanse Reg" (1976) 39 THR-HR 120, 128; J Neethling Die Reg op Privaatheid (1976) 380.

2) Cf Neethling Privaatheid op cit 406.

3) McKerron Delict op cit 10; Van der Merwe & Olivier op cit 196.

4) McKerron Delict op cit 11; Van der Merwe & Olivier op cit 427f.

5) See above 125.

6) See above 283.

7) Mathews v Young 1922 AD 492, 505; Govt of RSA v Ngubane 1972 (2) SA 601 (AD) 606.

8) Cf Hoffa NO v SA Mutual Fire & General Insurance supra 952; Van der Merwe & Olivier op cit 210f.

9) Union Govt v Warneke 1911 AD 657, 662; Nochomowitz v SANTAM Insurance Co (Pty) Ltd 1972 (1) SA 718 (T) 721.

The Roman-Dutch law jurists were not faced with the harmful consequences arising from publications by mass media like the press, radio and television, and there is much to be said for the view that such organizations should be held liable for sentimental damages without proof of intention on their part.[1] The increasing threat to privacy by the press in an over-crowded and ever-expanding society seems to warrant the introduction of strict liability for invasions of privacy by them[2] even though the plaintiff does not suffer patrimonial loss. The elimination of the requirement of intention by the wrongdoer for a successful action for invasion of privacy by the press would obviate the difficulties caused by the recent trend of the courts to favour the subjective test for animus injuriandi.[3] The press should be able to raise the traditional defences which rebut the wrongfulness of their conduct,[4] but not those which negative animus injuriandi.[5]

4. Conclusion

The common law development of the right to privacy in South Africa has been inhibited by statutory provisions which give the State wide powers to interfere with the liberty of the individual for ideological reasons.[6] It is true that the European Convention on Human Rights recognizes that the State may interfere with the right as

> "is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country".[7]

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1) See above 169.

2) SA Strauss, MJ Strydom & JC Van der Walt Die Suid-Afrikaanse Persreg (1976) 258f. See above 157f.

3) See above 152.

4) See above 159.

5) Ibid.

6) Cf HR Hahlo & E Kahn South Africa: The Development of its Laws and Constitution (1960) 797; JD Van der Vyver Die Beskerming van Menseregte in Suid-Afrika (1975) 84ff. See above 12, 178, 337.

7) Article 8(2). See above 108.

Nonetheless South Africa cannot be regarded as a "democratic society", and much of its racial and security legislation goes beyond what is acceptable in the Western democracies.[1)]

On the other hand, as in the United States[2)] and other countries where the right to privacy has evolved in the common law,[3)] South African law has been unable to safeguard the individual adequately against the collection of information in data banks by the public[4)] and private[5)] sectors. While the common law remedies may be adequate once the individual discovers that he has become the subject of an offensive invasion of privacy, in most cases he is not aware that his privacy has been invaded.[6)] There is a need for legislation to control the collection and dissemination of data bank information in both the public and private sectors. A useful precedent for the control of the former is to be found in the United States Privacy Act,[7)] and for the regulation of the latter in the legislation of the Canadian Provinces.[8)]

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1) The racial and security laws in South Africa conflict with almost every article of the Universal Declaration of Human Rights to which the country is not a signatory. Cf I Brownlie Basic Documents on Human Rights (1971) 106. See above 12, 178, 337, 375.

2) See above 51ff.

3) Cf Federal Republic of Germany, see above 84ff; France, see above 96ff; other European countries, see above 108ff.

4) See above 285.

5) See above 286.

6) See above 287.

7) 5 United States Code §552 a (Supp 1976). See above 68.

8) Cf Manitoba Personal Investigations Act, SM, 1971, c 23; British Columbia Personal Information Reporting Act, SBC, 1973, c 139; Ontario Consumer Reporting Act, So, 1973, c 97; Nova Scotia Consumer Reporting Act, SNS, 1973, c 4; Saskatchewan Credit Reporting Agencies Act, 55, 1972, c 23. See above 122f.

CHAPTER NINE

CONCLUSIONS

In the light of the above analysis of the wrong of invasion of privacy in South Africa it is submitted that the following conclusions may be drawn:

(1) Social scientists see the right to privacy as the right to control over one's "information preserve"[1] and "a status of personal dignity",[2] while an invasion of privacy is "an immoral affront to human dignity".[3]

(2) The wrong was accommodated under the actio injuriarum in Roman law and many of the injuriae previously regarded as referring to reputation or chastity are analogous to the modern concept of invasion of privacy.[4]

(3) The broad principles of the developed Roman action were received into Roman-Dutch law.[5]

(4) Although the Roman and Roman-Dutch law wrongs also referred to injuries to reputation or chastity the common factor linking most of them was interference with dignitas.[6]

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1) E Goffman Relations in Public (1972) 63. See above 3.

2) OM Ruebhausen & OG Brim "Privacy and Behavioural Research" (1965) 65 Columbia LR 1184, 1189. See above 7.

3) E Shils "Privacy: Its Constitution and Vicissitudes" (1956) 31 Law and Contemp Problems 289, 306. See above 186 n 5.

4) DJ McQuoid-Mason "Roman Law and the Right to Privacy" (1976) 1 NULR 277. See above 18.

5) See above 41.

6) CF Amerasinghe Aspects of the Actio Injuriarum in Roman-Dutch Law (1966) 176, 190. See above 43.

(5) The modern action for invasion of privacy developed in the United States,[1] but it has also been recognized in several European countries[2] and enshrined in the European Convention on Human Rights.[3]

(6) The action in South Africa has generally been recognized as falling under the actio injuriarum as an impairment of dignitas.[4] This approach accords with that of the social scientists, but it has been suggested that privacy is independent of dignitas.[5]

(7) Invasion of privacy has not been clearly defined by the courts in South Africa, but where it falls under the actio injuriarum the plaintiff must usually prove the essential requirements of animus injuriandi,[6] wrongfulness[7] and impairment of personality.[8]

(8) Where, however, the invasion of privacy is perpetrated by the press the plaintiff need not prove animus injuriandi,[9] and the defendants may only escape liability if they can raise a defence which establishes the lawfulness of their conduct.[10]

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1) See above 51ff.

2) Cf Federal Republic of Germany, see above 84ff; France, see above 96ff; other European countries, see above 108ff.

3) Article 8(2). See above 108.

4) Cf O'Keeffe v Argus Printing & Publishing Co Ltd 1954 (3) SA 244 (C) 249; Kidson v SA Associated Newspapers Ltd 1957 (3) SA 461 (W) 467f; Mhlongo v Bailey 1958 (1) SA 370 (W) 373; Rhodesian Printing & Publishing Co Ltd v Duggan 1975 (1) SA 590 (RAD) 594. See above 185.

5) J Neethling Die Reg of Privaatheid (1976) 380. See above 184 .

6) Amerasinghe Actio Injuriarum op cit 185f, 192f; cf Neethling Privaatheid op cit 380. See above 147.

7) Amerasinghe Actio Injuriarum op cit 183. See above 170.

8) Amerasinghe Actio Injuriarum op cit 182. See above 181.

9) SAUK v O'Malley 1977 (3) SA 394 (AD) 407. See above 169.

10) See above 169. But cf Amerasinghe Actio Injuriarum op cit 197f.

(9) An action may lie for negligent invasion of privacy if the plaintiff can prove patrimonial loss,[1] which has been extended to include damages resulting from emotional shock.[2]

(10) Privacy is essentially a natural desire which is "primarily designed to protect the feelings and sensibilities of human beings"[3] and does not apply to artificial persons,[4] which should rely on some other remedy.[5]

(11) Invasions of privacy usually take the form of intrusions[6] or publicity[7] and in both instances individual privacy is being further threatened by the increasing use of data banks in the public[8] and private[9] sectors.

(12) The activities of private investigators and security guards should be controlled by legislation,[10] which should also prohibit the unauthorized importation, manufacture, sale or delivery of monitoring equipment.[11]

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1) See above 366.

2) Cf Bester v Commercial Union Versekeringsmaatskappy Bpk 1973 (1) SA 769 (AD) 777f. See above 367

3) Universiteit van Pretoria v Tommie Meyer Films 1977 (4) SA 376 (T) 384. See above 278f.

4) Ibid.

5) For instance defamation (RG McKerron The Law of Delict 7 ed (1971) 181; NJ Van der Merwe & PJJ Olivier Die Onregmatige Daad in die Suid-Afrikaanse Reg 2 ed (1970) 348) or unlawful trade competition. Dun & Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd 1968 (1) SA 209 (C) 218; Oude Meester Group Ltd v Stellenbosch Wine Trust Ltd 1972 (3) SA 152 (C) 160; Victor Products (SA) Pty Ltd v Lateulere Manufacturing (Pty) Ltd 1975 (1) SA 961 (W) 965. See generally McKerron Delict op cit 214f; Van der Merwe & Olivier op cit 330; HJO Van Heerden Grondslae van die Mededingingsreg (1958) 258. See above 280. Therefore in the case of industrial espionage (cf Sunday Times Magazine 25 September 1977) the injured party may bring an action for unlawful competition. Where, however, somebody's office or telephone is "bugged" the individual concerned may sue for invasion of privacy.

6) See above 198. 7) See above 246.

8) See above 285. 9) See above 286.

10) Cf Rhodesia: Private Investigators and Security Guards (Control) Act of 1977. See above 216f.

11) Cf B v D Van Niekerk "Unplugging the Bug, or the Right to be Let Alone in Criminal Law - Some Reflections" (1971) 88 SALJ 171. See above 217.

(13) The data bank threat could be met by legislation to regulate the activities of public[1] and private[2] agencies.

(14) Privacy in South Africa has been further eroded by the mass of racial[3] and security[4] legislation which has been introduced to enforce the government's policy of separate development.

(15) Apart from the data bank threat[5] and the numerous statutory interferences[6] with individual liberty, South African common law is flexible enough to provide protection against most of the categories of invasion of privacy recognized in the United States[7] and elsewhere.[8]

(16) The utility of the action in South African law has not yet been fully realized, particularly as an alternative to defamation,[9] the uncertain wrong of injuria per consequentias,[10] and injurious falsehood.[11]

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1) State agencies could be subject to legislative safeguards as provided for in the United States Privacy Act of 1974 (5 United States Code §552 a (Supp 1976); See above 59d) or in the Cerman Land Hessen Data Protection Act of 1970 (Act 1 7 October 1970; see above 94).

2) The proposed South African Credit Agreements Bill (B85-'77 (1977)) could include provisions similar to those in the English Consumer Credit Act of 1974 (see above 81), or the American Fair Credit Reporting Act (see above 64 , or the Canadian legislation (see above 122f. Such legislation should not only control the nature, accuracy and accessibility of the information stored but also require the data bank agencies to notify the persons concerned that information profiles have been opened on them.

3) Cf JD Van der Vyver Die Beskerming van Menseregte in Suid-Afrika (1975) 84ff. See above 12, 178, 337, 375.

4) Cf AS Mathews Law, Order and Liberty in South Africa (1971) 54ff. See above 207, 241.

5) See above 283.

6) See above 177, 337f, 370f.

7) See above 55ff.

8) Cf Federal Republic of Germany, see above 84ff; France, see above 96ff. For other European countries, see above 108ff.

9) See above 348.

10) See above 351.

11) See above 361.

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