RECENT DEVELOPMENTS

LEGAL STYSTEM

Crash, bang, wallop, what a photograph: a very British confidentiality claim

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Introduction

Viewers of the recent television drama series *A Very British Scandal* were 'treated' to the very public divorce proceedings between the Duke and Duchess of Argyll 60 years ago, the Duke obtaining a divorce on grounds of the Duchess's adulterous behaviour. The divorce, and the events leading up to it were very much a *cause celebre*, perhaps equalling the Profumo scandal for public interest and curiosity. The programme very much highlighted the public morals, and misogyny, of the day, the Duchess being portrayed as the scarlet woman, not only by her husband and a male-dominated society, but by women generally. This included her female 'friends' who were afraid that her behaviour would besmirch the reputation and ideal of women, whose conjugal duties towards her husband excluded her right to actually enjoy sexual relations. This is not to condone the Duchess's behaviour (my condonation is completely irrelevant in any case), but merely highlights the hypocrisy and arrogance of the age; where husbands were allowed mistresses, and it was quite common for the male aristocracy to produce both an heir and a spare.

As the programme showed, the Duke was certainly the winner in all this; being granted his divorce, and marrying a wealthy American heiress shortly afterwards; whilst the Duchess was publically shamed and lost her marital home. It was certainly a divorce case from a, thankfully, different age, yet for those who study human rights the Duke and Duchess provided a different legal precedent, for we subsequently witnessed the first real privacy case in the British courts. After the divorce was granted, the Duke sold the marital story to the newspapers, and the Duchess sought an injunction to stop him and the newspapers from disclosing this information.[1] Those who know anything about modern privacy law would instantly recognise this scenario as a classic battle between the right to private life and freedom of speech, but at this time there was no privacy law as such, and any actions for breach of confidence had been founded on a contractual duty of confidentiality, usually between employers and employees, or between business people.

The finding in this case was, therefore, fundamental to individual privacy rights.[2] Were the intimate facts of their relationship capable of creating a duty of confidentiality, thus preventing the Duke from disclosing them, or selling them to the newspapers? And, if there was such a duty of confidentiality, had the Duchess's right of confidentiality been lost by her promiscuity, as found in the divorce proceedings? This article will provide the background facts to the case as well as the High Court's decision, and then examine the significance of the ruling with respect to the development of modern

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[1] *Duchess of Argyll v Duke of Argyll and others* [1967] Ch. 302

[2] Surprisingly, the case has attracted very little academic commentary, apart from mention of the judgment in various textbooks on tort and (because of the potential breach of the Judicial Proceedings (Regulation of Report) Act 1926, criminal law. However, see 'The Argyll Charade' 1999 *Journal of the Law of Society in Scotland* 22. For a historical account of the life of the Duchess and the affair, see Charles Castle, *The Duchess who Dared: the life of Margaret, Duchess of Argyll,* Swift Press 2021.

privacy law. It will then assess the original claim with respect to the principles of modern privacy actions.

The facts and decision in *Argyll v Argyll*

The plaintiff (the Duchess) and the first defendant the Duke) were married in March, 1951. In 1959 the Duke presented a petition for divorce from the Duchess on the ground of her adultery. Initially the proceedings were defended, but her cross-petition was withdrawn. In 1963 a decree of dissolution of the marriage was made, and in the same year articles by the Duchess were published in a Sunday newspaper in which certain statements were made in relation to the first defendant's personal conduct and financial affairs. In 1964, she issued a writ and sought an interlocutory (interim) injunction to restrain the Duke from communicating to the second and third defendants (the editor and proprietors, respectively, of another Sunday newspaper), and them from publishing, information of, *inter alia*, secrets of her relating to her private life, personal affairs or private conduct communicated to the Duke in confidence during the subsistence of their marriage, and not previously made public and any particulars relating to the proceedings for divorce in Scotland other than those authorised under s.1(1)(b) of the Judicial Proceedings (Regulation of Report) Act 1926. The claim was that such publication was in breach of marital confidence and in contravention of the 1926 Act.

Although the details of the intended articles were never published in the report, the Duchess outlined the basis of her claim that publication would be in breach of the couple's marital bond:

> During a number of years before our marriage began to deteriorate, my ex-husband and I had a very close and intimate relationship in which we freely discussed with each other many things of an entirely private nature concerning our attitudes, our feelings, our hopes, aspirations and foibles, our past lives and previous marriages, our business and private affairs, and many other things which one would never have discussed with anyone else. Apart from explicit discussion, we naturally discovered many things about each other which, but for our close relationship, we would not have done. These things were talked about and done on the implicit understanding that they were our secrets and that we allowed the other one to discover them only because of the complete trust and mutual loyalty which obtained between us and created an absolute obligation of confidence.[3]

In the Chancery Division of the High Court, Ungoed-Thomas J, dealing with the principal issue of confidentiality, held that a contract or obligation of confidence need not be expressed, but could be implied, and that a breach of contract or trust or faith could arise independently of any right of property or contract (other than any contract which the imparting of the confidence might itself create). Accordingly, in the exercise of its equitable jurisdiction a court would restrain a breach of confidence independently of any right at law.[4] The judge then held that, with the object of preserving the marital relationship, it was the policy of the law that communications, not limited to business matters, between husband and wife should be protected against breaches of confidence.[5] Thus, where the court recognised that such communications were confidential and that there was a danger of their publication within the mischief which it was the policy of the law to avoid, it would interfere; further, on the facts publication of some of the passages complained of would be in breach of marital confidence.[6]

In the judge's view, marriage was accepted as the highest legal consideration, representing more than mere legal contract and relationship and status. But, if, for the court's protection of confidence, the confidence must arise out of a contractual or property relationship, it does not lack its contract: the

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[3] *Duchess of Argyll v Duke of Argyll and others* [1967] Ch. 318.
[4] *Duchess of Argyll v Duke of Argyll and others* [1967] Ch. 302, 322, B-C, citing *Prince Albert v. Strange* (1849) 1 H. & T. 1; 1 Mac. & G. 25, and *Pollard v. Photographic Company* (1889) 40 Ch.D. 345.
[5] *Ibid*, 329 F-330A.
[6] *Ibid*, 330 F-G, *Rumping v Director of Public Prosecutions* [1964] A.C. 814 considered.

confidential nature of the relationship is of its very essence and so obviously and necessarily implicit in it that there is no need for it to be expressed.[7] Importantly, the judge held that the law's policy to preserve the close confidence and mutual trust between husband and wife was not extinguished by the subsequent adultery of one spouse resulting in divorce; such conduct did not, therefore, relieve the other spouse from the obligation to preserve their earlier confidences.[8] Accordingly, the plaintiff's adultery did not entitle the first defendant to publish the confidences of their married life, and an injunction would be granted restraining him from so doing.

Turning to the previous publication of the plaintiff's articles, the judge held that such articles did not relate to the confidences betrayed in the first defendant's articles and were not of the same order of perfidy (treachery or disloyalty). Thus, the plaintiff was not thereby disentitled to any injunction which might be granted to her. Although a person coming to equity must come with clean hands, the cleanliness required is to be judged in relation to the relief sought.[9]

The judge then confirmed that an injunction might be granted to restrain the publication of confidential information, not only by the person who was a party to the confidence (The Duke) but by other persons into whose possession that information had come (for example the press); accordingly injunctions would be made against the second and third defendants in respect of publication of the marital confidences.[10] Finally, the judge held that the fact that the 1926 Act created an offence of publishing evidence in divorce proceedings, other than that referred to by the judge, did not make prosecution the only remedy or debar an individual injured or threatened with injury by unlawful publication from remedy.[11]

The development of the law of privacy in domestic law

The decision in the *Argyll* confidentiality proceedings is worth revisiting in order to gauge how the case would be dealt with today, but before we examine that it is instructive to see how this judgment developed the modern law of privacy.

In the absence of a distinct law of privacy, and with Article 8 of the European Convention having no force in domestic law at the time of this action, plaintiffs (now claimants) would resort to the laws of defamation and confidentiality to enforce their reputational or privacy interests. In particular, although the original purpose of the law of confidentiality was to protect the commercial interests of the claimant, the law could in rare circumstances be used to safeguard privacy interests. This would allow individuals to seek a remedy, either by the payment of compensation, and as the law of confidentiality allows remedies based on prior restraint, injunctive relief could be effective tool in protecting the privacy rights of the individual. For example, the law of confidentiality (and copyright) was used to protect private confidential information in *Prince Albert* v *Strange*[12] in order to prevent an employee from exploiting private drawings owned by the plaintiffs, members of the Royal Family, which had been given to his employers by the plaintiffs. The court found that the employee had obtained the drawings in breach of confidence, and awarded an injunction to prevent any commercial exploitation; thus protecting not only the commercial rights of the plaintiffs, but, indirectly their privacy and family interests. The significance of *Argyll*, however, was that in this case the law was extended to protect information pertaining to private confidential relationships, such as marriage. That then allowed the court to grant an injunction

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[7] *Ibid*, 322, D-E.
[8] *Ibid*, 332, G. Contrast the subsequent decision in *Lennon* v *Mirror Group Newspapers* [1978] FSR 573, where an injunction was refused because both parties had brought their private affairs into the public domain to such an extent that an injunction to protect confidential information would have been inappropriate.
[9] *Ibid*, 332, A-B.
[10] *Ibid*, 333, C; *Ashburton v. Pape* [1913] 2 Ch. 469 followed.
[11] *Ibid*, 338G-339 A, D-E, 341C-D, G, 343A, dictum of Willmer LJ in *Windeatt v. Windeatt* [1962] 1 W.L.R. 527, 532 applied.
[12] (1842) 2 De G & Sm 652.

to the Duchess to stop the Duke and the newspapers from disclosing intimate details of the marriage relationship, which had been provided by his wife.

Despite the decision in *Argyll*, the law appeared to require some form of *contractual* agreement to attach liability for breaches of confidence, but in *Stephens* v *Avery*[13] it was held that it was not necessary that the relationship in question was legally binding. In that case, the plaintiff had confided in her friend about a sexual relationship that she had had with a woman who had subsequently been killed by her husband. In breach of a promise to keep the information confidential, the defendant had told the story to the newspapers and the plaintiff sought an injunction to prevent publication. Significantly, the court held that the relationship of the parties was not the determining factor in an action of confidentiality; rather it was the acceptance of the information on the basis that it would be kept secret that affected the conscience of the recipient. In this case the court found that the plaintiff's clear statement of secrecy imposed the clearest duty on the defendant. Significantly, the fact that the matter was concerned with sexual relations outside marriage did not take away the law's protection, and in any case the sexual conduct of the plaintiff was not so morally shocking in this case as to stop the newspaper from spreading the story all over its pages.[14] In the court's view, the wholesale revelation of the sexual conduct of an individual could not properly be called trivial 'tittle tattle'. In the *Argyl*l case, it was argued that the Duchess's behavior was indeed that shocking, yet the judge appears to have favoured the preservation of the marital bond, rather than deny the Duchess her confidentiality.

The cases of *Argyll and Stephens'* were, therefore, perhaps unwittingly, instrumental in developing the trend for future privacy cases under what is now known as the law of misuse of private information.[15] First, marital, and then other relationships, were covered by a duty of confidentiality. Secondly, that duty extended to others (such as the press) who had come into possession of such information as a consequence of that breach of duty. The law at that time could not protect the plaintiff where the information was acquired outside such a breach; thus the Duchess was powerless to prevent the general disclosure and discussion of her sexual and personal affairs, including the publication of the infamous photograph of her carrying out a sex act with one of her lovers. The present law, see below, would protect her in such a case, public interest defences notwithstanding, but the judgment in *Argyll* was instrumental in protecting privacy interests where the disclosure was in breach of that personal relationship. Thirdly, the law would protect the plaintiff even if their conduct was promiscuous or immoral, as was thought the behavior that the Duchess was attempting to keep secret.

Yet despite the development of the law of confidence to protect certain aspects of privacy, it is important to stress that the law did not protect the right of privacy as such. Thus the law did not protect the individual simply because private information was disclosed or an individual's privacy was invaded. For example, in *Kaye* v *Robertson*[16] the Court of Appeal stated that although it was satisfied that the action of the newspapers in conducting and publishing an interview with the claimant when he lay critically ill in hospital was a monstrous invasion of privacy, domestic law provided no remedy.[17] However, subsequent cases seemed to suggest that there was no need to establish any duty to keep such information private, along with a breach of that duty. Most famously, an injunction was granted in *HRH Princess of Wales* v *MGN Newspapers,*[18] where photographs of the Princess of Wales had been taken while she was exercising in a private gymnasium. These cases established that the duty of confidentiality

[13] [1988] 2 WLR 1280.
[14] See also *Barrymore* v *Newsgroup Newspapers Ltd* [1997] FSR 600, where an injunction was granted to stop the further publication of extracts of letters written by the claimant, a television personality, to his homosexual lover. In this case the court held that the information about the relationship is for the relationship and not for a wider purpose.
[15] The term was derived from various cases, most notably *Campbell v MGN Ltd* [2004] 2 AC 457.
[16] [1991] FSR 62.
[17] For a coverage of that case, see Steve Foster 'Listen very carefully' (2016) 167 NLJ 22.
[18] Unreported, 8 November 1993.

could be imposed unilaterally and did not have to be founded on the breach of any express or implied agreement of the parties[19] and provided the basis of the development of the law of confidentiality under the Human Rights Act 1998.

Confidentiality, privacy and the Human Rights Act 1998

Since the coming into operation of the Human Rights Act 1998, the law of confidentiality has been used to develop a law of privacy that is consistent with Article 8 of the European Convention, which guarantees respect for private and family life. For example, in *Douglas* v *Hello! Magazine,*[20] the Court of Appeal recognised that celebrity claimants had an expectation of privacy and confidentiality with respect to photographs taken at their wedding. Privacy protection has been achieved, however not by the creation of a new tort or action in privacy, but by the development of the law of confidentiality, using Article 8 of the Convention and the case law of the European Court as a guide.[21] Thus, in *A* v *B plc and Another*,[22] the Court of Appeal held that it was not necessary for the courts to develop a separate tort of privacy, and this confirmed by the House of Lords in *Campbell* v *MGN Ltd*,[23] where the majority concluded that the information in question – details of the claimant's drug treatment – was such that the claimant had a *reasonable expectation of privacy*.

Of relevance to the situation in *Argyll*, in *A* v *B plc* it was confirmed that the law of confidence could apply to information regarding a sexual relationship outside marriage.[24] However, in the opinion of Lord Woolf CJ, there was a significant difference between the confidentiality that attached to sexual relations in transient relationships, and that attached to sexual relations within marriage or other stable relationships. The Court of Appeal also felt that although those in the public eye were entitled to a private life, they must expect and accept that their actions would be more closely scrutinised by the media and that even trivial facts could be of great interest to readers and other observers of the media. Thus, in *Theakston* v *MGN Ltd*,[25] it was held that the principle of confidentiality could not be extended to all acts of intimacy and that a transitory engagement with a prostitute in a brothel was far removed from sexual activities in a private home. Further, a public figure might hold a position where higher standards of conduct might rightly be expected from the public, and the higher the profile the more likely that might be the position.[26]

Notwithstanding these cases, the decision of the Supreme Court in PJS v News Group Newspapers Ltd,[27] reaffirmed the more general approach, that both public and private figures had a reasonable expectation of privacy in the details of extra marital relationships. The Supreme Court held that disclosure or publication of purely private sexual encounters would, on the face of it, constitute the tort of invasion of privacy, and that repetition of such disclosure or publication on further occasions was capable of constituting a further tort of invasion of privacy, especially if it occurred in a different medium. The Supreme Court also upheld the Court of Appeal's decision that kiss and tell stories about a public figure which did no more than satisfy readers' curiosity concerning someone's private life did

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[19] See also *Creation Records Ltd* v *Newsgroup Newspapers Ltd* [1997] EMLR 444, where the court granted an injunction to stop the further publication of a photograph of the pop group Oasis, taken surreptitiously at a photo session to promote the group's new album.
[20] [2001] 2 WLR 992. See Morgan, Privacy, Confidence and Horizontal Effect: 'Hello' Trouble [2003] CLJ 442.
[21] The leading decision of the European Court in this area is *Von Hannover v Germany* (2005) 40 EHRR 1, which established the general principles that public figures have a general expectation of privacy, and that there is no general public interest in the revelation of private matters.
[22] [2002] 3 WLR 542.
[23] [2004] 2 AC 457.
[24] This general position had been accepted in *Stephens* v *Avery* [1988] 2 All ER 477, above, n. 13.
[25] [2002] EMLR 22.
[26] See *Ferdinand v MGN Ltd* [2011] EWHC 2454. See Steve Foster 'The Public Interest in Press Intrusion into the Private Lives of Celebrities (2011) 16(4) *Communications Law* 129.
[27] *PJS v News Group Newspapers* [2016] AC 1081

not serve the public interest. Further, it held that the information which the newspaper proposed to publish would not advance any public debate or provide support for competing opinions in circulation.

Thus, although a number of decisions in recent years have justified the revelation of such information where public figures are featured, that is usually when the claimant has previously lied to the public in respect of their private life and publication is necessary to correct that misinformation,[28] or where there is a wider and genuine public interest in that information. Thus, in AAA v Associated Newspapers,[29] it was held that there existed an exceptional public interest in the professional and private life of an elected politician (Boris Johnson) so as to justify the publication of a newspaper article claiming that a child had been born as a result of an extra martial affair that he had had. The general rule, therefore, is against the revelation of the sexual activities, of celebrities, public figures and private individuals; the domestic courts ruling that such information does not serve the public interest and in any case will not generally overrule the high expectation of privacy which those individuals enjoy with respect to their own, and their family's privacy

The controversy surrounding such an approach was seen in the high profile decision in *Mosley v News Group Newspapers Ltd*,[30] a case involving the publication by the press of photographs and graphic details of the sexual antics of Max Mosely, the president of the governing body of Formula 1 and son of the fascist leader Oswald Mosely. The case is important in that it assesses both the legal expectation of sexual privacy of public figures and whether the press are entitled to claim a public interest defence in such cases. In this case the claimant sought damages from the defendants after they had published an article entitled ‘‘F1 Boss Has Sick Nazi Orgy With 5 Hookers’’ together with video footage of him taking part in a sado-masochistic event attended by the him and 5 women. The articles alleged that the sex sessions had a Nazi theme and had mocked the way in which Holocaust victims had been treated in concentration camps. A follow up story was published by the defendants, based on the confessions of one of the women who had taken clandestine photographs of the event. The claimant alleged that publication constituted a breach of his right of privacy.

In giving judgment for the claimant, it was held that the claimant had a reasonable expectation of privacy in relation to sexual activities, albeit unconventional, carried on between consenting adults on private property, and that consequently, the clandestine recording of that event on private property engaged the claimant’s rights under Article 8. As a consequence, serious reasons had to exist to justify any interference with that right and the court had to determine whether the degree of intrusion in the present case was proportionate to publication of such information.[31] In the court’s view it was highly questionable that in modern society the principle of iniquity could be applied so as to deprive the claimant of his right of privacy in cases involving sexual activity, fetishist or otherwise, that had been conducted in private. Consequently the woman had committed both a breach of confidentiality and a violation of the claimant’s Article 8 rights.

Turning to the public interest defence, the court found that despite the defendant’ assertions, there was no evidence to suggest that the events had a Nazi theme or that the participants had mocked victims of the Holocaust. In the absence of that evidence, although there had been bondage, beatings and domination typical of sado-masochistic behavior, there was no public interest or other justification for the recording and publication of these private events. Although such behaviour would be viewed by some people with distaste and moral disapproval, in the light of modern rights-based jurisprudence such did not justify intrusion on the personal privacy of the claimant. The court thus found an unjustified breach of his rights in confidentiality and privacy.

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[28] Ferdinand above, n 26, and McClaren v News Group Newspapers [2012] EWHC 2466

29 [2013] EWCA 554

30 The Times, 30 July 2008

31 The court also recognized that the woman in question owed a duty of confidentiality towards the claimant and the other participants as those taking part in such activities might be expected not to reveal private conversations and activities.

The principles laid down in *Mosely* reflect the jurisprudence of the European Court of Human Rights,[32] and of course have particular relevance to the situation in the *Argyll* case: privacy is preserved whatever the perversity of the activities in question, and the interest of the public is not the same as the public interest.

Photographs and privacy

The *Argyll* affair revolved significantly around the publication and discussion of that infamous photograph, and the decisions in cases such as *Campbell* and *Mosley* reflect the domestic courts' robust approach in defending individuals from the distress and intrusion caused by the publication of photographs. Thus, the courts recognise that they involve a more intimate and distressing violation of privacy, and in *Jagger* v *Darling*,[33] an injunction was granted to Elizabeth Jagger (the daughter of Sir Mick Jagger) to stop further publication of CCTV footage taken in the defendant's nightclub, showing the claimant engaged in sexual activities with another celebrity. Granting the injunction the judge held that there was no genuine public interest in the publication of the images and that repeated publication of the images would only serve to humiliate the claimant. The claimant had a reasonable expectation of privacy and the balance clearly was in favour of restricting publication.[34]

The robust protection of privacy rights against the publication of intimate photographs is perhaps best illustrated by the decision in *Rocknroll v News Group Newspapers Ltd*.[35] In this case, a court granted an interim injunction restraining the publication in a national newspaper of photographs taken at a private party of a partially naked man who, some years later, married a well-known actress. Delivering judgment, Briggs J held that the claimant's article 8 rights were plainly engaged by the threat to publish the photographs. They showed him at a private party on private premises, behaving in a manner in which he would be entirely unlikely to behave in public. Further, it was most unlikely that the defendant could establish at trial that he had intended to consent to publication in a national newspaper. Nor was it likely that the defendant could establish that, when posting them in 2010, the claimant had anticipated that the photographs would become accessible to anyone with a Facebook account, let alone to a national newspaper.[36]

This again reflects the jurisprudence of the European Court, and would now be material in deciding whether the photograph of the Duchess should be published; assuming that she acted in time before it was indeed published by the newspapers to coincide with the divorce proceedings. Of course, today the Duchess would not be able to effectively control the dissemination of the stories and photograph on social media, but that would not prevent her getting injunctions to stop further publication, particularly by the press who are capable of causing more distress by such publication.[37]

Conclusions

It remains to summarise as to how the Duchess of Argyll would have fared in her action under the modern law of privacy, and to note that despite the dramatic changes to privacy laws since that time,

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[32] *Von Hannover v Germany*, n. 21, above.
[33] [2005] EWHC 683.
[34] See also the decision in *Theakston*, n. 25, above.
[35] [2013] EWHC 24 (Ch).
[36] [2013] EWHC 24 (Ch), at paras. 12-13. Further, it was held that there was nothing to suggest that the claimant had deprived himself of a reasonable expectation of privacy, either by being a public figure or because he had contributed to publicity about his first marriage. He was not prominent in the public sphere in his own right, and public figures were entitled to article 8 rights on the same basis as anyone else. Whether a person had waived privacy rights by courting publicity called for fact-sensitive evaluation rather than the application of some general principle (at para. 19)
[37] See *PJS v News Group Newspapers*, n. 28, above, where injunctions were continued despite the stories leaking on various social media sites.

the end result would probably be the same as it was in November 1964, when the original judgment was delivered.

Today, the Duchess would no doubt have a reasonable expectation of privacy in those matters relating to her marriage and her private sexual conduct and affairs. Further, following *Mosely*, and other cases, that expectation would not have been destroyed by her sexual promiscuity, however much the public may have disapproved of her conduct. The conduct, however peculiar or extreme was not illegal, or so immoral that it would deprive her of her expectation of privacy. So too, any defence of public interest would, in all likelihood, fail, because the publication of the information was not of, or in the public interest, despite being of great interest to the public. Further, her previous revelations relating to the Duke's behaviour, and his incompetence regarding financial matters, were not of the same nature or seriousness to doubt her desire for such matters to remain private.

The decision in *Argyll* was, therefore, of great interest and significance, for not only did it pave the way for the protection of privacy interests, specifically with respect to sexual conduct and secrets, but the court appears to have employed a number of principles which are fundamental to the resolution of modern disputes between individual privacy and free speech and press freedom. Having said that, we were, and are now, free to read and watch all the lurid details because of the law's inability at that time to protect privacy outside the law of confidentiality. Had the present law and remedies been available to the Duchess at that time, she would have sought injunctions against the press reporting the details before her husband attempted to sell the story; and compensation had she not acted in time. Also, given the absence of social media, perhaps the details would not have come out, or at least to the general public, and we would not be talking about the events to this day. Whether that is a good thing is a matter of opinion, but the programme, and the undiminished interest in this tale of aristocracy and sexual misbehaviour, has allowed us to revisit the events and examine their legal and social significance.