

# **Celebrity privacy and the development of the judicial concept of proportionality:**

## **How English law has balanced the rights to protection and interference**

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**Passed without corrections**

## Statement of Originality

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A handwritten signature in blue ink that reads "R Callender Smith". The signature is written in a cursive style and is underlined with a single horizontal line.

Robin Callender Smith

11 August 2014

## Details of collaboration and publications

R Callender Smith, *Press Law* (Sweet & Maxwell 1978).

R Callender Smith, 'Freddie Starr ate my privacy: OK!' *Queen Mary Journal of Intellectual Property* Vol 1 No 1 April 2011, 53 – 72.\*

R Callender Smith, 'Mirror, mirror on the wall....are those image rights I see before me?' *Queen Mary Journal of Intellectual Property* Vol 2 No 2 2012, 195 – 197.\*

R Callender Smith, 'The Missing Witness? George V, Competence, Compellability and the Criminal Libel Trial of Edward Frederick Mylius.' *The Journal of Legal History* Vol 33 No 2 August 2012, 209 – 239.\*

R Callender Smith, 'From *von Hannover (1)* to *von Hannover (2)* and *Axel Springer AG*: do competing ECHR proportionality factors ever add up to certainty?' *Queen Mary Journal of Intellectual Property* Vol 2 No 4 2012, 389 – 393.\*

R Callender Smith, 'Discovery and compulsion: how regulatory and litigation issues relating to intellectual property rights are challenging the fundamental right to the protection of personal data.' *Queen Mary Journal of Intellectual Property* Vol 3 No 1 2013, 2 – 21.\*

R Callender Smith, 'Protection from Harassment Act 1997: from Anti-Stalking Crimes to Celebrity Privacy Remedies.' *Queen Mary Law Journal* Vol 5 Spring 2014, 23 – 37.\*

Robin Callender Smith, 'Privacy law is madness' *Sunday Express* (London, 17 April 2011) 37.

Robin Callender Smith, 'No privacy in the web age' *Sunday Express* (London, 23 September 2012) 37.

Robin Callender Smith, 'Juries? I have a reasonable doubt' *Sunday Express* (London, 24 February 2013) 37.

\* Available on SSRN Author page: <http://ssrn.com/author=1708592>

## Abstract

This thesis examines how English law has, and has not, balanced celebrities' legal expectations of informational and seclusional privacy against the press and media's rights to inform and publish. Much of the litigation that developed the English laws of privacy has been celebrity-generated by those with the financial resources to seek out and utilize privacy regimes and remedies in ways not immediately available to ordinary members of the public. The media, generally, has had the resources to present the relevant counter-arguments.

Privacy protection was initially afforded to celebrities by breach of confidence and copyright. While public interest and "fair dealing" defences developed within English law, there was no underlying or consistent practical element in legislative or judicial thinking to promote a balance between the competing interests of protection and interference. That practical element, the concept of proportionality, developed in the Convention case-law of the ECtHR in Strasbourg during the 1950s. It was not until the Human Rights Act 1998 (HRA) that English legislators and the UK judicial system began to reflect and apply its consequences.

Arriving at proportionate results and decisions – particularly in the realms of privacy - requires both the engagement of the rights that are sought to be maintained as well as a careful balancing exercise of these rights both internally and vis-à-vis each other. Because celebrities, with their Article 8 concerns, and the media, with Article 10 arguments, seek for their causes to prevail, the ways in which legislation and litigation now resolves matters is by the "ultimate balancing test" of proportionality. Proportionality is the measure within this thesis that is constant from chapter to chapter, highlighting, respectively, where the application of proportionality and balance might have produced different results as regimes developed historically and where new developments were needed to accommodate its requirements when it was apparently absent.

## Acknowledgements

The patience, perseverance, guidance and encouragement I have received from my two supervisors, Professor Ian Walden and Professor Christopher Millard, have been invaluable. They were the inspiration for embarking on and completing this thesis. Professor John Angel, also of QMUL's CCLS, suggested that I audited the LLM module on the Privacy and Information Law course that Ian and Christopher taught with Anne Flanagan in 2008/2009. In 2009/2010, I completed my LLM in Computer and Communications Studies, 37 years after completing my LLB at QMUL in 1973.

I would also like to thank and acknowledge the support of the academic community at QMUL/CCLS and Professors Joanna Gibson, Julia Hörnle, Spyros Maniatis, Duncan Matthews, Chris Reed and Uma Suthersaanen, Drs Gaetano Dimita and Tom O'Shea together with Anne Flanagan and Gavin Sutter. Also, beyond QMUL/CCLS, Professors Catherine Barnard at Trinity College, Cambridge, Phillip Johnson at University College Dublin, Adam Tomkins at Glasgow University and Bjørnar Borvik at the University of Bergen together with Drs Gillian Black at Edinburgh University, David Erdos at Trinity Hall, Cambridge, and Dorota Leczykiewicz at Trinity College, Oxford.

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My friends - former senior in-house counsel at *Express Newspapers* Stephen Bacon and senior in-house counsel at *The Sun* and *The Sun on Sunday* Justin Walford - have given me the opportunity over 35 years to practise some of what is developed in this thesis thanks to the patience of Martin Townsend (editor of the *Sunday Express*) and Victoria Newton (editor of *The Sun on Sunday*).

## Dedication

This thesis is dedicated to my wife Valerie Eliot Smith BA, Barrister, who is an Associate postgraduate student at QMUL/CCLS. To her, and to her knowledge of the works of William Shakespeare, I owe the ideas for the celebrity taxonomy and the golden thread of proportionality together with all the personal elements of her inestimable support, patience, love and understanding.

## In memoriam

Roderick Symington Smith (10 November 1944 – 20 May 1962), my late cousin, who died of a brain haemorrhage shortly after being awarded a Senior Scholarship in Classics at Christ Church, Oxford, and his father – Professor Sir Thomas Broun (TB) Smith QC LLD (3 December 1915 – 15 October 1988) – Professor of Scots Law at Edinburgh University and a Scottish Law Commissioner. Part of revising and restructuring this thesis in April 2014 was completed during a four-day stay at Christ Church, Oxford, close to the rooms TB occupied there as an undergraduate.

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# CHAPTER 1

## Scope of the thesis, key concepts, sequence of chapters and limitations

“Some are born great, some achieve greatness and some have greatness thrust upon them.”<sup>1</sup>

### 1.1 Scope of Thesis

This thesis examines the various privacy regimes in English law that have been, are and may be used by celebrities. It explores the tension between the elements that protect such privacy and those which permit intrusion. That tension generally manifests itself as a conflict between the information celebrities wish to keep private and that which the press and media wish to comment upon, expose and publish.

The substance of the analysis in this thesis is the increasingly clearly articulated judicial concept of proportionality, a concept that also informs the way contemporary domestic and European legislation and jurisprudence is constructed. Its observable explicit or implicit existence or absence, whether called proportionality or something similar, is the core running through the chapters of this thesis. Issues of proportionality – the application of an articulated and visible rule of reason – allow for the consideration of where the balance lies in either protecting or permitting interference with an individual’s seclusional or informational privacy. It can prevent unreasonable and excessive legal consequences both within the development of case law and in the framing and application of statute law. It provides a touchstone by which the effect of

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<sup>1</sup> Malvolio *Twelfth Night* Act 2 Scene 5 144 – 146 (misunderstanding the letter written by Maria and thinking it is from Lady Olivia telling him that he will achieve greatness by becoming her husband... only to be mocked for his delusions by both Olivia and the Clown).

any unbalanced and inadequate statutory measures and case-law can be moderated and moulded into a coherent framework to protect celebrity privacy.

Celebrity status, which will be examined more closely below, carries within it a paradox. At its most extreme the paradox creates the *Streisand* effect.<sup>2</sup> This occurs when an individual's legal actions to attempt to protect, hide or remove personal information, has the opposite effect of drawing attention to the information sometimes making its public revelation a particular media goal.<sup>3</sup> The most recent manifestation is the attributed global celebrity accorded to Spanish citizen Mario Costeja González, immortalised after his successful battle against Google to stop linking his name with an old (and subsequently satisfied) debt.<sup>4</sup> Another manifestation of the *Streisand* effect is that the detail sought to be protected may be spread rapidly via social media and on the internet. This emphasises how the traditional media are effectively constrained by the law and self-regulation in ways that do not bind the non-traditional media. Hence the chanting of "CTB! CTB! CTB!" that greeted the footballer Ryan Giggs when he appeared at Manchester United FC matches during 2011 after obtaining and maintaining a privacy injunction. The paradox itself, and its effect, is not an internet phenomenon. Rumour and social traffic in private information is ageless. What has changed is where the revelations take place, the nature of the material being revealed which is often of a sexual nature, the scale of the audience who may now receive the information and the speed at which such revelations can now occur.

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<sup>2</sup> <http://www.economist.com/blogs/economist-explains/2013/04/economist-explains-what-streisand-effect>

<sup>3</sup> This also needs to be seen in the context of the growth of access to information on the Internet. In 2000, 30% of UK households had Internet access. By 2013 this had risen to 80%: <http://www.statista.com/statistics/272765/internet-penetration-of-households-in-the-united-kingdom-uk/> . in 2013, 36 million adults (73%) accessed the Internet every day, 20 million more than in 2006 when the Office for National Statistics began its records: <http://www.ons.gov.uk/ons/rel/rdit2/internet-access---households-and-individuals/2013/stb-ia-2013.html>

<sup>4</sup> Case C-131/12 *Google Spain and Google Inc v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*. The case is discussed in detail at Chapter 6.3.2.

The thesis considers the ways in which celebrity litigants have used and shaped traditional and emerging privacy regimes. Their pockets have been deeper than those of ordinary members of the public. The majority of celebrity challenges have been met and tested by equally well-resourced media counter-arguments. The synthesis resulting from such litigation has provided a rich and informative seam of case law which applies as equally to ordinary members of the public as it does to the celebrity protagonists. The chronological starting point for the thesis is *Prince Albert v Strange* in 1849: the examples, cases and statutes considered cover nearly 175 years with a cut-off point of 11 August 2014.<sup>5</sup> These privacy domains have developed by convention, at common law, by way of European law decisions or have been introduced by statute (sometimes incorporating EU Directives or implementing Regulations).<sup>6</sup>

Also examined is another paradox. Celebrities have helped drive an accumulation of substantive law available for use to protect privacy. However the procedural elements - necessary to enforce, preserve and protect private information – have been rendered less effective as a result of the technological environment in which the substantive law operates. Celebrities are obvious targets for unlawful and unrestrainable revelations - and ill-informed speculation - via texts, tweets, un-moderated comment in chat-rooms and through online discussions in the social media on internet platforms like Facebook. The internet provides a route for what might be seen as an ‘unregulated’ and unruly section of society to subvert legal rules and procedures by identifying and publishing some information that celebrities seek to keep private. The means of addressing, discouraging and preventing such privacy breaches by regulation as well as by civil and criminal actions are – variously - in a state of flux, currently ill-formed and only randomly effective. This presents a major legal challenge for the future.

An additional issue since this thesis began in September 2010 has been the increasing willingness of the English and CJEU courts to assert the ability to

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<sup>5</sup> The date on which all the web references were checked as being live and accessible.

<sup>6</sup> Regimes like copyright, data protection and protection from harassment are not celebrity-specific in their origins but all have seen “early adoption” by celebrities for the protection of their privacy.



deal with actions that might previously have been thought to be outside their jurisdiction. The most notable effects of this are, it is argued, to import the jurisdiction for image rights decisions into UK law and – in the privacy regime of data protection – to make internet search engines in the US and elsewhere domestically liable for breaches and links to content in ways not previously appreciated.

The next three sections examine elements of the three key words and concepts in the thesis title.

## **1.2 Key Concepts**

There are three key concepts examined and explored in this thesis: celebrity, privacy and proportionality.

### **1.2.1 Celebrity**

A taxonomy of celebrity might be thought to be as simple and concise as Malvolio's formulation quoted at the beginning of this chapter. But a review of academic sources in the field of media studies and social history indicates that the taxonomy is broad and multi-faceted and covers a proliferation of approaches and definitions.<sup>7</sup>

#### **1.2.1.1 Taxonomy: defining celebrities**

Leslie suggested that six characteristics are required for an individual to be considered a celebrity: leading a public life or working in the public sphere; accomplishing something of importance and interest to the public; being well-known or famous; seeking celebrity by being seen and heard regularly; being highly visible in the media, and – finally - connecting with the public by embodying its dreams and aspirations.

If one accepts those characteristics, then celebrity begins when all six factors are met. Note that celebrity does not depend on age, gender, place of birth, talent, or skill, although those

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<sup>7</sup> See, generally, *The Celebrity Culture Reader* Editor P David Marshall 2006 Routledge Oxford.

qualities can be helpful to some people rather than others. Celebrity depends on the action taken by individuals. That means how they use their talent, skills, age, gender and so forth.<sup>8</sup>

Boorstin<sup>9</sup> encapsulated the issue with the aphorism that celebrities are persons who are “well-known for their well-knownness”.

Rojek<sup>10</sup> usefully defines celebrity as the consequence of the “attribution” of qualities to a particular individual through the mass media. He identifies three categories. Firstly the *ascribed* celebrity is related to lineage and birth. This status typically follows from blood-lines and individuals who may “add to or subtract from their ascribed status by virtue of their voluntary actions....”.<sup>11</sup> The group includes royalty, the aristocracy, heirs and heiresses and political dynasties. The second category relates to *achieved* celebrity and derives from the “perceived accomplishments of the individual in open competition.”<sup>12</sup> This group includes scientists and intellectuals, philanthropists, entrepreneurs and leading business figures, artists, musicians, writers, heroes and explorers, politicians and campaigners, sports stars, film stars, actors and entertainers, models and pop stars. Finally, the third group comprises of *attributed* celebrity, something which is largely the result of the “concentrated representation of an individual as noteworthy or exceptional by cultural intermediaries.”<sup>13</sup> Many of the achieved celebrities may – at some time - have also populated this group along with “one-hit wonders, stalkers, whistle-blowers, streakers, have-a-go heroes, and mistresses” as well as “celeactors” like “soap” and reality TV

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<sup>8</sup> Larry Z Leslie *Celebrity in the 21<sup>st</sup> Century: A Reference Handbook* ABC-CLIO Santa Barbara, California 2011 31.

<sup>9</sup> Daniel Boorstin *The Image: A Guide to Pseudo-events in America* 25<sup>th</sup> Anniversary Ed. Vintage Books New York 1992 52.

<sup>10</sup> Chris Rojek, *Celebrity* Reaktion Books London 2001, 181 – 200.

<sup>11</sup> Ibid 17.

<sup>12</sup> Ibid 18.

<sup>13</sup> Ibid 18 – 28.

stars”.<sup>14</sup> For Giles,<sup>15</sup> celebrity is a “process”, a consequence of the way individuals are treated by the media.

What all the commentators recognise is that, from the 1990s onwards, the “celebrity” notion expanded into such an important commodity that it became a growth area for content development by the media itself. This in itself has increased the appetite of the media to have the freedom to make greater use of the commodity.<sup>16</sup>

In a highly convergent media environment, where cross-media and cross-platform content and promotion has become increasingly the norm, the manufacture of and trade in celebrity has become a commercial strategy for media organisations of all kinds.... The phenomena of *Big Brother* made that clear....The celebrity is also a commodity: produced, traded and marketed by the media and publicity interest industries. In this context, the celebrity’s primary function is commercial and promotional.<sup>17</sup>

Leslie has argued that celebrity, as the term is used in contemporary culture, is a concept that was not present in the earliest civilisations. It developed over time. It depended, among other things, on the quality and flow of information to the general public, something given greater depth and reach via the internet/social media. New methods have developed to communicate with the public and, as a consequence, the concept of celebrity has evolved to become more complex.<sup>18</sup>

#### **1.2.1.2 Taxonomy: synthesis**

With all this variety, a slight adjustment of Malvolio’s observation has been required for the celebrity taxonomy of this thesis. It accepts that his (or rather Shakespeare’s) words have been unconsciously reflected in the fundamental structure of research, debate and definition in this area. Those words also have

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<sup>14</sup> Ibid 12.

<sup>15</sup> David Giles, *Illusions of Immortality: A Psychology of Fame and Celebrity* Palgrave Macmillan 2000, 5.

<sup>16</sup> In ECHR Article 10 terms.

<sup>17</sup> Graeme Turner, *Understanding Celebrity* Sage 2004 9.

<sup>18</sup> Larry Z Leslie *Celebrity in the 21st Century* 23.

the advantage of being the taxonomy of the three forms of celebrity which has stood the test of time over the centuries. Malvolio's first category defines *ascribed* celebrities like the British monarch, the royal family, the aristocracy, heirs and heiresses and political dynasties. Such individuals generally have high-profile public personae. They, like all the others, are also entitled to private life rights. His second category recognises celebrity based on accomplishment or competition – politicians and the like – who have *achieved* celebrity. Those in both of the two groups described above are sometimes described as celebrities “par excellence”<sup>19</sup> – literally “better or more than all others of the same kind”.<sup>20</sup> Malvolio's third category describes those evanescent celebrities whose status is generated by media identification and whose celebrity status also falls within Rojek's *attributed* categorisation.

### **1.2.1.3 Taxonomy: effect of synthesis**

The celebrity taxonomy used throughout this thesis adopts the Malvolio/Rojek model of *ascribed*, *attained* and *attributed*. This model allows celebrities, in their lifetime, the opportunity to move through all three manifestations.

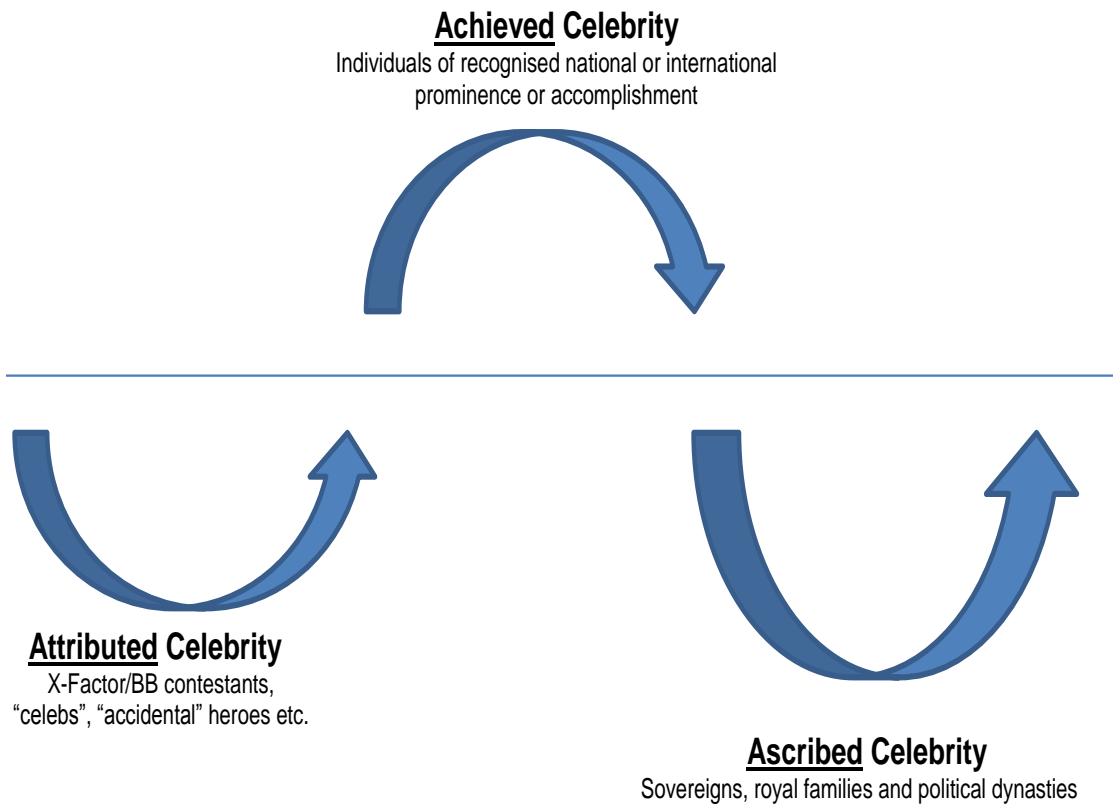
An example would be Kate Middleton. She began with an attributed celebrity profile as a St Andrew's University undergraduate who was one of Prince William's housemates before she moved to the attained celebrity when she became engaged to him and, finally, at her marriage to her ascribed celebrity status as Katherine, Duchess of Cambridge, a future queen and the mother of Prince George, third in line to the throne and – in his own right – an immediately ascribed celebrity.

A diagram, developed for this thesis as a linear and non-hierarchical representation of such celebrity movement through the stages of the taxonomy, follows below.

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<sup>19</sup> Used, particularly, as a legal term of art in the German Courts and the ECtHR.

<sup>20</sup> *The Oxford Essential Dictionary of Foreign Terms in English* 2002 Eds Jennifer Speake, Mark LaFlaur.



**Figure 1.1.** Taxonomy of Celebrity Graphic

The British royal family is one of the world’s leading celebrity brands.<sup>21</sup> Its members – from the monarch and her immediate family through to its more distant members – have for many years been the object of press and media attention domestically and internationally. Its existence provides an historical benchmark against which its continuance as a celebrity brand can be observed, particularly in terms of issues of privacy. While the arc of fame and celebrity for many individuals varies from the clichéd 15 minutes to something more substantial,<sup>22</sup> the British royal family is in the unusual position of providing a measure that endures in the public gaze from generation to generation. As such, it is probably unique on the world stage. The methods by which it might

<sup>21</sup> For a marketing perspective on this topic see John M T Balmer *A Resource-Based View of the British Monarchy as a Corporate Brand* Int. Studies of Mgt. & Org., vol. 37, no. 4, Winter 2007–8, 20–44.

<sup>22</sup> “*Brand Beckham*” is an example of the latter.

preserve its “brand integrity”, such as the limitation of photo opportunities, are becoming more evident.<sup>23</sup> A more aggressive and active pre-litigation and litigation strategy, of which there is some evidence already, is also being deployed to preserve informational and seclusional privacy rights.<sup>24</sup> Such strategies become more viable and effective when the substantive law settles and matures, as it has in this area. The inherent problem with the threat of, or actual, litigation is that overseas publications - and those using the social media outside the jurisdictional control of English law - confound the results of such efforts.<sup>25</sup>

This thesis does not seek to measure the royal family’s - or any celebrity’s - rise or fall in popularity, its *raison d’être*, or any reasons why the celebrity status should or should not continue to exist. It seeks only to present an evidence-based view derived from archive material, case law, statute law and European legislation of the legal issues relating to informational and seclusional privacy and the legitimate external scrutiny that can be applied to its members and celebrities generally. In this way a proportionate balance is achieved between the privacy rights themselves and the rights to interfere with them on an individual basis or as justifications for interference on a societal level. In so far as the royal family is referred to, the perspective of the thesis is neither monarchist nor republican. Members of the royal family, with the exception of the monarch, are subject to – and may make use of - the civil and criminal law of England by the routes which relate to everyone.<sup>26</sup> The thesis does observe, however, the role that the monarch and the royal family have played, and continue, to play, in the development of the laws of privacy since the 1840s.

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<sup>23</sup> The Duke and Duchess of Cambridge restricted pictures in the UK media of their attendance at St Mark’s Church, Englefield, on Christmas Day 2012. They were, however, used by overseas publications and show their annoyance at being photographed: <http://www.usmagazine.com/celebrity-news/news/kate-middleton-prince-william-attend-christmas-mass-at-st-marks-church-20122512>

<sup>24</sup> For instance the five pre-Christmas warnings issued on behalf of the Queen discussed in the Protection of Harassment Act 1997 chapter.

<sup>25</sup> Most recently, revealing pictures of the Duchess of Cambridge’s backside were published in the German magazine *Bild* on 28 May 2014: <http://www.bild.de/unterhaltung/leute/catherine-mountbatten-windsor/und-kim-kardashian-schoene-kehrseiten-36136770.bild.html>

<sup>26</sup> The unusual position of the monarch is examined in Chapter 5.3.

Sometimes their actions have put them in the vanguard, often they have been in the mainstream and occasionally they have let issues pass. As privacy law develops with judgements from Luxembourg and Strasbourg respectively shaping and influencing English law, together with the domestic reflection and incorporation of European legislation, further opportunities may present themselves.

## **1.2.2 Privacy**

Legal definitions of privacy abound and can become prolix.<sup>27</sup> Commentators on the nature and elements of privacy generally identify different but overlapping features. The four major commentators whose approaches are recognised and reflected in this thesis are the late Alan F Westin,<sup>28</sup> Daniel J Solove,<sup>29</sup> Nicole Moreham,<sup>30</sup> and Raymond Wacks.<sup>31</sup> Helen Nissenbaum's work has also provided informative and invaluable background reading.<sup>32</sup>

### **1.2.2.1 Westin**

Westin's theory of privacy concentrates on the ways in which people may protect themselves by temporarily limiting access to themselves by others.<sup>33</sup> According to him, 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.<sup>34</sup> Viewed in terms of the relation of the individual to social participation, privacy is the voluntary and temporary withdrawal of a person from the general society through physical or

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<sup>27</sup> For instance, since 1947 there have been three Royal Commissions into the British Press as well as the *Younger Report into Privacy* (1972) and two reports by Sir David Calcutt QC into privacy and the press (1990 and 1993). See more fully 1.2.2.5.

<sup>28</sup> Formerly Professor of Public Law and Government at Columbia University.

<sup>29</sup> John Marshall Harlan Research Professor of Law at the George Washington University and author of *Understanding Privacy* Harvard University Press 2008.

<sup>30</sup> Associate Professor at Victoria, University of Wellington, New Zealand and a co-author of Tugendhat and Christie's *Law of Privacy and the Media* 2nd Edn, Oxford University Press, 2011.

<sup>31</sup> Professor of Law and Legal Theory, University of Oxford, and author of *Privacy and Media Freedom* Oxford University Press 2013.

<sup>32</sup> Helen Nissenbaum *Privacy in Context: Technology, Policy and the Integrity of Social Life* Stanford 2010.

<sup>33</sup> Alan F Westin *Privacy and Freedom* New York Atheneum 1967.

<sup>34</sup> *Ibid* 7.

psychological means, either in a state of solitude or small group intimacy or, when among large groups, in a condition of anonymity or reserve. He suggests that people have a need for privacy that, in concert with other needs, helps individuals to adjust emotionally to daily life with other people. His privacy is both a dynamic process – where privacy can be regulated so it serves momentary needs and role requirements – and also something more passive, where individuals can have too little, sufficient, or too much privacy. For him, privacy is neither a self-sufficient state nor an end in itself, but a means for achieving the overall end of self-realization, particularly in the context of Western societies.

Westin identified four states of privacy which are the means by which the functions - the purposes or ends of privacy - are achieved. Solitude is being free from observation by others. Intimacy refers to small group seclusion for members to achieve a close, relaxed, frank relationship. Anonymity refers to freedom from identification and from surveillance in public places and for public acts. Reserve is based on a desire to limit disclosures to others; it requires others to recognize and respect that desire. The functions for these – the “whys” of privacy – are also fourfold. Personal autonomy refers to the desire to avoid being manipulated, dominated, or exposed by others. Emotional release refers to release from the tensions of social life such as role demands, emotional states, minor deviances, and the management of losses and of bodily functions. Privacy, whether alone or with supportive others, is personal space allowing opportunities for emotional release. Self-evaluation refers to integrating experience into meaningful patterns and exerting individuality on events. It includes processing information, supporting the planning process such as the timing of disclosures, integrating experiences, and allowing moral and religious contemplation. The final function, limited and protected communication, has two facets: the former sets interpersonal boundaries and the latter provides for sharing personal information with trusted others.<sup>35</sup>

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<sup>35</sup> Ibid 14.



### 1.2.2.2 Solove

Solove has focussed his work on creating, developing and working within a taxonomy of privacy that seeks to give a form, boundaries and meaningful expression to the concepts that inhabit this area of law. His taxonomy of privacy recognises four categories: information collection, information processing, information dissemination and invasion. He notes that, in terms of information collection, surveillance can play a significant part.<sup>36</sup> He suggests that surveillance in this contemporary Age of Information can alter people's behaviour by the potentially chilling Panopticon effect.<sup>37</sup> Information processing allows for private information to be aggregated and analysed in a way that can reveal facts and facets about an individual which would not immediately be apparent and which the individual might not expect to be combined and mined in this way. In terms of the dissemination of private information it can lead to breaches of confidence and

....the exposing to others of certain physical and emotional attributes about a person. These are attributes that people view as deeply primordial, and their exposure often creates embarrassment and humiliation. Grief, suffering, trauma, injury, nudity, sex, urination, and defecation all involve primal aspects of our lives—ones that are physical, instinctual, and necessary. We have been socialized into concealing these activities.<sup>38</sup>

In terms of invasion as a privacy harm, Solove notes that this does not always involve information. It can occur by way of intrusion – particularly on an

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<sup>36</sup> “What is the harm if people or the government watch or listen to us? Certainly, we all watch or listen, even when others may not want us to, and we often do not view this as problematic. However, when done in a certain manner—such as continuous monitoring—surveillance has problematic effects. For example, people expect to be looked at when they ride the bus or subway, but persistent gawking can create feelings of anxiety and discomfort.” Daniel J Solove *Understanding Privacy* Harvard 2009, 107.

<sup>37</sup> The philosopher and social reformer Jeremy Bentham's idea for prison construction in 1787 where all inmates could be overseen by way of an effective and ergonomic architectural design.

<sup>38</sup> Daniel J Solove *A Taxonomy of Privacy* U Pennsylvania LR Vol 154 January 2006 477 – 564, 536.

individual's seclusion – or by decisional interference in such personal and private matters.<sup>39</sup> The seclusional interference created by intrusion

often interferes with solitude, the state of being alone or able to retreat from the presence of others. Indeed, Warren and Brandeis wrote from a tradition of solitude inspired by Ralph Waldo Emerson, Henry David Thoreau, and Emily Dickinson.<sup>40</sup>

### 1.2.2.3 *Moreham*

This portion of Solove's observation on the appropriate taxonomy, and its effects, links conveniently to Moreham's more limited approach. For her, and it is a practical expression of the approach adopted by many contemporary English privacy law practitioners, privacy is:

the state of desired 'inaccess' or as 'freedom from unwanted access'. In other words, a person will be in a state of privacy if he or she is only seen, heard, touched or found out about if, and to the extent that, he or she wants to be seen, heard, touched or found out about. Something is therefore 'private' if a person has a desire for privacy in relation to it: a place, event or activity will be 'private' if a person wishes to be free from outside access when attending or undertaking it and information will be 'private' if the person to whom it relates does not want people to know about it.<sup>41</sup>

This definition and approach differs markedly from the broader data protection conception, which includes controlling the use of personal data whether private or public. English practitioners and judges appear to have found the privacy elements of data protection regimes difficult to factor into the privacy landscape that they observe as will be seen in the Data Protection chapter. Arguably, this definition is also only a sub-set of Article 8 jurisprudence, which extends to public arenas.

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<sup>39</sup> *Griswold v Connecticut* 381 US 479, 485 – 86 (1965) on contraception and *Roe v Wade* 410 US 113, 153 (1973) on abortion.

<sup>40</sup> Daniel J Solove *A Taxonomy of Privacy* 554.

<sup>41</sup> NA Moreham *Privacy in the common law: a doctrinal and theoretical analysis* LQR 2005, 121(Oct), 628-656, 635. See also, most recently, her position that a physical privacy action can and should be developed from within English common law: NA Moreham *Beyond information: physical privacy in English law* CLJ 2014, 73 (2) 350 – 377.

#### **1.2.2.4 Wacks**

Raymond Wacks does not believe any of current approaches to privacy are correctly formulated or tenable. For him, an acceptable definition of privacy remains elusive. He considers that Warren and Brandeis “ruined the show” by introducing into the concept of private life the “superfluous” feature of the “right to be let alone”.<sup>42</sup> For him, the protection of an individual’s privacy should be limited to the protection of personal information.<sup>43</sup> The “private” element of such information he regards as having been treated “in disappointingly nebulous terms” by all courts so that the critical question of what constitutes the class of information that was susceptible to legal protection has been obscured.

He urges that a focus on the type of private information – rather than the circumstances that may give rise to an expectation of privacy – would establish clearer boundaries between privacy and free speech.<sup>44</sup> In essence, his approach to the protection of privacy is to “identify the specific interests of the individual” that the law should secure. The nucleus of the right to privacy was the “safeguarding of private facts”.<sup>45</sup> The only way to have clear and authoritative guidelines for its intrusive and ill-defined antidote – the public interest – is to enact a statutory definition specifically in relation to the public interest. He supplied that definition in Clause 4 of his draft Protection of Privacy Bill.<sup>46</sup>

#### **1.2.2.5 Privacy definition in English law**

Having described briefly the range and differing conceptual bases of privacy, as expressed by those four commentators, it is instructive to look next at the chronology of the lack of success faced by specifically privacy-centred recommendations or attempts at legislation in English law before the HRA. For a while it was as if, by finding that privacy was too difficult to define, it was somehow acceptable to consign it to the “awkward and unsolvable” box where

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<sup>42</sup> Raymond Wacks *Privacy and Media Freedom* Oxford University Press 2013, 238.

<sup>43</sup> Ibid 240.

<sup>44</sup> Ibid 241.

<sup>45</sup> Ibid 256.

<sup>46</sup> The draft Bill was based largely on several of the 2004 recommendations of the Law Reform Commission of Hong Kong’s report *Civil Liability for Invasion of Privacy* on which he served.

it could then only exist as a problem without a solution or vaguely contained – in newspaper terms – by the less-than-objective variables of restraint by self-regulation. This is despite the UK having ratified the ECHR in 1951.

A series of six privacy Bills went before Parliament without ever gaining traction for actual legislation.<sup>47</sup> In 1972 – at a cross-party level – there was the Younger Committee Report on Privacy: it achieved little.<sup>48</sup> Its two recommendations for the creation of individual and new specific torts – unlawful surveillance and disclosure or other use of information unlawfully acquired – were ignored by Parliament.<sup>49</sup> It did, however, highlight the difficulties of defining the meaning of “privacy”.<sup>50</sup>

Then, in 1990, came the report of the Committee on Privacy and Related Matters chaired by David Calcutt QC.<sup>51</sup> It grasped the nettle of definition and decided that privacy related to the right of an individual to be protected

against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information.<sup>52</sup>

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<sup>47</sup> Those sponsored by Lord Mancroft (1961), Alexander Lyon MP (1967), Brian Walden MP (1969), William Cash MP (1987), John Browne MP (1989: the author assisted in drafting the public benefit defence elements of this Bill which was withdrawn before the Report stage) and Lord Stoddard (1989).

<sup>48</sup> Cmnd 5012.

<sup>49</sup> It referred to the Law Commissions of England & Wales and Scotland the issues relating to breach of confidence with a view to clarification and restatement in statute law. During this period there was also the Lindop Report in 1978 (Cmnd 7341) which considered the practical aspects of data protection and how this might be implemented. Its key recommendations were the creation of a Data Protection Authority and the adoption of Codes of Practice for different sectors, a precursor for the Data Protection Act 1984.

<sup>50</sup> “The first difficulty we faced as a Committee was in trying to define privacy and, in the event, we decided that it could not satisfactorily be done. We looked at many earlier attempts and we noted they either went very wide, equating the right to privacy with the right to be let alone, or that they amounted to a catalogue of assorted values to which the adjectives “private” or “personal” could be applied” explained Lord Byers (a member of the Younger Committee): HL Deb 06 June 1973 vol 343 cc106. The Younger Committee drew particular attention to Westin’s privacy definitions and Brian Walden MP’s Right to Privacy Bill 1970 – drawing from a “Justice” Committee draft – before concluding that “the concept of privacy cannot satisfactorily be defined”: Cmnd 5012 [58 – 73].

<sup>51</sup> Cmnd 1102.

<sup>52</sup> Ibid [3.7]. This effectively adopts the definition provided by Justin Walford – then of *Express Newspapers* – in his evidence to the Committee recorded at [3.2].

The *Calcutt* right to privacy included specific protection against physical intrusion; publication of hurtful or embarrassing personal material (whether true or false); publication of inaccurate or misleading personal material and publication of photographs or recordings of an individual taken without consent. Two years later Calcutt reviewed the area again.<sup>53</sup> He concluded that newspaper self-regulation had failed and that a privacy law was required.<sup>54</sup> Again nothing happened save a promise from the Government that there would be a focus on improving self-regulation delivered two years after the report was presented to Parliament.<sup>55</sup> It was, perhaps, inevitable that the consistent Parliamentary lack of resolve to address more formally the privacy issues identified in these reports, in relation to the press particularly, led to the Leveson Inquiry.

#### **1.2.2.6 Privacy as expressed in this thesis**

Significantly, nearly 25 years after Calcutt's 1990 privacy formulation, it pre-figured the elements of the contemporary tort of misuse of private information. It encompasses the informational and seclusional celebrity privacy issues that are explored in this thesis. The author does not believe that any single approach derived from the privacy theories advanced by the four commentators satisfactorily encapsulates the practical dynamic of the privacy elements that celebrities seek to protect in litigation. All of them mark out important parameters for consideration and all feature at various stages in the case law. Moreham's highly subjective concept - that something is private if a person has a desire for privacy in relation to it - corresponds most closely to celebrities' perceptions of what privacy *should be* as articulated in reported litigation. A place, event or activity is private if a person wishes to be free from outside access when attending or undertaking it. Information is private if the person to

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<sup>53</sup> Cmnd 2135 January 1993 *Review of Press Self-Regulation 1991 -92*. The triggers for the review were the PCC's responses to long-lens pictures of young Princess Eugenie playing naked in her parents' private garden (*The People* July 1991), topless pictures of her mother in the South of France (*Daily Mirror* August 1992), the publicised disintegration of the marriage of the Prince and Princess of Wales during 1992 and the treatment by the press of MPs Clare Short, Paddy Ashdown, Virginia Bottomley and David Mellor: 4.41 – 4.69.

<sup>54</sup> David Eady QC, as he was then, was a Calcutt Committee member.

<sup>55</sup> Cmnd 2918 July 1995 *The Government's Response to the House of Commons National Heritage Select Committee on Privacy and Media Intrusion*.

whom it relates does not want people to know about it. It is a subjective, flexible “bubble”. Wacks’ – at the other end of the scale – represents the objective scepticism about the imprecise definitions of privacy and public interest, urging greater concentration on the type of private information which should be protected from publication in the exercise of proportionate decision-making.

It is the act of actual or proposed publication that creates privacy issues for celebrities of all categories to a much greater extent than issues of surveillance. That is not to diminish the significance of the product of such celebrity surveillance. This can lead not only to harassment but fears of publication of the product which infringes privacy rights, as evidenced in the egregious phone hacking described later in Chapter 6.

Calcutt’s original 1990 report included consideration of the ECHR Article 10 freedom of speech balance in relation to privacy and issues of proportionality. The Report noted the UK’s lack of a written constitution and the fact that it had not directly incorporated the Convention into domestic law.<sup>56</sup> It rejected the approach to the balancing exercise in John Browne MP’s Protection of Privacy Bill.<sup>57</sup> It preferred the alternative, “pre-eminent” Article 10 approach evidenced in the ECtHR’s judgement in the *Thalidomide* case.<sup>58</sup> It failed to recognise the objective necessity for the “intense focus” required for each individual right – privacy and freedom of speech – before any other more generally balancing evaluation. So, while not adopting Calcutt’s Article 10 approach to striking the balance between free speech and privacy, the definition of privacy contained in his Report is the one reflected in this thesis. Privacy is breached when there is

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<sup>56</sup> Cmnd 1102 [3.12 – 3.18].

<sup>57</sup> *Ibid* [3.16]: “Any public use or public disclosure of private information is a tort of breach of privacy....[unless] the defendant satisfies the court that there was or is a public interest or public benefit in the information being so used or disclosed; and the plaintiff is unable to satisfy the court that the public interest or public benefit in the use or disclosure is outweighed by the public interest or public benefit involved in upholding the privacy of the information.”

<sup>58</sup> *Ibid* [3.17 - 3.18] relying on *Sunday Times v UK* 2 EHRR 245. “The court emphasised that it was ‘faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted’. This meant that the Committee “...started from a position that freedom of speech is pre-eminent. Certain exceptions protecting individual privacy may then prove to be necessary”.

intrusion into an individual's personal life or affairs, or those of his family, by direct physical means or by publication of information. This is also closest to the definition used in contemporary celebrity litigation. How that privacy right is balanced is the next issue for examination.

### 1.2.3 Proportionality<sup>59</sup>

#### 1.2.3.1 Introduction

Proportionality has been an evolving concept in English law. Some jurists focus on its origins<sup>60</sup> in the approach of the German Constitutional Court to proportionality (*verhältnismäßigkeit*).<sup>61</sup> The Federal Constitutional Court of Germany, established after World War II, adopted and developed the proportionality principle. It applies the proportionality principle as a generalised head of review for administrative action and the concept plays a key role in the administrative law Germany.<sup>62</sup> It uses proportionality in cases in which there are conflicts between individual rights. These rights may not be qualified to a further extent than is necessary to reconcile them. Even today there is nothing about proportionality that is explicit in German basic law. However outlines of the principle of proportionality and the importance of balancing competing interests pre-date the Human Rights Act 1998 (HRA).<sup>63</sup> Principles of proportionality can be discerned within the fabric of English law in many of the

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<sup>59</sup> For a concise review of this of this concept see Eric Engle *The History of the General Principle of Proportionality: an overview* 10 Dartmouth Law Journal 1 – 11 (2012).

<sup>60</sup> Lady Arden LJ, in a speech on 12 November 2012 at King's College London as the annual address of the UK Association for European Law, narrows its origin to *Kreutzberg* 14 June 1882, Pr OVG, 29, 253. There, the Prussian Supreme Administrative Court developed the notion that the state required special permission in order to interfere with a citizen's liberties.

<sup>61</sup> See Basil S Markensis *Privacy, freedom of expression and the horizontal effect of the Human Rights Bill: lessons from Germany* LQR 1999, 115 (Jan) 44-88.

<sup>62</sup> Proportionality comprises three elements: (1) Suitability – the measure should be suitable for the purpose of facilitating or achieving the desired objective; (2) Necessity – the measure should be necessary and (3) Fair balance – the measure should not be disproportionate to the restriction which it involved.

<sup>63</sup> *R v Goldstein* [1983] 1 WLR 151, 155B: Lord Diplock described proportionality as meaning "in plain English, you must not use a steam hammer to crack a nut, if a nutcracker would do."

12 equitable maxims that developed historically to correct the harshness and inflexibility of some common law rules and precedents.<sup>64</sup>

### **1.2.3.2 Equity and Proportionality**

In terms of the development of the English equitable doctrine of breach of confidence as a privacy remedy at least one commentator believes the claim to the equitable origins of the action have been overstated.<sup>65</sup> Even he, however, concedes that the Courts of Equity did make important contributions to the development of this area of protected private information.

Also the development of the public interest defences, to make the scope of equitable action more proportionate, lie in pre-HRA and pre-ECHR Convention law.<sup>66</sup> There is a close affinity between these separate concepts of the “public interest” and “proportionality” but this thesis does not argue that they are the same benchmark.

### **1.2.3.3 Proportionality post-Human Rights Act (HRA) 1998**

Lord Steyn’s summary in *Re S* of the operation of proportionality in relation to the tension between private life issues and freedom of speech in post-HRA 1998 English law is a classic of conciseness.<sup>67</sup>

The interplay between Articles 8 and 10 has been illuminated by the opinions in the House of Lords in *Campbell v MGN Ltd* [2004] 2 WLR 1232....What emerge[s] clearly from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for

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<sup>64</sup> Particularly “where there is equal equity, the law shall prevail, ”, “equality is equity, ”, “equity looks to intent rather than form” and “equity looks on that as done which ought to be done..”. The full list is detailed in *Snell’s Equity* 32nd Ed Sweet & Maxwell 2010.

<sup>65</sup> Lionel Bently’s review of its historical development at Chapter 2.02 in *Gurry on Breach of Confidence* 2<sup>nd</sup> Ed Oxford University Press 2012.

<sup>66</sup> *Gartside v Outram* (1857) 26 LJ Ch 113. The claimant alleged that a clerk had copied confidential documents. The defendant said they disclosed fraud. The defendant filed interrogatories which the claimant refused to answer. Page-Wood VC said the claimant had to answer: “The true doctrine is that there is no confidence as to the disclosure of an iniquity. You cannot make me the confidant of a crime or fraud...”

<sup>67</sup> *Re S* [2004] UKHL 47.



interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.<sup>68</sup>

As ECtHR Article 8 and Article 10 case law has developed through, in particular, its Grand Chamber judgements so the “values” identified in *Re S* have been developed, explained and underpinned in Strasbourg and reflected back into English case law.<sup>69</sup> The criteria laid down in the ECtHR’s case-law include consideration of the contribution to a debate of general interest; how well-known and relevant the person concerned is in the context of the report; the prior conduct of the individual in question; the method of obtaining the information and its veracity; the content, form and consequences of the publication and, finally, the nature and severity of any sanctions imposed as a result of publication.<sup>70</sup>

From English cases it is possible to discern the range of Article 8 issues that will be considered prima facie as involving private information and given value.<sup>71</sup> These include the following in relation to individuals: physical or mental health; physical characteristics, including nudity; racial or ethnic characteristics; emotional states, particularly in the context of distress, injury or bereavement; personal and family relationships; sexual orientation; intimate details of personal relationships and information conveyed in the course of such relationships; political opinions and affiliations; religious commitment; financial and tax-related information; communications and correspondence; matters relating to the home and to children and past involvement with criminal behaviour and involvement in crime as a victim or witness.

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<sup>68</sup> Ibid [17].

<sup>69</sup> See *Axel Springer AG v Germany* [2012] ECHR 227, discussed in greater detail in Chapter 3.3.3.2 and 3.5.3.1.

<sup>70</sup> Domestically the Supreme Court recently reviewed the history and practical application of the proportionality test in *Bank Mellat v HM Treasury* [2013] UKSC 39, striking down a direction telling all financial institutions not to deal with an Iranian bank. The legal ground was that the direction was “disproportionate”. Lord Sumption described it as involving “an exacting analysis of the factual evidence in defence of the measure” [20].

<sup>71</sup> There is a detailed list with full citations of the relevant cases in Mullis and Parkes *Gatley on Libel and Slander* 12<sup>th</sup> edn Sweet & Maxwell 2013, 22.5

The freedom of expression values protected by Article 10 in English law had earlier been explained – also by Lord Steyn – in *R ex parte Simms v SSHD*.<sup>72</sup>

In a democracy it is the primary right: without it an effective rule of law is not possible....it promotes the self-fulfilment of individuals in society....The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.

Although he was talking about public life, his explanation applies equally to its private life values. It deters inappropriate behaviour – including such conduct as phone hacking and tapping – and encourages the modification of bad behaviour through public discussion and, where necessary, direct legal action.

### **1.3 Arrangement of Chapters**

Ultimately no arrangement of the sequence of the chapters in the thesis conveniently accommodates the logic or the chronological development of celebrity privacy rights and proportionality. The sequence of the privacy regimes described in the chapters which follow was chosen because Breach of Confidence and Misuse of Private Information are – in essence - common law or equitable developments: Copyright, the Protection from Harassment and Data Protection Acts are statutory regimes.

### **1.4 Limitations**

Subject to the limitations below the law and cases explored in this thesis reflect matters as of 11 August 2014.

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<sup>72</sup> *R ex parte Simms v SSHD* [2000] 2 AC 115, 125 – 6.

### 1.4.1 Defamation

Defamation is the major privacy remedy which is not covered in this thesis.<sup>73</sup> For a time, post-*Mosley* in 2008, it looked as if defamation had been relegated to the position of an also-ran in celebrity litigation about private life rights. Put simply, why should celebrities issue libel writs when the rule in *Bonnard v Perryman* allowed the media claiming truth to continue to publish with only the penalty of damages at the conclusion of an unsuccessful trial as the cost of business? A misuse of private information writ and injunction, on the other hand, could secure immediate anonymity for the target up to (and potentially after) the conclusion of the trial.

Defamation's exclusion from this thesis – apart from reasons of space – occurs because the practical consequences of changes to this area of law in the Defamation Act 2013 are (as yet) untested.<sup>74</sup> Defamation actions generally are clearly alive and well.<sup>75</sup> They outnumber recorded privacy actions by a significant factor. Covering defamation in an abbreviated form within the confines of this thesis would have diluted the focus on all the other areas which have been examined. At the conclusion of this thesis the author intends to unite defamation in a broader study of celebrity privacy and proportionality for reasons concisely outlined in the Preface to the current edition of *Gatley*.

### 1.4.2 Leveson<sup>76</sup>

Past and contemporary regulation of the press by the Press Complaints Commission (PCC) by way of its Editorial Code is examined in this thesis in the

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<sup>73</sup> In *Application by Guardian News Media in HM Treasury v Ahmed* [2010] UKSC 1, the *Guardian* contended that reputation did not fall within the scope of Article 8, relying on the decision of the Court of Human Rights in *Karako v Hungary* [2009] ECHR 712. Lord Rodger, rejecting that argument, drew attention to the clear statement on the point in the decision in *Petrina v Romania* [2009] ECHR 2252. He suggested [at 42] that some degree of attack on personal integrity was required before Article 8 was engaged.

<sup>74</sup> Its major provisions did not come into force until 1 January 2014.

<sup>75</sup> Sweet & Maxwell record defamation cases *in court* as: 2009 (78), 2010 (83), 2011 (84) and 2012 (71):  
[http://www.sweetandmaxwell.co.uk/downloads/defamation\\_cases\\_plummet\\_15\\_per\\_cent.pdf](http://www.sweetandmaxwell.co.uk/downloads/defamation_cases_plummet_15_per_cent.pdf)

<sup>76</sup> <http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.levesoninquiry.org.uk/>. The four volumes of *An Inquiry into the Culture, Practices and Ethics of the Press*

chapters relating to the Protection from Harassment Act 1997 and Data Protection. The industry's self-created post-Leveson regulator – the Independent Press Standards Organisation (IPSO) – aims to continue with its predecessor's Editorial Code when it starts work sometime during the autumn of 2014.<sup>77</sup>

Given the political, legal and practical uncertainties which have surrounded, and continue to surround, this area it would not have been productive to pursue the ever-changing script on this topic. The Leveson Inquiry did focus part of its attention on data protection issues and this is reflected, as appropriate, throughout the thesis.

### **1.4.3 EU Data Protection Regulation**

Like the Leveson Inquiry, this became a moving target in the hinterland of this thesis. The Regulation began life on 25 January 2012 when the European Commission released a draft to replace Directive 95/46/EC, the foundation for current EU (and UK) data protection legislation.

When - and if - finally agreed the Regulation could have a significant and wide-ranging impact on businesses, imposing new compliance obligations with significant sanctions for non-compliance. On March 12, 2014, the European Parliament concluded the formal First Reading to confirm the compromise text of the draft Regulation approved by Parliament's LIBE Committee in October 2013.<sup>78</sup> The Council of Ministers has yet to finish its review of the Regulation, which must then be agreed with the Parliament later in 2014. The recent CJEU judgement of *Google Spain*, dealt with in Chapter 6, may have set the direction of travel for some of its eventual provisions.

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was published on 29 November 2012:  
[http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780\\_i.pdf](http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780_i.pdf)

<sup>77</sup> <http://www.theguardian.com/media/2014/may/28/press-regulator-ipso-board-ros-altmann-charles-wilson>

<sup>78</sup> Vote: 621 in favour of the Regulation, 10 against and with 22 abstentions.

## CHAPTER 2

# Breach of Confidence as a Celebrity Privacy Remedy

### 2.1 Introduction

Breach of confidence has jurisdictional origins and manifestations in contract, tort and property as well as equity. Many consider it is *sui generis* in nature.<sup>79</sup> Its association with such a broad spectrum of areas of legal activity helps to explain its durability, flexibility and utility from 18<sup>th</sup> to the 21<sup>st</sup> century. The traditional narrative that places *Prince Albert v Strange*<sup>80</sup> as the watershed case in this regime is, perhaps, too limited.<sup>81</sup> It also ignores some of the irresolvable idiosyncrasies in the case. Although some key cases in Chancery were important developments, the primary mechanisms for protecting confidentiality were not simply the inventions of Chancery from before the Judicature Acts. In fact, the courts seem to have been willing to be pragmatic in the protection of confidential information by using “whatever mechanism was to hand”.<sup>82</sup> As a classic celebrity case however and with all its faults – the ascribed celebrity of the Queen’s consort seeking the protection of the Queen’s own courts to protect the royal couple’s privacy - it is an example of circumstances that could occur as much now as then. There are many echoes which were replayed with only a slightly different factual matrix with another ascribed celebrity in the Prince of Wales’ *Hong Kong Diaries* case in 2006. It was also, as will be explored, a missed opportunity to define and develop more clearly a specific English law of

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<sup>79</sup> A full discussion can be found in Aplin, Bently, Johnson and Malynicz *Gurry on Breach of Confidence: The Protection of Confidential Information* Oxford 2012, 4.01 – 4.117.

<sup>80</sup> *Prince Albert v Strange* (1849) 1 De G & SM 652.

<sup>81</sup> *Gurry* 2.01 – 2.157.

<sup>82</sup> *Ibid* 2.02

privacy. It was left to Warren and Brandeis in the US to pray elements of the *Prince Albert* case in aid as they formulated their common law synthesis.

This chapter concentrates on the celebrity privacy rights of all categories protected by breach of confidence, acknowledging that this regime has grown through the development of a broader case law encompassing commercial and trade secrets. There it still has a vital and active role. This chapter considers not only the protected interests but also the ways in which permitted interference with the rights has evolved. Then the civil elements of the remedies and enforcement issues are examined.

Issues relating to what would now be termed proportionality in the development of the regime will be considered because breach of confidence is the major area of this thesis to have faced the irresistible domestic impact and mutational effect of the HRA.<sup>83</sup> Issues of proportionality and the balancing exercise – when played out in the context of the new, post-*Campbell*<sup>84</sup> tort of misuse of private information – resulted in breach of confidence having two manifestations. The first is the “traditional” formulation, dealt with in this chapter, and which includes the “hybrid” breach of confidence action involving the kind of personal information that also contains within it a commercial value as in *Douglas v Hello*.<sup>85</sup> The second is where, as in *Campbell*, the claim is for misuse of private information and which forms the basis of the new tort explored in Chapter 3. The true basis of that action relates to the protection of personal autonomy and dignity.<sup>86</sup> Whether, as a celebrity privacy remedy, breach of confidence has become something of a specialist adjunct will only become clear with the passage of time. Post HRA, the “traditional” breach of confidence has been “utilized, colonized, hollowed [and] then discarded” in favour of the two-stage

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<sup>83</sup> Described as a “tectonic” shift by Raymond Wacks *Privacy and Media Freedom* Oxford 2013, 3.

<sup>84</sup> *Campbell v MGN* [2004] UKHL 22.

<sup>85</sup> *Douglas v Hello (No 8)* [2007] UKHL 1.

<sup>86</sup> *Campbell* per Lord Nicholls [13 – 15] and Lord Hoffman [48 – 50].

test. Having initially used it as a “vehicle” the courts then shed its confines so that its classical elements are no longer structurally important.<sup>87</sup>

## 2.2 Protected Rights

The nature of confidential information was aptly characterised by Lord Donaldson in the *Spycatcher* case as being like an ice cube:

Give it to the party who undertakes to keep it in his refrigerator and you still have an ice cube.... Give it to the party who has no refrigerator or who will not agree to keep it in one, and by the time of the trial, you just have a pool of water which neither party wants. It is the inherently perishable nature of confidential information which gives rise to unique problems.<sup>88</sup>

The classic formulation of breach of confidence requires the following elements: there must be information which is confidential, the claimant must be able to show that the defendant is under an obligation not to use or disclose the information *and* must also be able to show that either the proposed or actual use or disclosure of that information is in breach of the obligation of confidentiality. If the information becomes public then it cannot – any longer – be confidential. In these circumstances it will have lost its “quality of confidence”.<sup>89</sup> This area – when facts *are* in the public domain – will be examined in respect of the implicit fourth element of the action: the public interest defence. This requires consideration separately and in greater detail than the other elements described briefly above. It may be open to the discloser to justify the breach of confidence on the basis that, among other things, it is in the public interest.<sup>90</sup>

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<sup>87</sup> Rebecca Moosavian *Charting the journey from confidence to the new methodology* EIPR 2012, 34 (5) 324 – 335, 335.

<sup>88</sup> *AG v Guardian Newspapers Ltd (Number 2)* [1989] 2 FSR 27 [48].

<sup>89</sup> “Something which is public property and public knowledge cannot *per se* provide any foundation for breach of confidence”: Megarry J in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 [47]. Megarry J’s approach was approved in *AG v Observer Ltd* [1990] 1 AC 109, 168 per Lord Griffiths and unanimously by the House of Lords in *Douglas v Hello* [2008] 1 AC 1, [307].

<sup>90</sup> See Y Cripps *The Public Interest Defence to the Actions for Breach of Confidence and The Law Commission’s Proposals on Disclosure in the Public Interest* (1984) Oxford

Contemporary celebrity cases like *Campbell* and *Douglas* – which are dealt with later - confirm that breach of confidence<sup>91</sup> remains a developing and flexible area of law “the boundaries of which are not immutable but may change to reflect changes in society, technology and business practice”<sup>92</sup> and which can alter its “centre of gravity”<sup>93</sup> allowing it to protect informational privacy. As a consequence – in terms of the second element – being able to demonstrate that the recipient of the information understood that information was confidential or private may result in the court treating the recipient as being bound.<sup>94</sup>

### 2.2.1 A celebrity cause of action *par excellence* or a convenient accommodation? *Prince Albert v Strange*.

The celebrity chronology of breach of confidence actions starts with *Prince Albert v Strange* because that was the cause of action on which the court issued and then confirmed the restraining injunction.<sup>95</sup> But it only got to that result by adopting a strained formulation within the litigation itself - and the Courts’ judgments in their various reported iterations - to steer the arguments through the copyright “reefs” which might have wrecked the action.<sup>96</sup> This case is a significant example of judicial ingenuity in accommodating the litigation and

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Journal of Legal Studies 361. What is less clear is whether its absence is a substantive pre-requisite of the action or whether it operates as a defence.

<sup>91</sup> The breach of confidence claim in *Campbell* was abandoned in the Court of Appeal because she accepted that she had presented herself in a “false light”, anticipating a successful defence on that issue on public interest grounds. In equitable terms, she had not come to the court “with clean hands”.

<sup>92</sup> [2001] QB 967, 1011 [165] (CA) per Keene LJ.

<sup>93</sup> [2004] 2 AC 457 (HL), 473 [51] per Lord Hoffman.

<sup>94</sup> *Gurry* Ch 1 [1.03].

<sup>95</sup> See also *Gurry* Ch 2 [2.05 – 2.09] and [2.39 – 2.57]; Jeremy Phillips *Prince Albert and the Etchings* [1984] 12 EIPR 344 - 349; D Tritter *A Strange Case of Royalty: The Singular "Copyright" Case of Prince Albert v Strange* (1983) 4 JMLP 111 – 129, 113 and Fiona R Burns *Lord Cottenham and the Court of Chancery* Journal of Legal History Vol 24 No. 2 (August 2003) 187 – 214, 195 (recording the comment by Sir John Rolt – a former Attorney General and Lord Justice in Chancery – that Lord Cottenham tended “to crush the facts of any case so as to fit any principle upon which he preferred to act”.)

<sup>96</sup> [1849] EWHC Ch J20 (08 February 1849); 41 ER 1171, 1 McN & G 2, [1849] EWHC Ch J20, (1849) 2 De Gex & Sim 652. D.Tritter *A Strange Case of Royalty* 112 observes: “The several reports of *Prince Albert v Strange* generally recite the same events, although with important differences, depending upon which affidavit is being summarised. To a present-day observer, Chancery’s idiosyncrasies make it impossible to say which, if any, of the recitations of the occurrences can be identified as incontrovertible fact.... From a modern viewpoint, findings of fact must seem the product of the most fragile laboratory of truth.”



privacy needs of the royal couple. The Prince had sought an injunction to prevent Strange from publishing a catalogue that Strange had prepared, describing private etchings made by the Queen and the Prince “principally of subjects of private and domestic interest.” Strange did not know that, at the time he prepared the catalogue, the copies of the etchings he had seen had been obtained without the royal artists’ consent.

Although the case was decided on breach of confidence grounds, there is an underlying groundswell of copyright within it.<sup>97</sup> It was opened on behalf of the Prince – on the avowed basis that it did *not* turn upon the question of copyright – by Mr Sergeant Thomas Talfourd, a copyright expert who drafted the relevant Copyright Act.<sup>98</sup> Lord Cottenham, the Lord Chancellor, could not be seen to decide the case using pure copyright law because the law only applied to published works (and the Prince asserted that the etchings had not been published). There was a separate line of authority in Chancery restraining the use or publication of unpublished literary and artistic works as common law property.

In the Prince’s original affidavit in the Royal Archives sworn on the 20 October 1848 he states:

And I say that the impressions of the said etchings were intended to be for the private use of Her Majesty and myself only and that – although copies of some of such etchings have been given (occasionally and very rarely) to some of the personal friends of Her Majesty one to one friend and one to another, yet I say (speaking positively for myself and to the best of my belief for her Majesty) that no such collection as that so advertised for exhibition as aforesaid was ever given away by us or either of us or by our or either of our permission.

It was not suggested that Strange’s catalogue itself breached the royal couple’s copyright: Strange was simply describing what he had seen.

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<sup>97</sup> Or more correctly, copyright denial.

<sup>98</sup> Copyright Act 1842.

But it was not only Strange who had seen the works, a point which goes to the heart of any viable breach of confidence action.<sup>99</sup> *The Times* on 7 September 1848 carried a detailed review of the etchings “about to be presented to the public”.<sup>100</sup>

Although Counsel for the Prince contended that property in the drawings had been interfered with, he submitted that that interference was not essential to the argument mounted.<sup>101</sup> Defence submissions focussed on this.<sup>102</sup> The judgement for the Prince was clearly founded upon his having property in the sketches such that (somehow) any catalogue listing them thereby impaired the property.

But it was actually a breach of privacy that supplied the basis for the relief founded in breach of confidence.<sup>103</sup> The original Bill from Prince Albert used the terms ‘private’ and ‘privacy’ several times.<sup>104</sup> During the preliminary injunction hearing before Vice-Chancellor Knight Bruce the judge also used the word ‘privacy’ together with that of ‘property’: there had been ‘the abstraction of one of its most valuable quality, namely privacy’.<sup>105</sup> He added:

All the cases in which the court has interfered to protect unpublished letters or manuscripts ... proceed upon that principle of protecting privacy<sup>106</sup> ....[and that] the defendant’s

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<sup>99</sup> The existence of *The Times* review – ahead of the initial injunctive proceedings - does not feature at any stage in the legal argument or decisions on this case. If Strange himself had written the review for the “Berkshire paper” it is odd that nothing to this effect was mentioned during the proceedings. I have been unable, so far, to locate the paper in question from which *The Times* printed this review.

<sup>100</sup> As noted immediately above *The Times* on p. 5 credited the review to “a Berkshire paper”. The Prince’s affidavit, on which the original bill was filed and on which the Prince’s action was based, is dated six weeks later on 20 October 1848. *The Times* review described the works as dating back to 1840 and being signed by the royal couple.

<sup>101</sup> 2 De G & Sm 652 at 677 – 679.

<sup>102</sup> 1 Mac & G 25 at 33 – 35.

<sup>103</sup> 1 Mac & G 25 at 47.

<sup>104</sup> The Prince’s Affidavit of 20 October 1848 was witnessed by S Anderson. It specifically states that the drawings and etchings were ‘principally subjects of private and domestic interest ... For greater privacy, they (had been made) by means of a private press ... The impressions had been placed in some of the private apartments of Her Majesty ... Such etchings were private portraits.’

<sup>105</sup> *Prince Albert v Strange* (1849) 1 De G & SM 652, at 670.

<sup>106</sup> At 671.

conduct had been an intrusion – an unbecoming and unseemly intrusion ... a sordid spying into the privacy of domestic life'.<sup>107</sup>

When the matter came before Lord Cottenham, the Lord Chancellor, similar language was used:<sup>108</sup>

In the present case, where privacy is the right invaded, the postponing of the injunction would be equivalent to denying it altogether. The interposition of this Court in these cases does not depend on any legal right; and, to be effectual, it must be immediate.

Whatever the reason – the need to accommodate the royal couple with some kind of remedy which was more conveniently labelled breach of confidence to distract from the latent copyright issues - the case is a crucible that mixes all the major elements: the attributed celebrity of the royal family, an itinerant, disaffected journalist (the precursor of the modern paparazzo),<sup>109</sup> a profit-motivated publisher, a “burgeoning public avid for news”<sup>110</sup> and the technologies that allowed mass speed printing and mass distribution of the product.<sup>111</sup> The court itself acknowledged that “the importance which has been

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<sup>107</sup> At 700.

<sup>108</sup> *Prince Albert v Strange* [1849] EWHC Ch J20 (8 February 1849) 12, [5].

<sup>109</sup> Jasper Tomsett Judge had made a career as a royal-watcher, filing news and gossip about the court, and publishing cheap pamphlets describing the stables and kitchens at Windsor and other such matters for tourists. He discovered that a cache of the engravings had been given to a former employee of an occasionally out-sourced printer. This former employee, Thomas Middleton, and Judge struck a deal: £5 for 60 of the prints. Judge then agreed with Strange to publish a critical catalogue of these etchings, to be sold to visitors to the exhibition planned for Strange's shop in Paternoster Row. Judge issued a number of press releases publicizing both pamphlet and exhibition.

<sup>110</sup> Megan Richardson and Leslie Hitchens *Celebrity privacy and the benefits of simple history* (Chapter 10, 266) in Andrew T Kenyon and Megan Richardson *New Dimensions in privacy law: international and comparative perspectives* Cambridge University Press 2004.

<sup>111</sup> It is possible that it was one of Judge's press releases that was picked up and used verbatim in the “Berkshire paper” which was then reproduced in *The Times* of 7 September 1848. See also the pamphlet written by Judge and published by Strange in 1849 selling for half-a crown: “*The Royal Etchings*”. *A Statement of Facts Relating To The Origin, Object, and Progress of the Proceedings in Chancery, Instituted by Her Majesty & the Prince Consort*. An original of this is in LSE's Women's Library.

attached to this case arises entirely from the exalted station of the Plaintiff.”<sup>112</sup> These ingredients remain as constants in the contemporary privacy landscape.

Another key factor in the judgements was the fact that the plates from which the etchings had been made belonged to the Prince.<sup>113</sup> Lord Cottenham LC noted:

the catalogue and the descriptive and other remarks therein contained, could not have been compiled or made, except by means of possession of the several impressions of the said etchings surreptitiously and improperly obtained....The possession of the defendant....must have originated in breach of trust, confidence or contract....<sup>114</sup>

Thus, at the outset, this portion of the law of private information – with significant elements within the judgment that could have been used to fashion a law of privacy *per se* in English law – began its “celebrity” life. The formulation by the Lord Chancellor of an action founded on “trust, confidence or contract” which was binding on the defendant’s conscience stretches what might be regarded as truly “confidential” in a modern sense.<sup>115</sup> What it does encapsulate, express and prevent as a corrective equitable thread, however, is what amounts to unconscionable conduct and any benefit that might be derived from such unfairness.

The privacy elements, articulated clearly in the case, were quickly picked up in the US. Just over 120 years ago Samuel Warren and Louis Brandeis wrote their seminal Harvard Law Review article.<sup>116</sup> They argued that a new tort of privacy was not only necessary - given the pace of social and technological developments at the cusp of the twentieth century in US society - but that fundamental common law principles could be applied to create it. Until the HRA,

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<sup>112</sup> (1849) 2 De Gex & Smale 652; 64 E.R. 293; (1849) 1 Mac & G 25, 41 ER 1171, CA.

<sup>113</sup> Ibid: [the law] “shelters the privacy and seclusion of thoughts and sentiments committed to writing, and desired by the author to remain not generally known”.

<sup>114</sup> (1849) 1 Mac & G 25, 41 ER 1171, 1178 - 1179.

<sup>115</sup> Tugenhat and Christie *The Law of Privacy and the Media* 2<sup>nd</sup> Edn Oxford 2011 165 (footnote 11) in Chapter 4.

<sup>116</sup> Samuel D Warren and Louis D Brandeis *The Right to Privacy* (1890) 4 Harvard LR 193.

this creative process to define and develop a nominate tort in respect of privacy was avoided in England and Wales.<sup>117</sup>

Despite having ventured into this area of private matters, the potential lay dormant in English law for nearly 100 years until the middle of the next century.<sup>118</sup> There was only one other breach of confidence case of note in the 19<sup>th</sup> century: *Pollard v Photographic Co* in 1888.<sup>119</sup> There a photographer was restrained from selling or exhibiting copies of a photograph “got up as a Christmas card” of a lady who had commissioned him to take a picture of her.<sup>120</sup> The closest English law came to touching on any development of the law of privacy *per se* beyond *Prince Albert v Strange* were remarks in 1894 by Lord Halsbury in *Monson v Tussauds Ltd* – in words that he might have applied to *Google Spain* had it been before him - where he said:<sup>121</sup>

....The exhibition in question is dedicated to the gratification of the public curiosity in regard to every person or event which may for the moment be interesting. I confess I regard such a scheme with something like dismay. Is it possible to say that everything which has once been known may be reproduced with impunity in words or pictures; every incident of a criminal or other trial be produced, and its publication justified; not only trials, but every incident which has actually happened in private life, to furnish material for the adventurous exhibitor, dramatised

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<sup>117</sup> However this did not stop English and Scots law – 40 years later - using Warren and Brandeis’ precise route to create the new tort/delict of negligence in *Donoghue v Stevenson* [1932] AC 562. In Scotland the thwarted efforts of Professor Sir TB Smith QC to explore privacy law within the Roman Law *actio iniuriarum* approach – as Professor of Scots Law at Edinburgh University and as a Scottish Law Commissioner – have since been the subject of two positive retrospective analyses: *A mixed Legal System in Transition: TB Smith and the Progress of Scots Law* Ed Elspeth Reid and David Carey Miller Edinburgh University Press 2005 and *Rights of Personality in Scots Law: A Comparative Perspective* Ed Niall R Whitty and Reinhard Zimmermann Dundee University Press 2009.

<sup>118</sup> See generally R Callender Smith *Freddie Starr Ate my Privacy: OK!* Queen Mary Journal of Intellectual Property Vol 1 No 1 April 2011 53 – 72.

<sup>119</sup> *Pollard v Photographic Co* (1888) 40 Ch D 345.

<sup>120</sup> Per North J at 354 (applying *Prince Albert v Strange*): “....the Court of Chancery always had an original and independent jurisdiction to prevent what that Court considered and treated as a wrong, whether arising from a violation of an unquestionable right or from breach of contract or confidence....”

<sup>121</sup> *Monson v Tussauds Ltd* [1894] 1 QB 671, 687.

peraventure and justified because, in truth, such an incident had really happened?

That case did no more than establish “libel by innuendo” and did nothing further to buttress privacy arguments.<sup>122</sup> Attempts to broaden the approach of the English courts to matters relating to privacy remained intractably stuck in the traditional causes of action or failed completely.<sup>123</sup>

## 2.2.2 Classification of Confidential Information

Four main classes of information have traditionally been protected within breach of confidence: trade secrets, personal confidences, artistic and literary confidences and government information. Trade secrets, generally,<sup>124</sup> falls outside the context of this thesis but the other three classes have celebrity issues in the case law because of the personalities involved.

### 2.2.2.1 Personal confidences

The key formulation in this area was set by the litigation involving the achieved celebrity Duke of Argyll’s attempt to publish his account<sup>125</sup> of his life with the socialite wife he had divorced – on the grounds of her adultery<sup>126</sup> – after an agreement that she would not contest the divorce on the basis that nothing more would be said about her adultery.<sup>127</sup> Ungood-Thomas J – relying particularly on *Prince Albert v Strange* - was satisfied that a breach of

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<sup>122</sup> Alfred John Monson had been accused in Scotland of murder. The jury had returned a “not proven” verdict. Madame Tussaud’s Gallery in London erected a waxwork of him – at the entrance to the Chamber of Horrors - holding a gun. In the libel action he recovered one farthing.

<sup>123</sup> Three examples of this lack of success taken from representative points across the 20<sup>th</sup> century illustrate this point: *Tolley v Fry* [1931] AC 333: appropriation of the Claimant’s image in an apparent brand endorsement resulted only in a libel by innuendo; *Bernstein of Leigh v Skyview & General* [1978] QB 479: photographic aerial over-flights did not breach privacy if the picture was taken from an angle outside the property and, finally, *Kaye v Robertson* [1991] FSR 62 which is discussed later in this chapter.

<sup>124</sup> The exception is remarks made in the *Douglas* case: see Lord Phillips MR at Chapter 3.5.1.

<sup>125</sup> In *The People*.

<sup>126</sup> The Duke’s petition for divorce listed 88 putative lovers including two Cabinet Ministers, three Hollywood stars and three members of the royal family. Within the litigation that led to the injunction the Duchess herself cross-petitioned alleging that the Duke was having an affair with her step-mother – Mrs Wigham - who recovered £25,000 for this allegation.

<sup>127</sup> *Argyll v Argyll* [1967] Ch 302.

confidence could arise independently of property or contract and that such an obligation could be enforced in equity “independently of any law”.<sup>128</sup> No public interest argument of any substance was advanced in this case.

What resembles a breach of confidence can arise out of misusing private – rather than trade or commercial - information obtained by way of contract of employment.<sup>129</sup> When this happens now the contractual element becomes a factor for consideration in the proportionality balancing exercise.<sup>130</sup> The jurisdiction to enforce the contractual duty of confidence comes from the 19<sup>th</sup> century principle in *Doherty v Allman*: equity will intervene to enforce the parties’ bargain.<sup>131</sup> In *Attorney General v Barker* Malcolm Barker was employed in the royal household between 1980 and 1983 on terms which included a contractual undertaking not to disclose, publish or reveal any incident, conversation or information concerning any member of the royal family or any visitor or guest which came to his knowledge during his employment unless authorized.<sup>132</sup> The undertaking was perpetual and worldwide and the first defendant expressly acknowledged that it included an agreement on his part not to publish any such matter in any book. He set up a Canadian company to publish his unauthorized book “*Courting Disaster....the hilarious and shocking recollections of a Buckingham Palace official*” in the UK and he refused to comply with his undertaking.

The Attorney General successfully applied in England for worldwide injunctions against him.<sup>133</sup> In terms of both the injunction and its extra-territorial effect, the

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<sup>128</sup> Ibid 322 B – D. There is an over-riding impression that all this inter-linked litigation had only one object: to pay off the lawyers’ bills rather than because of any real animosity between the amphetamine-taking Duke and the promiscuous Duchess.

<sup>129</sup> It is not a true breach of confidence but one where the breach of contractual undertakings in a contract of employment created the litigation, producing a similar effect. See also *Attorney General v Blake* [2001] 1 AC 268 which successfully prevented the notorious Russian spy George Blake from further benefitting from the profits of the publication of his biography.

<sup>130</sup> See *HRH Prince of Wales v Associated Newspapers* [2006] EWHC 11 (Ch) and [2006] EWCA Civ 1776.

<sup>131</sup> *Doherty v Allman* (1878) 3 App Cases 709, 720: a House of Lords case involving reversions of leases and the contractual effect of covenants.

<sup>132</sup> *AG v Barker* [1990] 3 All ER 257.

<sup>133</sup> Despite the world-wide injunction, the book is available on Amazon.co.uk.

Court of Appeal upheld the original decision because the Attorney General had *not* based the claim on breach of confidence but on breach of contract. Mr Barker had entered – with consideration - into a negative covenant which was limited neither territorially nor in time. That covenant was enforceable provided it could not be attacked for obscurity, illegality or on public policy grounds such as being in restraint of trade. The covenant was not void on any ground of public policy or on the ground that it restricted the freedom of expression abroad contrary to ECHR Article 10.<sup>134</sup>

The 1988 case of *Stevens v Avery* – with the attributed celebrity notoriety of the claimant - provides a more contemporary example together with a fleeting acknowledgement - but only as a path not taken - of the competing interests in play in terms of proportionality and the balancing test. Rosemary Stevens had a secret lesbian lover, a Mrs Telling, whose husband had killed her when he had discovered the two ladies together.<sup>135</sup> Anne Avery was a close friend of Mrs Stevens and had later been told about her lesbian relationship with the deceased woman.<sup>136</sup> She sold the information to the *Mail on Sunday* who ran it under the headline “Rosemary’s Story”. In an unsuccessful appeal to strike out Mrs Steven’s breach of confidence claim the defendants sought to limit what could be regarded as confidential to matrimonial secrets and not relationships between unmarried partners. Browne-Wilkinson VC concisely despatched that argument on the basis that, although it had never been argued, there was no reason in principle why “that most private sector of everybody’s life....sexual conduct” could not be the subject of a legally enforceable duty of confidentiality. Moreover:

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<sup>134</sup> In *Grigoriades v Greece* Application 24348/94 (1997) 27 EHRR 464 the ECtHR determined that Article 10 applied to contracts of employment, at least for those in the public sector. A different approach was adopted by the New Zealand Court of Appeal in *AG for England and Wales v R* [2002] 2 NZLR 91. The New Zealand Bill of Rights Act 1990 contains a provision which is analogous to ECHR Article 10. That right to expression had no bearing on the construction of a confidentiality contract between an SAS soldier and his former employer, the Ministry of Defence. The court, however, refused injunctive relief on proportionality grounds.

<sup>135</sup> *Stevens v Avery* [1988] Ch 449.

<sup>136</sup> The relationship – although the cause of the killing – was unknown to the police and Mrs Stevens did not give evidence at the trial.



The basis of the equitable intervention to protect confidentiality is that it is unconscionable for a person who has received information on the basis that it is confidential subsequently to reveal that information....it is the acceptance of the information on the basis that it will be kept secret that affects the conscience of the recipient of the information.<sup>137</sup>

He identified that there was a fundamental difficulty with the case - involving what would now be the proportionate result of the Article 8 and 10 balancing exercise - because of the relationship between “the privacy to which every individual is entitled to expect” and freedom of information.<sup>138</sup>

To many, the aggressive intrusion of sectors of the press into the private lives of individuals is unpalatable. On the other hand, the ability of the press to obtain and publish for the public benefit information of genuine public interest, as opposed to general public titillation, may be impaired if information obtained in confidence is too widely protected by the law. Moreover, is the press to be liable in damages for printing what is true? I express no view as to where or how the borderline should be drawn in such a case.<sup>139</sup>

He excused himself from this task on the basis that he was only dealing with an application to strike out and not the full trial. In the event the matter settled between the parties. However the answer to his question is as relevant then as now. Earlier in his judgement he had mentioned the unreported case of *M and N v Kelvin McKenzie and NGN*.<sup>140</sup> That case related to the homosexual conduct of the plaintiffs. Garland J had refused an injunction on the ground that there was no arguable case that this was confidential on the premise that the mere existence of a homosexual relationship between two parties did not raise a duty of confidence between them or as against third parties. The Vice – Chancellor was not comfortable with that formulation and pointedly expressed “no view as to the correctness of that decision.”<sup>141</sup> The tone of his judgement generally was unsympathetic to the defendants and there is the impression (albeit subjective)

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<sup>137</sup> *Stevens v Avery* [1988] Ch 449, 456.

<sup>138</sup> *Ibid* 456.

<sup>139</sup> *Ibid* 457.

<sup>140</sup> *M and N v Kelvin McKenzie and NGN* (unreported), 18 January 1988.

<sup>141</sup> *Stevens v Avery* [1988] Ch 456, [E].

that if he had been dealing with the matter at trial he might well have found for the plaintiff. That may be why the matter settled. Post-HRA this case would most likely be presented as a misuse of private information matter. Private information of a sexual nature now is routinely regarded as a protected area, Mrs Avery had been told the facts in confidence and was paid to breach Mrs Stephens' confidence. On the other hand there may have been a public interest in knowing that Mr Telling, who was convicted of manslaughter, had been telling the truth when he said that he killed only after finding his wife with another woman who he did not identify, who was not called as a witness at the trial, whose identity the police had been unable to discover and who had not gone to the police to assist them voluntarily. With the facts published – and they were clearly true facts – a proportionate result might now be a *Mosley v NGN* award of damages for that misuse of the private sexual information. There is no *Campbell*-type hypocrisy in concealing sexual preferences and Mrs Avery was not a celebrity or public figure.

*Barrymore v NGN*,<sup>142</sup> which involved the attributed television celebrity Michael Barrymore and revelations published in *The Sun* from his former employee Paul Wincott about their homosexual relationship, related to letters sent between the two men. Barrymore relied on a “Trust and Confidence Agreement” made between them.<sup>143</sup> Jacob J, in granting the injunction and applying *Stevens v Avery*,<sup>144</sup> held that - irrespective of the agreement - there was a strongly arguable case that the details of the relationship between them should be treated as confidential. The information in the article relating to sexual conduct could be the subject of a duty of confidence, since information only ceased to be capable of protection as confidential when it was known to a substantial number of people. The information in the article was not known to a substantial number of people before *The Sun* published it.

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<sup>142</sup> *Barrymore v NGN* [1997] FSR 600.

<sup>143</sup> The agreement, which was by deed, included the obligation not to disclose or make use of any “confidential business information”, which included “personal information”. The agreement had been concluded after most of the matters referred to in the article.

<sup>144</sup> *Stevens v Avery* [1988] Ch 449.

The fact is that when people kiss and later one of them tells, that second person is almost certainly breaking a confidential arrangement. It all depends on precisely what they do. If they merely indicate there has been a relationship, that may not amount to a breach of confidence and that may well be the case here, because Mr Barrymore had already disclosed that he was homosexual, and merely to disclose that he had had a particular partner would be to add nothing new.

However, when it goes into detail (as in *The Sun* article), about what Mr Barrymore said about his relationship with his wife and so on, it crossed the line into breach of confidence.<sup>145</sup>

Then came two near-contemporary cases with achieved celebrity litigants and their financial resources to litigate to the highest level to explore and resolve the private information issues in their respective cases. In *Douglas v Hello! Ltd*<sup>146</sup> the magazine *OK!* contracted for the exclusive right to publish photographs of a celebrity wedding at which all other photography would be forbidden. Its rival, *Hello!* published photographs which it knew to have been surreptitiously taken by an unauthorised photographer pretending to be a waiter or guest. Lord Hoffman – at the end of serial litigation in respect of the issues arising out of this case – concluded that the original trial judge (Lindsay J) had been right. He found that *OK!*'s £1m payment was for the benefit of the obligation of confidence imposed upon all those present at the wedding in respect of any photographs of the wedding. “Provided that one keeps one’s eye firmly on the money and why it was paid, the case is, as Lindsay J held, quite straightforward,” he noted, before concluding:

The fact that the information happens to have been about the personal life of the Douglasses is irrelevant. It could have been information about anything that a newspaper was willing to pay for. What matters is that the Douglasses, by the way they arranged their wedding, were in a position to impose an

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<sup>145</sup> *Barrymore v NGN* [1997] FSR 600, 603 – 604.

<sup>146</sup> *Douglas v Hello! Ltd* [2006] QB 125.

obligation of confidence. They were in control of the information.<sup>147</sup>

There were no public interest issues successfully argued in that case, a distinction between *Douglas* and *Campbell v MGN*.<sup>148</sup>

The shift from the deployment of equitable principles to the aim of obtaining a proportionate result reflecting competing Convention rights continued in two other cases of note. In *Theakston v MGN*<sup>149</sup> an attributed celebrity presenter of BBC TV's *Top of the Pops* series had been surreptitiously photographed with prostitutes in a brothel in Mayfair. He had been drinking with friends that night, and could not remember much of what happened at the brothel. The prostitutes texted him warning him they would go to the press with the photographs unless he paid to stop them and, in the event, they did. The injunction sought to prevent publication both of the details of his activities in the brothel and the photographs which were taken there without his consent. He had previously placed certain aspects of his love and sexual life in the press. He had not, when he entered the brothel, stipulated that his activities there should be kept confidential. Ouseley J noted, in respect of the HRA:

It may very well be that Parliament intended section 12(4) to be given effect, not through the creation of direct “horizontal effects” in the form of a limited new privacy related cause of action applicable only in section 12 cases, but through the approach which the Courts would adopt to the scope of existing causes of action, in particular breach of confidence.<sup>150</sup>

He decided there was a public interest in publishing the fact that he had behaved in the manner he had, given his public role as a television presenter in programmes aimed at young people. He specifically used the law of confidence

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<sup>147</sup> *Douglas v Hello* [2007] UKHL 21 on appeal from [2005] EWCA Civ 106; [2005] EWCA Civ 595; [2005] EWCA Civ 861.

<sup>148</sup> *Campbell v MGN* [2004] UKHL 22 and discussed later – on the breach of confidence/public interest interplay – at 2.3.2 in this chapter.

<sup>149</sup> *Theakston v MGN* [2002] EWHC 137(QB).

<sup>150</sup> *Ibid* [28].

in respect of the photographs.<sup>151</sup> They contained intimate, personal and intrusive details (including apparent cocaine use) that meant his ECHR Article 8 privacy rights prevailed over the ECHR Article 10 rights of paper's and the prostitutes' rights of freedom of expression.

There was also *A v B & C*.<sup>152</sup> A was a married Premier League footballer. B was a national newspaper. C was one of two women with whom A had affairs. At first instance Jack J had granted an injunction restraining the newspaper from publishing the stories which C and the other woman, D, had sold to it about their affairs with A. Lord Woolf CJ lifted the injunction and made a number of points about what had happened at first instance. In his view, a blizzard of authorities were being cited.<sup>153</sup> To prevent that he laid out a 15-point set of guidelines for the future.<sup>154</sup> Then he subjected Jack J's procedural approach on the facts – and the different iterations of the four hearings Jack J had allowed the case at first instance – to six points of criticism.<sup>155</sup> Finally, reflecting Ouseley's approach in *Theakston*,<sup>156</sup> he concluded:

We do not go so far as to say the relationships of the class being considered here can never be entitled to any confidentiality. We prefer to adopt Ouseley J's view that the situation is one at the outer limits of relationships which require the protection of the law. The fact that it attracts the protection of the law does not mean, however, that an injunction should be granted to provide that protection. In our view to grant an injunction would be an unjustified interference with the freedom of the press.<sup>157</sup>

By 2006 and *McKennitt v Ash*<sup>158</sup> the issues of breach of confidence were being addressed with a more confident articulation of proportionality, of the Article 8 and Article 10 balancing exercise and also by reference to the ECtHR

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<sup>151</sup> Ibid [78]: third sentence.

<sup>152</sup> *A v B & C* [2002] EWCA Civ 337.

<sup>153</sup> Ibid [10].

<sup>154</sup> Ibid [11 – 12] but covering 13 pages of the judgement.

<sup>155</sup> Ibid [43] which runs to four pages.

<sup>156</sup> Decided four weeks earlier.

<sup>157</sup> Ibid [47].

<sup>158</sup> *McKennitt v Ash* [2006] EWCA Civ 1714.

jurisprudence of *Von Hannover 1*. Ms Ash had written a book about her former friend and employer, the Canadian singer and attributed celebrity Loreena McKennitt. Ms McKennitt, who guarded her private information zealously, successfully prevented publication of details about her personal and sexual relationships, her personal feelings - in particular in relation to her deceased fiancé and the circumstances of his death<sup>159</sup> - as well as matters relating to her health and diet and her emotional vulnerability. The court confirmed that the information was protected as confidential because it was sufficiently private to engage Ms McKennitt's Article 8 rights and, in the circumstances, Ms Ash's right of freedom of expression under Article 10 had to yield to those of her former friend and employer. Ms Ash did not have the right she claimed to tell her own story. With echoes of *Stevens v Avery*, that story was "shared" only in the sense that Ms McKennitt had admitted Ms Ash into her confidence.<sup>160</sup> Ms Ash had no story of her own to tell and what she sought to do was – in effect – a parasitic expression of claimed Article 10 rights. The information restrained was not already in the public domain and – when private information engaged Article 8 - the question was whether the information was private, not whether it was true or false. The result in this case was greeted by the media (not for the first time) as the death-knell of the "kiss and tell" story.<sup>161</sup>

Similarly in *Gold v Cox*<sup>162</sup> Ann Summers, an attributed celebrity and successful lingerie businesswoman, had employed a nanny with an employment contract containing express provisions as to confidentiality. The nanny had pleaded guilty to attempting to poison Ms Summers and was sentenced to 12 months' imprisonment. After her release from prison there were fears that she and a friend (Leanne Bingham, who had also worked for Ms Summers) intended to write a book about Ms Summers. Tugendhat J granted the injunction on the basis that Ms Cox was subject to a written confidentiality agreement and,

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<sup>159</sup> He, his brother and a friend had drowned in a boating accident in Canada in 1998.

<sup>160</sup> *Stevens v Avery* [1988] Ch 449.

<sup>161</sup> "Court deals blow to gossip titles": *Guardian* 14 December 2006  
<http://www.guardian.co.uk/media/2006/dec/14/pressandpublishing.privacy> .

<sup>162</sup> *Gold v Cox* [2012] EWHC 272 (QB).

although Ms Bingham was not, there was a strong case that she was under an implied obligation of confidentiality.

From the range and span of the celebrity cases described in this section it is clear that breach of confidence has and continues to provide protection to personal information. What it does not do, however, is create the kind of thematic unity that groups and binds this area of law into something more potent in terms of the protection of privacy. It shows a growing recognition of the principle of unconscionability vis-à-vis disregard for individual celebrities' (or others) privacy. But unconscionability is a concept with its roots in equity and does not have the potency or rigour of the individual Article 8 and Article 10 proportionality assessments and the ultimate balancing test. Certainly it set up the platform to restrain forms of conduct which are likely to cause an invasion of privacy, protecting the secrecy of information confided by one person to another, but this is some way short of providing that protection to information that may never have been confided to anyone. This is the key contradistinction between breach of confidence as a celebrity privacy remedy and misuse of private information as a celebrity privacy tort.

### **2.2.2.2 *Literary and artistic confidences***

There are two broad categories in this area. The first is where information is intended for public performance, sale or display, as with the plot of a play.<sup>163</sup> The protection sought here is to prevent “spoilers” devaluing the information.<sup>164</sup> The other category, relating directly to celebrity cases and specifically to informational privacy, involves works created by their authors for private use and enjoyment, as with the etchings in *Prince Albert v Strange*,<sup>165</sup> or the physician’s diary in *Wilson v Wyatt*.<sup>166</sup> A recent example is *HRH Prince of Wales*

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<sup>163</sup> *Gilbert v Star Newspaper* (1894) 11 TLR 4: injunction granted to prevent publication of the plot of WS Gilbert’s comic opera *His Excellency* which was due to open a few days later.

<sup>164</sup> As in *Times Newspapers v MGN* [1993] EMLR 443.

<sup>165</sup> *Prince Albert v Strange* (1849) 2 De Gex & Smale 652; 64 E.R. 293; (1849) 1 Mac & G 25, 41 ER 1171, CA.

<sup>166</sup> *Wilson v Wyatt* (1820): Unreported but mentioned in *Prince Albert* and *Argyll v A*. The diary entries related to the health of King George II.

*v Associated Newspapers*.<sup>167</sup> Shortly after a state visit by the Chinese President to London, the *Mail on Sunday* published extracts from a journal written by the Prince of Wales about his official visit to Hong Kong in 1997. It had obtained the journal from a former employee of the Prince's, together with seven other journals. The Prince brought an action for breach of confidence and copyright, and applied for summary judgment in respect of all eight journals. Dismissing the *Mail on Sunday's* appeal, the Court of Appeal concluded that the information was obviously both private and of a confidential nature, because of both the relationship within which it was disclosed and its nature. No-one receiving a copy of the journal would have felt entitled to publish it without permission. The fact that there was a breach of a contractual duty of confidence was "a significant element to be weighed in the balance" between Articles 8 and 10. The test was not simply whether publication was in the public interest but whether it was in the public interest that the duty of confidentiality should be breached. It was not. Publication was also an infringement of the Prince's copyright.

In terms of providing a proportionate result, summary judgment - as part of the procedure that may be deployed in this area – may certainly be in accordance with the law but the result is blunt and less nuanced than a full trial. If successful, it usually strikes out the action there and then. It allows the Court to make a decision on the basis of written witness statements that are not tested in cross-examination. It avoids the necessity of the Claimant (the Prince of Wales in this case) attending the court proceedings.<sup>168</sup> The witness statements from two of the Prince's Principal Private Secretaries<sup>169</sup> were met by a witness statement

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<sup>167</sup> *HRH Prince of Wales v Associated Newspapers* [2006] EWHC 11 (Ch) and [2006] EWCA Civ 1776.

<sup>168</sup> The procedure under the (then) CPR Part 24.2. required Blackburne J (and the Court of Appeal on review) to be satisfied that the *Mail on Sunday* had no real prospect of successfully defending the claim and that there was no other compelling reason why it should proceed to trial.

<sup>169</sup> Sir Stephen Lamport (1996 – 2002) and Sir Michael Peat (2002 – 2012). Their evidence was that, over a 30 year period, the Prince had kept handwritten journals recording his personal impressions and private views on his overseas tours. Sir Stephen described them as "candid and very personal and intended as a private historical record". The journals were photocopied by his private office and circulated to members of his family, close friends and advisers. The Prince expected they would be placed in the Royal



from Mark Bolland, on behalf of the *Mail on Sunday*. Mr Bolland had been Assistant Personal Secretary to the Prince from 1996 to 1997 and Deputy Private Secretary from 1997 to 2002.

Given that the limits of the public interest defences in the areas of confidence, privacy and copyright is complex – and at the time more novel and less developed than now in terms of private information – this may be a decision of its time, and limited to its particular facts even though only six years have passed. As Blackburne J remarked,<sup>170</sup> some of the evidence in the witness statements was third-stage hearsay: hardly the most robust evidence on which to deliver a summary judgment. The contents of the single journal that had gone into the public domain via the *Mail on Sunday* could not be stifled but the other seven journals remained protected.<sup>171</sup>

The cross-analysis between the Prince's Article 8 rights and the newspaper's Article 10 rights led to the Court rejecting the public interest arguments of the newspaper. However, public interest in this sphere, given the Prince's role and his previous statements, merited a more detailed analysis than was ever possible on a summary judgment application. In particular, the treatment of the "zone of privacy" argument set out in *A v B, C and D*,<sup>172</sup> in light of the Prince's

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Archives after his death. Although the numbers vary according to the maker of the witness statement, a minimum of 14 copies were sent out and they had probably been read by a total of 21 readers (husbands and wives were on the list).

<sup>170</sup> [2006] EWHC 522 (Ch) [79]: "...against that vague and (triple) hearsay account...".

<sup>171</sup> The *MoS*'s position was the information in the journal "was not intimate personal information but information relating to the claimant's public life and to a "zone of his life" which he had previously put in the public domain....the information concerned the claimant's political opinions which the electorate had a right to know as being within the ambit of the Freedom of Information Act 2000....the claimant has intervened in and lobbied on political issues. Alternatively....there was a powerful public interest in the disclosure to the public of the information which outweighed any right of confidence the claimant might otherwise have": [2006] EWHC 522 (Ch) [7].

<sup>172</sup> *A v B, C and D* [2005] EWHC 1651 (QB): The Claimant sought an injunction against his former wife B, as well as C and D (UK and US publishers of a lifestyle magazine), to which she had given an interview about their relationship. The Claimant had previously placed into the public domain personal information about himself, B and their children including his past drug habit and rehabilitation. Although drafted in very wide terms, he was effectively seeking to restrain any publication of further details about these subjects; C and D stated that they did not intend to publish any information outside of these subjects. The court held – refusing the injunction – that, in assessing whether the Claimant had a reasonable expectation of privacy, his own conduct was an important consideration. He had voluntarily put personal information into the public domain and this

pronouncements, receives very little attention or analysis in the judgment. The accommodation provided to the Prince's privacy interests evidenced in this case is substantial. Contractual issues – and the interplay with breach of confidence – played an important part both in the first instance decision and in the Court of Appeal. In the latter, the Chief Justice<sup>173</sup> noted<sup>174</sup> that the action was not a claim for breach of privacy that involved any extension of the old law of breach of confidence. The circumstances that involved the disclosure had been in breach of a “well-recognised relationship of confidence, that which exists between master and servant”. He pointed out that the ECHR recognised that it may be necessary in a democratic society to give effect to a duty of confidence “in the old sense” at the expense of freedom of expression. He concluded:

It seems to us that the case such as this requires consideration of the weight that should be given to the fact that the information in this case had been received by Ms Goodall in confidence, and, furthermore, under a contractual duty of confidence. This factor received little recognition in the submissions of counsel or, indeed, in Blackburn J's judgement.

Because the information in the Journal was disclosed to the *Mail on Sunday* by Ms Goodall – an employee in the Prince's Private Office – in circumstances and under a contract that placed under a duty to keep the contents of the Journal confidential there was a strong public interest in preserving the confidentiality of private journals and communications within private offices. There was an important public interest in employees in the position of Ms Goodall respecting the obligations of confidence that they had assumed. “Both the nature of the

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was a highly relevant factor. The defendants were intending only to publish information within the same 'zone' as that already published by him. This case has to be contrasted with the later decision of *McKennitt v Ash*. In that case the Claimant successfully sued in relation to an invasion of privacy despite the fact that she had already released similar material into the public domain. *McKennitt* was a decision after full trial, whereas *A v B, C and D* concerned an interim injunction.

<sup>173</sup> Lord Phillips of Worth Maltravers.

<sup>174</sup> *Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776 [28].

information and the relationship of confidence under which it was received weigh heavily in the balance in favour of Prince Charles,” he concluded.<sup>175</sup>

Although the Court stated the appropriate test was that of proportionality it seems that, in such celebrity cases, the existence of a duty of confidence - particularly of a contractual nature – will tip the balance in favour of Article 8 in all but the most exceptional cases.

### **2.2.2.3 Government Information**

The case of *AG v Jonathan Cape* broadened the scope and reach of the action.<sup>176</sup> Lord Widgery CJ rejected the submission that the principles from *Prince Albert’s* case and later authorities could only be applied to private situations.<sup>177</sup> At issue was the publication of the political diaries of Richard Crossman. He had been a cabinet minister under Harold Wilson and an editor of the *New Statesman*.<sup>178</sup> His three volume *Diaries of a Cabinet Minister*, which covered his time in government from 1964 to 1970, became the subject of a major attempt by the government of the day to suppress them on grounds of breach of confidence. He died on 5 April 1974 and his publisher, Jonathan Cape, wanted to run them in the *Sunday Times*. After significant delays in getting any clearance from the Cabinet Secretary<sup>179</sup> the *Sunday Times* went ahead and published.<sup>180</sup> After some preliminary injunctive sparring the matter was tried before Lord Widgery CJ. He noted:

I cannot see why the court should be powerless to restrain the publication of public secrets while enjoying the *Argyll* powers in relation to domestic secrets.... I conclude, therefore, that when a Cabinet Minister receives information in confidence the improper publication of such information can be restrained by

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<sup>175</sup> Ibid [71].

<sup>176</sup> *AG v Jonathan Cape* [1976] QB 752.

<sup>177</sup> Ibid [769 – 770].

<sup>178</sup> At one stage he was a putative Prime Ministerial candidate.

<sup>179</sup> John Hunt (later Lord Hunt of Tanworth).

<sup>180</sup> See *Gurry* Chapter 2.143: governmental duties of confidentiality had previously been considered to be covered by the Official Secrets Act 1911.

the court, and his obligation is not merely to observe a gentleman's agreement to refrain from publication.<sup>181</sup>

The court decided, however, that personal and government secrets did not necessarily embody the same rights and values. With government secrecy it was necessary to show that the public interest in restraining disclosure outweighed other public interests such as freedom of expression.<sup>182</sup> That required a close examination of the circumstances and the information in question.

In these actions we are concerned with the publication of diaries at a time when 11 years have expired since the first recorded events. The Attorney-General must show (a) that such publication would be in breach of confidence; (b) that the public interest requires that the publication be restrained, and (c) that there are no other facts of the public interest contradictory of and more compelling than that relied upon. However, the court, when asked to restrain such a publication, must closely examine the extent to which relief is necessary to ensure that restrictions are not imposed beyond the strict requirement of public need.<sup>183</sup>

Lord Widgery concluded that the information in Crossman's diaries was too old to do any damage and refused the injunction. That is a clear example of the kind of proportionality assessment that becomes more evident as the case law progresses, balancing the need to restrict confidential information against the practical effect of the passage of time.<sup>184</sup> As a result of this case, politicians of all kinds (and their advisors) seek to keep historical diaries, both written and dictated, for publication at an appropriate period after they have left office.

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<sup>181</sup> *AG v Jonathan Cape* [1976] QB 752, 769 – 770.

<sup>182</sup> This is a prescient echo to the balancing exercise required within the Freedom of Information Act 2000 when government or Cabinet secrets are at issue. There is the inevitable argument about the "chilling effect" of any contemporary disclosure which might inhibit advisors or decision-makers which is often counter-balanced by arguments in relation to the passage of time.

<sup>183</sup> *AG v Jonathan Cape* [1976] QB 752, 770 – 771.

<sup>184</sup> The Supreme Court recently came to the opposite conclusion – in the context of a Freedom of Information Act 2000 request – in *Kennedy v The Charity Commission* [2014] UKSC 20. That decision did open up the possibility of a more positive and nuanced approach as to how public authorities might treat the passage of time that engaged Article 10 in general enquiries made to them outside FOIA.

In the *Spycatcher* case at issue were revelations about his work in a book of that name made by Peter Wright, a former MI5 employee with attributed celebrity notoriety.<sup>185</sup> The contents of the book had been disseminated worldwide. Copies were obtainable without difficulty in the UK. The UK government sought to restrain publication in Australia. *The Observer* sought to report those proceedings, which would inevitably also involve publication of Peter Wright's revelations, and the AG also sought to restrain that coverage. The House of Lords decided that the duty of confidence arose when confidential information came to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others. There would be no point in imposing a duty of confidence in respect of the secrets of the marital bed if newspapers were free to publish those secrets when betrayed to them by the unfaithful partner. When trade secrets are betrayed by a confidant it is usually the third party who exploits the information and it is the activity of the third party that must be stopped.

In this pre-HRA world the court significantly, and untypically, was comfortable looking to Article 10 of the Convention for external support and justification of its domestic decision about how the common law should develop. Lord Griffiths' view was trenchant. He noted that the newspapers wanted to publish as much of *Spycatcher* as they could under the fair dealing exception in copyright law and to comment on the contents of the book. They had played no part in the publication of *Spycatcher* and wanted to draw only on what was in the public domain asserting that the information had lost the quality of confidentiality and that they were in no way "tainted" by Peter Wright's breach of confidence and should be free to publish.

In the context of a claim to protect a private confidence, this would be a conclusive answer to the claim. But we are not here dealing with a claim to protect a private confidence. We are dealing with an undoubted breach of confidence by a member of the Security Services and a claim that to continue that breach by

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<sup>185</sup> *AG v Observer Ltd* [1990] 1 AC 109.

further publication of *Spycatcher* in this country would damage the future operation of our Security and Intelligence Services and thus imperil national security. The court cannot brush aside such a claim supported as it is by the evidence of the Secretary to the Cabinet. This is the detriment to the public interest that the Attorney-General identifies as justifying a continuing ban on *Spycatcher*. It must be examined and weighed against the other countervailing public interest of freedom of speech and the right of the people in a democracy to be informed by a free press.

Article 10 of the Convention....identifies “the interests of national security” and “preventing the disclosure of information received in confidence” as separate grounds upon which the right to freedom of expression may, in some circumstances, have to be restricted. I see no reason why our law should take a different approach....<sup>186</sup>

Of equal significance is that when *Spycatcher* was taken to the ECtHR, Strasbourg’s approach to the Article 10 issue came to a different conclusion.<sup>187</sup> The court found that the aims of the restriction to maintain the authority of the judiciary and to protect interests of national security were legitimate. However, the case turned on the requirement that restrictions should be necessary in a democratic society. The circumstances in which the initial interlocutory injunction was obtained were very different from those existing at the time it was continued.<sup>188</sup> Suppression could no longer be justified on the grounds of breach of confidentiality or detriment to the AG’s case because any damage had already been done. The continuation of the interlocutory injunctions was not proportionate and represented a restriction of the media’s freedom to inform its readers of a matter of legitimate public concern. The comparisons between the domestic and the European result highlights the lack of appreciation of issues of proportionality in the House of Lords at this stage, 1990, 10 years away from the HRA coming into force. It was not enough to seek to pray in aid the analogy of Article 10 in its decision-making: for a proportionate result it

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<sup>186</sup> *AG v Observer Ltd* [1990] 1 AC 109, 272 – 273.

<sup>187</sup> *Observer v United Kingdom* (1992) 14 EHRR 153.

<sup>188</sup> In July 1986 the interlocutory relief granted was proportionate to objectives underlying the application. However, by 30 July 1987, the book had been published in the United States and no attempt had been made to suppress its importation.

should also have considered a wider, practical horizon and context, despite the margin of appreciation accorded to national law by Strasbourg.

*Spycatcher's* significance in terms of this thesis is not as a celebrity privacy case but in the way in which breaches of confidence were extended by the case to third parties into whose hands the confidential information came. This included situations where the media surreptitiously had acquired information that they knew or ought to have known was secret.<sup>189</sup>

## 2.3 Permitted Interference

The category above examined the nature and categorization of the privacy rights protected in breach of confidence. This next section looks in greater detail at where the courts or legislation have considered arguments or expressions relating to interference with those rights. The focus is on attributed celebrity cases and seeks to identify any transposition of equitable principles into expressions of proportionality.

### 2.3.1 Equitable Roots: “Just Cause or Excuse”

The major permitted interference in this area relates to the public interest defence. One of the early cases in this area, *Gartside v Outram*<sup>190</sup> seemed to proceed on the basis that what amounted to “just cause or excuse” was really a mechanism for the defendant to argue that no confidence arose after the elements of the action had been made out.<sup>191</sup> The foundation of the just cause or excuse defence was clarified by Lord Denning MR.<sup>192</sup> He stated that it should

extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always –

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<sup>189</sup> See also *Shelley Films Ltd v Rex Features Ltd* [1994] EMLR 134 and *Creation Records Ltd v NGN* [1997] EMLR 444.

<sup>190</sup> *Gartside v Outram* (1857) 26 LJ Ch 113, 114 (Wood V-C)

<sup>191</sup> This approach was categorised as “picturesque if somewhat imprecise” and “not so much a rule of law as an invitation to judicial idiosyncrasy by deciding each case on an ad hoc basis as to whether, on the facts overall, it is better to respect or override the obligation of confidence” by Gummow J in *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, 451 –8 (FCA). In short, a random approach that did not recognise issues of proportionality or balance in achieving the final outcome.

<sup>192</sup> *Initial Services Ltd v Putterill* [1968] 1 QB 396.

and this is essential – that the disclosure is justified in the public interest. The reason is because “no private obligations can dispense with the universal one which lies on every member of the society to discover every design which may be formed contrary to the laws of the society, to destroy the public welfare”: *Annesely v Anglesey* (Earl).<sup>193</sup>

### 2.3.2 Lord Denning switches on truth and turns off “false light”

An example of permitted intrusion is the 1977 case of *Woodward v Hutchins*.<sup>194</sup> The pop singers Tom Jones, Englebert Humperdinck and Gilbert O’Sullivan parted company with Christopher Hutchins, their press agent, in 1976. His task had been to project their private and public lives in a favourable light and he had toured with them extensively. He then wrote a series of articles for the *Daily Mirror* seeking to correct “fallacies and half-truths” about their lives and careers. Litigation began after the first article was published about the lives and careers’ of the plaintiffs focusing on why Mrs Jones’ threw her jewellery from a car window, and how the pop star got high and what he did thereafter in a Jumbo jet. It went on to preview detailed revelations of his infidelity.<sup>195</sup> Hutchins had originally signed a contract agreeing to respect all confidences obtained during his employment but stated that he had torn this up in the presence of the managing director of the celebrities’ management company.

Lord Denning MR, in discharging the injunction, made it clear that he did not regard the case as an ordinary breach of confidence matter.

There is no doubt whatever that this pop group sought publicity. They wanted to have themselves presented to the public in a favourable light so that audiences would come to hear them and support them. Mr Hutchins was engaged so as to produce....this favourable image, not only of their public lives but of their private lives also. If a group of this kind seek publicity which is to their advantage, it seems to me that they cannot complain if a servant or employee of theirs afterwards discloses the truth about them. If the image which they fostered was not a true image, it is in the public interest that it should be corrected. In

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<sup>193</sup> Ibid 405.

<sup>194</sup> *Woodward v Hutchins* [1977] 2 All ER 751.

<sup>195</sup> The woman in question was Marjorie Wallace, a former Miss World. In 22 April 2012 he admitted to the *Daily Telegraph* sleeping in one year with 250 groupies.



these cases of confidential information it is a question of balancing the public interest in maintaining the confidence against the public interest in knowing the truth....As there should be 'truth in advertising', so there should be truth in publicity. The public should not be misled.<sup>196</sup>

The reasoning Lord Denning offered – supported by his two colleagues – is relatively brief and under-developed. This is the general problem with the exploration of the public interest cases within breach of confidence. It is difficult to gauge exactly how far the defence goes beyond the disclosure of iniquity.<sup>197</sup> Lord Denning took the view that the incident on the Jumbo jet was in the public domain because it was known to all the passengers on the flight.<sup>198</sup> The reality, however, was that no accounts of what had happened on the flight had ever been published before the *Daily Mirror's* revelations.<sup>199</sup> Significantly he regarded the breach of confidence action as having been inserted in an attempt to obtain an injunction when, in libel, the injunction could have been resisted.<sup>200</sup> This is an early manifestation of the *John Terry* problem in this celebrity area.<sup>201</sup>

The following year Lord Denning declined to prevent John Lennon's first wife, Cynthia, telling her story to the *News of the World*. He distinguished *Argyll v*

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<sup>196</sup> Ibid 754.

<sup>197</sup> Another example comes from Ungood-Thomas J in *Beloff v Pressdram* [1973] 1 All ER 241: "The defence of public interest clearly covers and, in the authorities does not extend beyond, disclosure, which as Lord Denning emphasised must be disclosure justified in the public interest, but matters, carried out or contemplated, in breach of the country's security, or its people, including matters medically dangerous to the public; and doubtless other misdeeds of similar gravity."

<sup>198</sup> Ibid 755.

<sup>199</sup> Now, doubtless, all the passengers on such a flight would have made *Twitter* posts about it and clearly put the information in the public domain.

<sup>200</sup> Ibid 755: "Just as in libel, the courts do not grant an interlocutory injunction to restrain publication of the truth or of fair comment. So also with confidential information. If there is a legitimate ground for supposing that it is in the public interest for it to be disclosed, the courts should not restrain it by an interlocutory injunction, but should leave the complainant to his remedy in damages. [If] the plaintiffs failed in....libel on the ground that all that was said was true....[it] would seem unlikely that there would be much damages awarded for breach of confidentiality. I cannot help feeling that the plaintiffs' real complaint here is that the words are defamatory; and as they cannot get an interlocutory injunction on that ground, nor should they on confidential information."

<sup>201</sup> *John Terry (formerly LNS) v Persons Unknown* [2010] EWHC 119 (QB). Misuse of private information injunction refused by Tugendhat J because the footballer was seeking to use the action to preserve his sponsorship image and avoid the defamation rule in *Bonnard v Perryman*.

*Argyll*<sup>202</sup> on the basis that there was so much in the public domain already about their marriage including a 1972 article by their former chauffeur “which exposed the immorality and misdeeds of this couple and others in their goings on”.<sup>203</sup>

It was this line of Lord Denning’s reasoning that took away Naomi Campbell’s breach of confidence claim as it moved to the Court of Appeal in 2003. Having been photographed coming out of a Narcotics Anonymous (NA) meeting, the headline alongside the photograph read “*Naomi: I’m a drug addict*”. The article contained in very general terms information relating to her treatment for drug addiction, including the number of NA meetings she had attended. She had no option but to concede that there was a public interest justifying publication of the fact that she was a drug addict and was having therapy and her success in the case was limited to the misuse of private information about NA, the length and type of her treatment and the use of photographs of her leaving the NA meetings.<sup>204</sup>

The significance of *Campbell* – like the earlier case of *Woodward v Hutchins*<sup>205</sup> - is the way in which the public interest defence operated (belatedly it might be thought) to prevent the continuation of a false image. Naomi Campbell pretended she had not used drugs. Tom Jones and Englebert Humperdinck had pretended to be “clean living”.

Naomi Campbell herself had faced an earlier *Woodward v Hutchins*-type situation in *Campbell v Frisbee*.<sup>206</sup> Her manager’s contract included a clause

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<sup>202</sup> *Argyll v Argyll* [1967] Ch 302.

<sup>203</sup> *Lennon v NGN and Twist* [1978] FSR 573, 575 per Lord Denning: “One only has to read these articles all the way through to show that each of them is making money by publishing the most intimate details about one another and accusing one another of this, that and the other, and so forth. It is all in the public domain.”

<sup>204</sup> Her s.13 Data Protection Act 1998 damages claim also succeeded.

<sup>205</sup> *Woodward v Hutchins* [1977] 1WLR 760: Tom Jones’ and Englebert Humperdinck’s press agent – whose job had been to generate favourable publicity for them when he worked for them – described an earthier version to the *Daily Mirror* after he had left involving episodes of drink, sex and other matters. The Court of Appeal discharged an injunction against him. Bridge LJ: “It seems to me that those who seek and welcome publicity of every kind bearing upon their private lives so long as it shows them in a favourable light are in no position to complain of an invasion of their privacy which shows them in an unfavourable light.” See also this Chapter pages 30- 31 below.

<sup>206</sup> *Campbell v Frisbee* [2002] EWCA Civ 1374.

agreeing to keep confidential any personal or professional matters learned during her employment with Ms Campbell. When their relationship disintegrated – because Vanessa Frisbee claimed she had been violently assaulted - Ms Frisbee took the assaults as repudiation of the contract. She then gave an interview to the *News of the World* about various sexual encounters between Ms Campbell and the actor Joseph Fiennes.<sup>207</sup> On appeal the court held it was at least arguable that the Ms Frisbee had a public interest defence, as Ms Campbell had painted a false picture of herself to the public as a reformed and stable individual who was engaged to be married. Ms Frisbee’s appeal against summary judgment was allowed. What the case does not clarify is the weight to be attached to a contractual term imposing confidentiality.<sup>208</sup> The issue in this case was whether, notwithstanding the alleged repudiation of the contract by the actions of Ms Campbell in attacking Ms Frisbee, the obligation of confidence could nevertheless be enforced. Lightman J at first instance had held that it could. The Court of Appeal held “reluctantly” that at the Summary Judgment stage this view was too robust.<sup>209</sup> Lord Phillips MR observed:

The courts are in the process of adapting the law of confidentiality in the light of the Human Rights Act 1998 in order to reflect the conflicting Convention rights of respect for private and family life and freedom of expression. In *Campbell v Mirror Group Newspapers* Miss Campbell largely resolved this conflict by conceding that the defendants were entitled to publish the fact that she was a drug addict in order to ‘set the record straight’. It seems unlikely that any similar narrowing of the issues will occur in the present case.<sup>210</sup>

Another example of a breach of a confidence claim failing because the information corrected the attributed celebrities’ false light presentation of their

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<sup>207</sup> The significance of those was that Ms Campbell was engaged to Flavio Briatore, the Renault F1 team manager, at the time.

<sup>208</sup> Contrast Walker LJ in *London Regional Transport v Mayor of London* [2001] EWCA Civ 1491 at [46] and the previously referenced *AG v Barker* [1990] 3 All ER 257, 260.

<sup>209</sup> Ibid [35]: “We say ‘reluctant’ because, while this case may provide a valuable addition to the developing jurisprudence on the right to privacy if it proceeds to trial, the costs involved in the provision of that benefit are likely to be disproportionate to what is at stake in terms of damages or an account of profits.”

<sup>210</sup> *Campbell v Frisbee* [2002] EWCA Civ 1374 [33].

married life involved David and Victoria Beckham and their former nanny, Abbie Gibson.<sup>211</sup> The *News of the World* ran a seven-page article about their marriage having reached “breaking point”: Mr Beckham wanted “to split” and that Mrs Beckham had been in tears over rumours of his affairs with other women. Ms Gibson was the source. There was a confidentiality clause in her original contract of employment. The injunction – seeking to prevent further revelations - was refused on the basis that the couple were seeking to present themselves as a couple without marital difficulties and – on balance – the matter should be resolved at trial and, if appropriate, with damages.<sup>212</sup>

### **2.3.3 ...but “truth” has its limits if illegally obtained**

A more rigorous approach from Sir John Donaldson MR, where the public interest defence did not prevail, is *Francome v MGN*.<sup>213</sup> The newspaper obtained from an undisclosed source a number of taped telephone conversations made by a well-known and very successful jockey – an attributed celebrity - and his wife.<sup>214</sup> The tapes revealed breaches by John Francome of certain Jockey Club regulations and possibly the commission by him of criminal offences and the newspaper put him on warning of publication. The action against MGN sought damages for trespass or breach of confidence and an injunction restraining the defendants from publishing material based on the tapes or any transcript made from them. MGN argued it had not been a party to the trespass, there was no right of action against it or its source for breach of confidence regarding telephone conversations since users had to accept the inherent risk of eavesdropping by reason of, inter alia, crossed lines and official telephone tapping, and because s.5 did not confer any private right in respect

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<sup>211</sup> Unreported proceedings – save in *PA Media Lawyer* 25 April 2005 – of proceedings in the High Court on 24 April 2005.

<sup>212</sup> The Professional Association of Nursery Nurses has a sample contract for Nannies which includes the statement: “It is a condition of employment that now and at all times in the future, save as may be lawfully required, the employee shall keep the affairs and concerns of the householder and its transaction and business confidential.”

<sup>213</sup> *Francome v MGN* [1984] 2 All ER 408.

<sup>214</sup> The tapes had been made by illegal tapping of the plaintiffs' telephone in circumstances not involving the defendants but which constituted a criminal offence under s 5a of the Wireless Telegraphy Act 1949. Section 5 further provided that disclosure of any information obtained as a result of illegal telephone tapping was also an offence.

of illegal telephone tapping. MGN argued further it was entitled to rely on the 'iniquity rule' that publication was justified as being in the public interest because it would expose conduct which involved a breach of the law or was contrary to the public interest.<sup>215</sup> The judge granted an injunction restraining publication and ordering the defendants to disclose the source from which they had obtained the tapes. The Court of Appeal held the Francomes' were entitled to protect confidential material in their private telephone conversations. The illegal tapping of their telephone breached their right to the confidentiality.<sup>216</sup> Significantly, the fact that the plaintiffs' cause of action was for breach of confidence meant that the principles relating to justifiable publication of defamatory material did not apply.<sup>217</sup> This is a line of argument that has continued into the new action of misuse of private information, examined in Chapter 3. Accordingly, in the exercise of its discretion to preserve the rights of the parties pending trial, the court would uphold the injunction restraining publication of the taped material, since the balance of justice or convenience lay in the plaintiffs' favour.<sup>218</sup> In a parliamentary democracy obedience to the law was not a question of choice, apart from the extremely rare exception of the moral imperative. The proposition that citizens are free to commit a criminal offence where they have formed the view that it will further what they believe to be the public interest is inimical to the rule of law and parliamentary democracy.<sup>219</sup> This proposition has only been strengthened by the issues raised in the Leveson Report about media conduct and phone hacking generally.

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<sup>215</sup> MGN also argued that the injunction restraining it from committing a criminal offence under s.5 of the 1949 Act could only be granted by the AG, that in reality the claim would lie in defamation after publication, in defence of which justification would be pleaded and – as a result – an injunction could not be issued. It also claimed that it was protected by s.10 of the Contempt of Court Act 1981 from disclosing its source.

<sup>216</sup> The plaintiffs also had an arguable case that they had private rights under s.5 of the 1949 Act and therefore they were entitled to an injunction to preserve their rights pending trial.

<sup>217</sup> This is a clear distinction between Lord Denning MR's approach in *Woodward v Hutchins* [1977] 2 All ER 751, 755.

<sup>218</sup> However, an order for the disclosure of the identity of MGN's source was inappropriate at the interlocutory stage since once the source was disclosed there would be no point in having a trial on that issue.

<sup>219</sup> *Francome v MGN* [1984] 2 All ER 408, per Sir John Donaldson MR 412 - 413 and Fox LJ 415.

## 2.4 A breach which failed to qualify for protection: *Kaye v Robertson* (1991)

In the example which follows it might have been thought that the law in relation to breach of confidence could have provided an effective remedy but in *Kaye v Robertson & Sport Newspapers Ltd*<sup>220</sup> the reality is that breach of confidence was never pleaded. That was because his counsel<sup>221</sup> took the view that there was no recognisable relationship between Gordon Kaye and the newspaper on which to found the breach.<sup>222</sup> Kaye was a well-known attributed celebrity television actor<sup>223</sup> recovering in hospital from a serious car crash and damage to his head. Two journalists had gained access to his private room in the hospital, took photographs and purported to conduct an interview with him.<sup>224</sup> This was despite his vulnerability and the breach of self-evident medical confidences.<sup>225</sup> The most the court managed was to continue an injunction preventing publication on the basis that publication could involve a malicious falsehood. That was on the basis that the Kaye could not have given informed consent to the interview because of his injuries.<sup>226</sup> But between the matter being heard in the High Court by Potter J – and in the interlocutory matters in the Court of Appeal ahead of *that* court's final decision - the *Sunday Sport* had been permitted to use the illicitly-taken hospital pictures of the actor on its 4 March 1990 front page providing it made it clear that it had not been granted permission to take them. Hence the headline: "*Bedside shots taken without*

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<sup>220</sup> *Kaye v Robertson & Sport Newspapers Ltd* [1991] FSR 62.

<sup>221</sup> Andrew Caldecott appeared for the Mr Kaye against Patrick Milmo QC for the editor of the *Sunday Sport*. He was not able to pray in aid *Pollard v Photographic Co* (1888) 40 Ch D 345 because, in that case, the photograph had been commissioned and paid for.

<sup>222</sup> Scott LJ, writing extra-judicially, asked "Why not?" in *Confidentiality and the Law* London LLP, 1991 xxiii.

<sup>223</sup> The star of '*Allo, 'Allo*.

<sup>224</sup> Leggatt LJ's final paragraph is telling: "We do not need a First Amendment to preserve the freedom of the press, but the abuse of that freedom can be ensured only by the enforcement of a right to privacy. This right has so long been disregarded here that it can be recognised now only by the legislature. Especially since there is available in the United States a wealth of experience of the enforcement of this right both at common law and also under statute, it is to be hoped that the making good of this signal shortcoming in our law will not be long delayed."

<sup>225</sup> Notices specifically restricting access to Gordon Kaye had been placed on the door of his private room at the Charing Cross Hospital by the hospital authorities and his agent.

<sup>226</sup> *Ibid* [2].

*consent. TV Star Rene ....the photos he tried to ban. Amazing sneak pictures.*<sup>227</sup> The newspaper's activity – without the restraint of any privacy or image rights and only the fig-leaf of a generously-worded court order – was, with the benefit a broader historical picture of how this area then developed, extreme. In terms of the European civil codes in Germany and France at the time this English press activity must have seemed extraordinary because – when the picture were taken – the images of Kaye could well have been the kind of “deathbed” images that led those countries to introduce protection for an individual's image rights.<sup>228</sup>

If the *Kaye* case occurred now the attributed celebrity actor would be given protection to prevent a misuse of his private information. He had a reasonable expectation of privacy, given the medical treatment being received. Adopting Lord Steyn's 2004 *Re S* formulation, although both Article 8 and Article 10 start with equal weighting the “intense focus” on the comparative rights being claimed reveals Article 8 private health issues with stronger clarity than the Article 10 right to know that the actor had suffered serious head injuries. Applying the “ultimate balancing test” of proportionality – it is contended – would have favoured the protection of the private information. In that admittedly unusual context, it reveals the severe limitations of the breach of confidence action.

## **2.5 Remedies**

As the authors of *Gurry* have noted, the remedies reveal the flexibility of the action for breach of confidence while at the same time exposing the lingering problems raised by the action's jurisdictional basis.<sup>229</sup> While the courts have a formidable armoury of remedies available, the deployment of them can sometimes be complicated by this uncertainty. The remedies include

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<sup>227</sup> [1991] FSR 62.

<sup>228</sup> Lord Bingham, one of the three judges in the case, said as much in the opening paragraphs of his judgment: “Any reasonable and fair-minded person hearing the facts which Glidewell LJ has recited would conclude that these defendants had wronged the plaintiff. I am....pleased.... that the plaintiff is able to establish....a cause of action....in malicious falsehood.”

<sup>229</sup> *Gurry Breach of Confidence* 2<sup>nd</sup> Ed 2012 [17.01].

injunctions, delivery up and monetary remedies whether termed equitable compensation or damages. The ECHR requires that the remedies available are practical and effective to support the rights granted under the Convention.<sup>230</sup> And so?

Historically the key equitable elements were the requirements that “he who comes into equity must do so with clean hands” and “he who seeks equity must do equity”. These equitable maxims gave courts a discretion about how and when they might be exercised on behalf of one party or another. Other criteria which allowed courts to deny equitable relief on discretionary grounds were the doctrines of laches, acquiescence and delay, all of which could prevent claimants who sought to disadvantage other parties by failing to act with reasonable speed.

### **2.5.1 Injunctions**

The primary remedy in breach of confidence cases (as with misuse of private information cases dealt with in the next chapter) is the injunction – either interim or final – as has been seen in the discussion of most of the cases in the preceding sections of this chapter. The principles governing the grant of interim injunctions are reflected by Lord Diplock’s judgment for the House of Lords in *American Cyanamid Co v Ethicon*.<sup>231</sup> His remarks can be seen as pre-figuring the concept of proportionality in this area. He stated that the proper test was first to assess whether there was a serious question to be tried, secondly to consider whether damages would be an adequate remedy for the party injured by the grant of – or refusal to grant – an interim injunction and finally where the balance of convenience (or the balance of injustice) lay. Since the HRA, special, more onerous rules under section 12 apply where Article 10 freedom of expression rights may be affected. These were enunciated by Lord Nicholls in *Cream Holdings v Banerjee* and come very close, in practice, to the high balance of probabilities standard that would be used in full trial. There is leeway,

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<sup>230</sup> *Von Hannover v Germany 1* (2005) 40 EHRR 1 [71] and *Armonas v Lithuania* (2009) 48 EHRR 53 [38].

<sup>231</sup> *American Cyanamid Co v Ethicon* [1975] AC 396.



however, because an injunction with a short return date can be granted before fuller consideration is given to whether to maintain it or discharge it.<sup>232</sup> Section 12 (3) HRA states that

no such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

In *Browne v Associated Newspapers* the Court of Appeal set out the approach to be used when cases related to the right to privacy. The applicant first had to establish the engagement of an arguable Article 8 right. Then the respondent had to establish the engagement of an arguable Article 10 right. Only then would the merits of the respected cases to be considered in the light of section 12 (3).<sup>233</sup> The governing principle in determining where the balance of convenience lay required an exploration of two contrary positions. Firstly, if the injunction was refused, would the claimant be adequately compensated in damages at full trial? If so then the interim injunction should not normally be granted. Secondly, if the injunction was granted would the defendant be adequately compensated by the claimants undertaking in damages for the loss sustained by the injunction.

In breach of confidence and misuse of private information cases the balance of convenience test has effectively been replaced by the concept of proportionality as expressed earlier by Lord Steyn in *Re S*:

.... First, neither article [8 nor 10] has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.<sup>234</sup>

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<sup>232</sup> *Cream Holdings v Banerjee* [2004] UKHL 44 [15].

<sup>233</sup> *Browne v Associated Newspapers* [2007] EWCA Civ 295 [23] (Clarke MR).

<sup>234</sup> *Re S (A Child)* [2004] UKHL 47.

In this sense proportionality can be seen as a judicial tool, a compass, a discipline for navigating the competing currents between conflicting rights that was never available to pre-HRA judicial decision-making dealing with equitable or quasi-equitable principles. It is not as if proportionality had not been considered prior to the HRA. It had.<sup>235</sup> The absence of a fundamental rights document – subsequently enshrined in the HRA – had impeded its development. This required the Convention right(s) to be tested against the objective being pursued. The interaction between these two inputs and the values they represented in any specific case was then assessed to determine the legitimacy of the measure. In this sense proportionality was a “branch of reasonableness” or a “correctness” test.<sup>236</sup>

## 2.5.2 Damages

Where personal information is concerned, damages are available for any pecuniary loss suffered because of the breach of confidence.<sup>237</sup> They can be awarded to cover hurt feelings,<sup>238</sup> mental distress,<sup>239</sup> loss of dignity<sup>240</sup> and a vindication of the right.<sup>241</sup> In terms of quantum, the damages for distress covered a general historical range between £2000 and £5000. The exceptional case was the award of £60,000 made in the *Mosley* case in 2008.<sup>242</sup> Aggravated damages may be awarded where the defendant’s motive is infected by a specific *animus* against the claimant.<sup>243</sup> Exemplary damages – to punish the defendant for what amounts to outrageous conduct – are not available

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<sup>235</sup> *Council of Civil Service Unions v Minister of State for the Civil Service* [1985] AC 374. Also J Jowell and A Lester *Proportionality: Neither Novel Nor Dangerous* Stevens 1988.

<sup>236</sup> A detailed exposition of the dynamics of proportionality in this area can be found in Alan DP Brady *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach* Cambridge University Press 2012.

<sup>237</sup> *Douglas v Hello!* [2005] EWCA Civ 595 [243].

<sup>238</sup> *Archer v Williams* [2003] EWHC 1670 (QB) [76].

<sup>239</sup> *McKennitt v Ash* [2005] EWHC 3003 (QB) [165].

<sup>240</sup> *Mosley v NGN* [2008] EWHC 1777 (QB) [49].

<sup>241</sup> *Ashley v Chief Constable of Sussex* [2008] UKHL 25 [21 – 22]: the damages here are to compensate for undermining another person’s Convention right.

<sup>242</sup> See R Jackson *Civil Litigation Costs Review – preliminary report* (The Judiciary, 2009) Appendix 17:2008 privacy awards were £35,000, £37,500, £20,000, £60,000, £10,000, £4000, £6000, £5500 and £1000.

<sup>243</sup> *Rookes v Barnard* [1964] HC 1129 and *Cassel v Broome* [1972] AC 1027.

because they are incompatible with Article 10 (2).<sup>244</sup> Eady J, noting that there was no existing authority to justify the extension of exemplary damage into breach of confidence, concluded that granting them in the *Mosley* case would not be proportionate. In effect, they can be accommodated within the general threshold of ordinary damages. Also, a defendant who has benefited and profited from the misuse of confidential information may find that the claimant successfully seeks an account of profits.<sup>245</sup>

Mention of statutory provisions on exemplary damages?

### **2.5.3 Accounts of Profits, Delivery Up and Publication**

An account of profits is a well-established equitable remedy to strip away profits where it would be “unconscionable” to allow someone to benefit from a breach of confidence. It is an alternative, not a parallel, remedy to damages where the claimant’s interest in the performance of the obligation of confidence makes it just and equitable that the defendant should retain no benefit from his breach of the obligation.<sup>246</sup>

Delivery Up can include a database or the elements of it that gave the key to the misuse of the confidential information to prevent further misuse. Publication of the judgment can only be made in intellectual property cases.

## **2.6 Summary**

Breach of confidence as a celebrity privacy remedy managed passably in the more respectful, sedate and structured world of the 19<sup>th</sup> and for a great deal of the 20<sup>th</sup> century. It could fall back on equitable maxims overlaid with contractual and property concepts as well as a pragmatic judiciary so that it preserved social norms and reflected a more stratified society’s sensibilities. The combined effect of *Prince Albert v Strange* and *Argyll v Argyll* cast a potentially protective shadow into the 1970s. It was only with attributed celebrity cases like

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<sup>244</sup> They are not “prescribed by law” nor “necessary in a democratic society” where compensatory damages are available.

<sup>245</sup> As in *AG v Blake* [2001] 1 AC 268.

<sup>246</sup> *Vercoe v Rutland Fund* [2010] EWHC 44 (Ch) [339] (Sale J).

*Woodward v Hutchins* that breach of confidence began to show where some of its fault lines might be found.

What then took away some of its flexibility was the kind of formulaic requirement of the key element of a pre-existing relationship that left Gordon Kaye having to rely on a different area of law than the one that – on the face of it – best fitted his predicament. Even when English courts tried to introduce references to ECHR principles and proportionality – as in *Spycatcher* in 1990 – the result was not the proportionate one arrived at on appeal to Strasbourg in 1992.

The impact of the HRA on this area forced judicial reasoning to apply itself both vertically and horizontally to the celebrity situations which then presented themselves from 2000 onwards leading, in *Campbell*, to the recognition of a new tort which will be examined in the next chapter. However, as Michael Douglas and Catherine Zeta Jones found (eventually), the Prince of Wales and Loreena McKennitt found in 2006, and Ann Summers found in 2012, the straightforward classical form of breach of confidence still works within the new, structured search for a proportionate result within the balancing of Article 8 and Article 10 rights.

Initially it looked as if breach of confidence, post-*Campbell* would become a poor relation in celebrity privacy litigation but – considering the cases above – its very existence adds weight to ways in which all categories of celebrity can seek to prevent intrusive or unauthorized private and confidential information becoming public. The development of the public interest defence within breach of confidence laid the foundations for many of the balancing factors that still need to be considered in the post-HRA world of proportionality. At root, after all, there is a fundamental difference between “confidence” and “privacy” and a wrongful disclosure of confidential information is not necessarily a misuse of private information.

## CHAPTER 3

# Misuse of Private Information as a Privacy Remedy

### 3.1 Introduction

The previous chapter dealt with the development, significance and limitations of breach of confidence as a celebrity privacy regime. The baton passes, in this chapter, to the recognition of the new, nominate tort of Misuse of Private Information and the procedures surrounding it.<sup>247</sup> Fourteen years since its outlines emerged in 2000, its key elements are still twofold: there must be a reasonable expectation of privacy in relation to the information itself which can only be over-ridden if the public interest elements in the balancing exercise prevail. It has an almost-exclusively celebrity-driven pedigree.

It ushered in a distinct change in how such cases were reported and cited. A key battleground examined in this chapter is the actual identity of the celebrities – or their concealment behind a variety of anonymous initials - who went to court to assert that publication or proposed publication of information about them should be restrained not because it was confidential (which it might also be) but because it was private. That anonymity, if granted by the court until trial of the issue (and beyond) became a matter for external internet and social media speculation fuelled, on occasions, by a general media fury about “secrecy” and the stifling of the media’s ability to run celebrity stories with impunity subject only to having to pay damages if the facts were not correct or if it was judged to have over-stepped the mark. As portrayed by the media this was “judge-made” law created by a coterie of unelected, out-of-control and overpaid specialists – without a Parliamentary mandate or specific legislation -

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<sup>247</sup> This thesis maintains that it is a tort and adopts Tugendhat J's careful review of its history: *Vidal-Hall & Ors v Google Inc* [2014] EWHC 13 (QB), [68].

which struck at the heart of the media's right to inform the public about what it needed to know about celebrities and their indiscreet and sometimes hypocritical lives.

Breach of confidence had allowed courts, as Sedley LJ noted, to do what they could using the tools available, to "stop the more outrageous invasions of individuals' privacy". Judges "had felt unable to articulate their measures as a discrete principle of law".<sup>248</sup> He continued:

Nevertheless, we have reached a point at which it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy ...The reasons are twofold. First, equity and the common law are today in a position to respond to an increasingly invasive social environment by affirming that everybody has a right to some private space. Secondly...the Human Rights Act 1998 requires the courts of this country to give appropriate effect to the right to respect for private and family life set out in Article 8 [ECHR]. The difficulty with the first proposition resides in the common law's perennial need (for the best of reasons, that of legal certainty) to appear not to be doing anything for the first time. The difficulty with the second lies in the word 'appropriate'.<sup>249</sup>

Now the two sources of law ran "in a single channel" as a result of the combined effects of s.2 and s.6 HRA. UK courts had to take into account EU and ECtHR jurisprudence which pointed to a "positive institutional obligation to respect privacy". Courts had to act compatibly with that and the other Convention rights, giving the "final impetus to the recognition of a right of privacy in English law".<sup>250</sup> Not everyone wanted to join the privacy party.<sup>251</sup>

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<sup>248</sup> *Douglas v Hello!* [2000] EWCA Civ 353, [110].

<sup>249</sup> *Ibid* [110 – 111].

<sup>250</sup> *Ibid* [111].

<sup>251</sup> Raymond Wacks *Privacy and Media Freedom* 109, footnote 15, summarises Lord Hoffman's HRA-based dissent in both *Campbell* and *Wainwright*. In essence, Lord Hoffman's argument was that the HRA weakened the argument for saying that a general tort of invasion of privacy was needed to fill the gaps in existing remedies because s.6 and s.7 HRA were themselves "substantial gap-fillers".

It was Lord Nicholls, however, in *Campbell v MGN*<sup>252</sup> who gave the new tort its name. He characterised a formulation derived from breach of confidence as “awkward” and the use of “duty of confidence” and “confidential” as “not altogether comfortable” on the basis that information about an individual’s private life would not ordinarily be called “confidential”.

The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information. In the case of individuals this tort, however labelled, affords respect for one aspect of an individual’s privacy. That is the value underlying this cause of action. An individual’s privacy can be invaded in ways not involving publication of information. Strip-searches are an example.<sup>253</sup>

The procedure and law for obtaining injunctions was discussed in detail in the previous chapter and will not be repeated here. The need for speed in taking action is paramount. If the defendant cannot be identified then the court can exercise its power to grant an injunction against persons unknown.<sup>254</sup>

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<sup>252</sup> *Campbell v MGN* [2004] UKHL 22, [14].

<sup>253</sup> *Ibid* [14 – 15].

<sup>254</sup> *Bloomsbury Publishing Group and JK Rowling v NGN* [2003] EWHC 1205 (Ch).

### 3.2 The Protected Right: *Campbell*,<sup>255</sup> *Mosley*<sup>256</sup> and *Von Hannover 1*<sup>257</sup>

This trio of cases mapped out the initial parameters of the action of misuse of private information against the backdrop of the HRA and issues of proportionality. It can be seen from the footnoted biographical information below that the first two individuals are achieved celebrities – in terms of the taxonomy of this thesis – Naomi Campbell having earlier in her modelling career been an attributed celebrity while the third, described as a celebrity *par excellence* in Germany, is (by virtue of both royal lineage and marriage) an ascribed celebrity.<sup>258</sup> It is of particular note that each of these three cases related to well-known, wealthy celebrities who were prepared to invest in defining, protecting or vindicating their privacy rights by engaging in the entirety of the appeals process.<sup>259</sup> They pitted themselves against well-resourced publishers. All of the

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<sup>255</sup> Naomi Campbell began work as a model in 1985 as a 15-year-old from Streatham, London. By 1998 *Time* magazine had declared her one of the six top “supermodels” in the world. Her relationships with prominent men, including boxer Mike Tyson and actor Robert De Niro, have been widely reported as have her highly publicised convictions for assault.

<sup>256</sup> From 1993 – 2009 Max Mosley was President of the Fédération Internationale de l'Automobile (FIA) which is the governing body for Formula One (F1). The youngest son of Sir Oswald Mosley (former leader of the British Union of Fascists from 1932 until interned 1940/1943) and the Hon Diana Mitford, he is a former F1 driver/team owner (March) and barrister who practised at the Patents Bar after graduating from Christ Church College, Oxford, with a physics degree in 1961. He served as a member of the 44th Independent Parachute Brigade Group (TA), formerly part of the 16<sup>th</sup> Airborne Division. His parents' marriage in 1936 took place in Germany in Joseph Goebbels' house with Adolph Hitler as guest of honour. The author, before starting his legal studies at QMUL, spent an afternoon interviewing Sir Oswald and Lady Diana in August 1970 at their home at the *Temple de la Gloire* on the outskirts of Paris. The link to Lady Diana's obituary tells her own extraordinary story: <http://www.telegraph.co.uk/news/obituaries/celebrity-obituaries/1438660/Lady-Mosley.html> .

<sup>257</sup> Princess Caroline of Hannover (*née* Grimaldi) is the eldest child of Rainier III, Prince of Monaco, and his wife, the actress Grace Kelly. She is the elder sister of Prince Albert II of Monaco and Princess Stéphanie. She has been heiress presumptive to the throne of Monaco since 2005 and is married to Ernst August, Prince of Hannover, the pretender to the former throne of the Kingdom of Hannover as well as the genealogical male heir of George III of the United Kingdom.

<sup>258</sup> It could be argued that Max Mosley, although not born of or into royalty, has the kind of background that makes him an ascribed celebrity from birth because of the celebrity notoriety of each of his parents. A more limited view has been taken, however, in terms of his categorisation within the taxonomy of this thesis. The classification of the children of celebrities is discussed in 3.3.3 of this chapter.

<sup>259</sup> Despite Naomi Campbell's personal wealth her legal team also ensured that there was a contingency fee agreement (CFA) with the benefit of after-the-event insurance (ATE),



parties were able to have access to the best advocates to explore their respective Article 8 and Article 10 positions. Although the first two were originally English cases, both went to Strasbourg. The third, although originally a German case that went to Strasbourg on appeal, played a significant role in the further development of UK domestic law in terms of misuse of private information

The core elements in misuse of private information exist when the information in question engages Article 8 ECHR because it is within the scope of the claimant's private or family life, home, or correspondence and what the defendant is about to do or has done – on analysis of the proportionality of interfering with the competing rights under Article 8 and Article 10 – results in a conclusion that protecting the rights of others requires freedom of expression to give way.<sup>260</sup>

### 3.2.1 Identified in *Campbell*

It was Baroness Hale in *Campbell* who, perhaps, best characterised the conduct that created the liability in terms of the elements which had to be weighed and balanced.<sup>261</sup> She noted that the case involved “a prima donna celebrity against a celebrity-exploiting tabloid newspaper”, each with its set of separate interests.<sup>262</sup>

In terms of the proportionality test she noted that it was

....much less straightforward when two Convention rights are in play, and the proportionality of interfering with one has to be balanced against the proportionality of restricting the other. As each is a fundamental right, there is evidently a “pressing social need” to protect it.... the problem of balancing two rights of

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when the matter went to the House of Lords, the effect of which presented itself at the ECtHR in *MGN v UK* 39401/04 [2011] ECHR 66.

<sup>260</sup> Ibid [19 – 20] Lord Nicholls, [92] Lord Hope, [134, 137 and 140] Baroness Hale and [166 – 167] Lord Carswell. Lord Hoffman, despite his dissent, agreed with the general principle [36].

<sup>261</sup> Each of the five judges in the House of Lords gave different reasons. There was a 3:2 majority in Ms Campbell's favour and Morland J's decision was upheld with an award of £2,500 general damages.

<sup>262</sup> Ibid [143].

equal importance arises most acutely in the context of disputes between private persons.<sup>263</sup>

By themselves, the photographs were unobjectionable. Covert photography, of itself, did not make the information contained in the photograph confidential. The activity photographed had to be private. Out-and-about pictures of Naomi Campbell would have been unexceptionable. She made a substantial part of her living out of “being photographed looking stunning in designer clothing”. Readers would be interested to see how she looked if and when she popped out to the shops for a bottle of milk.<sup>264</sup>

But here the accompanying text made it plain that these photographs were different. They showed her coming either to or from the NA meeting. They showed her in the company of others, some of whom were undoubtedly part of the group. They showed the place where the meeting was taking place....A picture is ‘worth a thousand words’ because it....adds to the information given in those words....In context, it also added to the potential harm, by making her think that she was being followed or betrayed, and deterring her from going back to the same place again.<sup>265</sup>

That was where Baroness Hale determined that the line had been crossed. The editor had accepted that, even without the photographs, it would have been a front page story. A generic picture of Naomi Campbell could have been used. The photographs could have been used to prove the truth of the story had it been challenged “but there was no need to publish them for this purpose.”<sup>266</sup>

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<sup>263</sup> Ibid [140]. Of note, however, is that Lord Steyn’s proportionality test in *Re S* produced a series of different results in respect of the Article 8/Article 10 balance as the case moved through its different stages resulting in an aggregated 5:4 majority against Ms Campbell (Lord Phillips MR, Chadwick and Keene LJ, Lord Nicholls and Lord Hoffman against Morland J, Lord Hope, Baroness Hale and Lord Carswell. Proportionality should not be confused with predictability. It would be unfair to compare it, however, with John Selden’s 17<sup>th</sup> century aphorism in the context of equity: ‘Equity is a roguish thing....equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity....One Chancellor has a long foot, another a short foot, a third an indifferent foot: ‘tis the same thing in a Chancellor’s conscience.’

<sup>264</sup> Ibid [154].

<sup>265</sup> Ibid [155].

<sup>266</sup> Ibid [156].

### 3.2.2 Explored in *Mosley*

Max Mosley sued the *News of the World* for copy and pictures headed *F1 Boss has sick Nazi Orgy with 5 Hookers* accompanied by a subheading *Son of Hitler-loving fascist in sex shame*. He also sued over the same information and images on the newspaper's website, which contained video footage relating to the same event. There was a follow-up article headed *Exclusive: Mosley Hooker tells all: My Nazi orgy with F1 boss*.<sup>267</sup> Eady J's starting point was that, since the HRA

The law now affords protection to information in respect of which there is a reasonable expectation of privacy, even in circumstances where there is no pre-existing relationship giving rise to an enforceable duty of confidence. That is because the law is concerned to prevent the violation of a citizen's autonomy, dignity and self-esteem. It is not simply a matter of 'unaccountable' judges running amok. Parliament enacted the 1998 statute which requires these values to be acknowledged and enforced by the courts.<sup>268</sup>

In any event, he pointed out, the courts had been increasingly taking them into account because of the need to interpret domestic law consistently with the United Kingdom's international obligations having signed up to the ECHR more than 50 years ago.

However it is his remarks in terms of proportionality, clarifying why Mr Mosley should succeed, which are illuminating. Many missed their enduring significance. Firstly he noted that the post-HRA approach of applying an "intense focus" was obviously incompatible with making broad generalisations "of the kind to which the media often resorted in the past". It was not enough to say that public figures must expect to have less privacy or that people in positions of responsibility must be seen as 'role models' and "set us all an example of how to live upstanding lives". Sometimes such factors might have a legitimate role to play when the "ultimate balancing exercise" came to be

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<sup>267</sup> For a fuller treatment of the issues in the trial see R Callender Smith *Freddie Starr ate my Privacy, OK!* *Queen Mary Journal of Intellectual Property* Vol 1, No 1 2011, 53 – 72, 59.

<sup>268</sup> *Mosley v NGN* [2008] EWHC 1777 (QB) [7].

carried out, but “generalisations can never be determinative”. In every case it depended upon what was revealed by the intense focus on the individual circumstances.<sup>269</sup> Judges had to ask whether the intrusion, or the degree of the intrusion, into the celebrity’s privacy was proportionate to the public interest supposedly being served by it.<sup>270</sup> The balancing process which had to be carried out on the facts before judges necessarily involved an evaluation of the use to which the relevant defendant had put - or intended to put – Article 10 freedom of expression rights. In this context “political speech” merited greater value than gossip or “tittle tattle”.<sup>271</sup> He decided that the only possible element of public interest in relation to misuse of private information would have been “if the Nazi role-play and mockery of Holocaust victims” were true.<sup>272</sup> After a careful factual analysis he had found that was not the case. He noted, in passing that, in the defamation context,<sup>273</sup> it seemed clear that it was for the court to decide whether the story as a whole was a matter of public interest, but there was scope for “editorial judgment” as to what details should be included within a story and how it was expressed. In this case the journalists’ perception was that the story was about Nazi role-play and, because the court had to decide whether that was reasonable, on the facts he dismissed that conclusion.

I consider that this willingness to believe in the Nazi element and the mocking of Holocaust victims was not based on enquiries or analysis consistent with “responsible journalism”. Returning to the terminology used ...in *Jameel*... the judgment was made in a manner that could be characterised, at least, as “casual” and “cavalier”.<sup>274</sup>

The practical key to the future direction of travel within this case – both in terms of proportionality and the way in which media lawyers’ checklists would now have to be constructed – is revealed in this observation:

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<sup>269</sup> Ibid [12].

<sup>270</sup> Ibid [14].

<sup>271</sup> Ibid [15].

<sup>272</sup> Ibid [136].

<sup>273</sup> He reminded himself this was not a defamation case.

<sup>274</sup> Ibid [170].

There may be a case for saying, when “public interest” has to be considered in the field of privacy, that a judge should enquire whether the relevant journalist’s decision prior to publication was reached as a result of carrying out enquiries and checks consistent with “responsible journalism”. In making a judgment about that, with the benefit of hindsight, a judge could no doubt have regard to considerations of that kind, as well as to the broad principles set out in the PCC Code as reflecting acceptable practice. Yet I must not disregard the remarks of Lord Phillips MR in *Campbell*... to the effect that the same test of public interest should not be applied in the “two very different torts”.<sup>275</sup>

This took the misuse of private information - sketched in outline in *Douglas* and *Campbell* – to the more clearly delineated territory of an active, new and individual tort. In short, if the media failed to put the substance – the “sting” - of the story that involved the publication of private information (as opposed to confidential information) to the celebrity target ahead of publication it would be likely to find itself stranded on the reef of its own lack of proportionality if it then sought the shelter of a public interest argument to resist injunctive or trial relief. As a result

It has to be recognised that no amount of damages can fully compensate the Claimant for the damage done. He is hardly exaggerating when he says that his life was ruined. What can be achieved by a monetary award in the circumstances is limited. Any award must be proportionate and avoid the appearance of arbitrariness. I have come to the conclusion that the right award, taking all these considerations into account, is £60,000.<sup>276</sup>

When the case moved into its European iteration at Strasbourg, it was argued on his behalf that the UK had violated its positive obligations under Article 8 of the Convention - taken alone and together with Article 13 - by failing to impose a legal duty on the *News of the World* to notify him in advance to give him a chance to seek an interim injunction preventing publication of material breached

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<sup>275</sup> Ibid [141].

<sup>276</sup> Ibid [236] together with costs of £420,000 (revealed subsequently in the ECtHR action): see 3.2.3. Footnote 282.

his Article 8 rights. The UK's position was that he was no longer the victim of any violation of the Convention. He had successfully pursued his domestic remedy, recovered damages and costs. That remedy vitiated the damage. Proceedings he had taken in Germany had settled for €250,000. He had since sought and gained a high profile in the UK as a champion of privacy rights and, in that context, had submitted evidence to Parliament and had participated in a number of press and media interviews. The UK's position was that the effect of the publication was not as detrimental to him as he claimed.<sup>277</sup> The ECtHR found that the UK was entitled to a wide margin of appreciation and had chosen to put in place a system for balancing the competing rights and interests which excluded a pre-notification requirement.<sup>278</sup> The ECtHR, rejecting his claim, concluded by emphasising<sup>279</sup>

the need to look beyond the facts of the present case and to consider the broader impact of a pre-notification requirement. The limited scope under Article 10 for restrictions on the freedom of the press to publish material which contributes to debate on matters of general public interest must be borne in mind. Thus, having regard to the chilling effect to which a pre-notification requirement risks giving rise, to the significant doubts as to the effectiveness of any pre-notification requirement and to the wide margin of appreciation in this area, the Court is of the view that Article 8 does not require a legally binding pre-notification requirement.

In terms of issues of proportionality the ECtHR identified that Eady J had considered in terms of the balancing exercise between Article 8 and Article

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<sup>277</sup> *Mosley v UK* (Application no. 48009/08) [2011] ECHR 774, [67 – 69]. His rebuttal was that damages were not an adequate remedy where private and embarrassing personal facts and intimate photographs were deliberately exposed to the public in print and on the internet. It was information that could never be erased from the minds of the millions of people who had read or seen the material. Privacy could not be restored to him by an award of damages. The only effective remedy would have been an injunction, something he was denied by the failure of the newspaper to notify him in advance. Similarly, actions taken in other jurisdictions did not remove his victim status.

<sup>278</sup> *Ibid* [122]. Also, a parliamentary committee had subsequently reported and rejected the argument that a pre-notification requirement was necessary in order to ensure effective protection of respect for private life.

<sup>279</sup> *Ibid* [132].

10,<sup>280</sup> that any exemplary damages award against the *News of the World* would have to have been so large that it would fail the test of proportionality and would risk having a chilling effect on freedom of expression.<sup>281</sup> Also that the nature and severity of any sanction imposed on the press in respect of a publication was relevant to any assessment of the proportionality of an interference with the right to freedom of expression.<sup>282</sup> This meant the ECtHR itself had to exercise “the utmost caution” where measures taken or sanctions imposed by the national authorities could dissuade the press from taking part in the discussion of matters of legitimate public concern.<sup>283</sup> It did not believe that prior notification was the “cure” for the problem.

In February 2010 the House of Commons Culture, Media and Sport Committee rejected the introduction of a legal requirement for prior notification in advance of press publication, recommending instead that the PCC’s Editors’ Code be amended to incorporate it.<sup>284</sup> Many of Mr Mosley’s arguments were subsequently considered by Leveson LJ in his inquiry.<sup>285</sup>

### 3.2.3 Strasbourg and *Von Hannover* 1

*Campbell* and the breach of confidence case of *Douglas* were English precursors of what became a broader European view with the first of the *Von Hannover* cases.<sup>286</sup> All three were soon part of the fabric of English celebrity litigation<sup>287</sup> and it is commonplace for all three to be cited in claimants’ solicitors

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<sup>280</sup> *Mosley v UK* (Application no. 48009/08) [2011] ECHR 774, [15].

<sup>281</sup> *Ibid* [26].

<sup>282</sup> A proportionality issue, in relation to the stifling Article 10 effects of Conditional Fee Agreements (CFAs) in the newspaper’s House of Lords litigation, was successfully taken to Strasbourg in *MGN Ltd v United Kingdom* [2011] ECHR 66.

<sup>283</sup> *Ibid* [116].

<sup>284</sup> *Press Standards, Privacy and Libel* (Second Report of Session 2009 – 10, HC 362-I) [92 - 93]. The amended provision in the Editors’ Code was also recommended to be subject to a public interest exception.

<sup>285</sup> Leveson Vol 2 Ch 3, 2.46, 3.8 and 11.11 and Vol 4 Ch 4, 3.8, 4.11, 7.20 and 8.9.

<sup>286</sup> *Von Hannover (1)* (2005) 40 EHRR 1.

<sup>287</sup> There is, however, an apparent conflict between *Campbell* and the chronologically later decision of *von Hannover*. If *Campbell* is applied as setting a threshold of “expectation of privacy” to deny protection for aspects of a person’s private life which are considered too insubstantial to warrant protection, then this has the potential to introduce an imbalance in approach because no such “threshold” criterion was applied to Article 10 rights. Such an

warning letters to the media. *Von Hannover (1)* helped set the legal stage for a major examination of the issues in this area. Photographs of Princess Caroline of Monaco had been published in *Bunte* and *Neue Post* between 1993 and 1997, showing her in scenes from her daily life engaged in activities of a purely private nature such as practising sport, out walking, leaving a restaurant or on holiday.<sup>288</sup> The ECtHR pointed out that the photos in which she appeared sometimes alone and sometimes in company

....illustrate a series of articles with such anodyne titles as ‘Pure Happiness’, ‘Caroline ... a woman returning to life’, ‘Out and about with Princess Caroline in Paris’ and ‘The kiss. Or: they are not hiding anymore?’<sup>289</sup>

The ECtHR found a fundamental distinction between reporting facts – even controversial ones – which were capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, and the reporting of details of the private life of an individual who did not exercise official functions.<sup>290</sup> Regard was given to the context in which the photographs had been taken – without Princess Caroline’s knowledge or consent – and the harassment endured by many public figures.<sup>291</sup> Photos of one particular incident (which the Court singled out for adverse comment) – Princess Caroline tripping over an obstacle at the Monte Carlo Beach Club and falling over – had been taken “secretly at a distance of several hundred metres, probably from a neighbouring house, whereas journalists’ and photographers’ access to the club was strictly regulated”.<sup>292</sup> The court commented that the distinction drawn between figures of contemporary society “par excellence”<sup>293</sup> and “relatively”

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approach would appear to conflict with the clear statements that neither right has presumptive priority - see *In Re S* [17].

<sup>288</sup> See generally R Callender Smith *From von Hannover (1) to von Hannover (2) and Axel Springer AG: do competing ECHR proportionality factors ever add up to certainty?* Queen Mary Journal of Intellectual Property, Vol. 2 No. 4 2012, 388–392

<sup>289</sup> *Von Hannover (1)* (2005) 40 EHRR 1 [61].

<sup>290</sup> *Ibid* [63].

<sup>291</sup> *Ibid* [68].

<sup>292</sup> *Ibid* [68].

<sup>293</sup> *Ibid* [54]: The German Federal Constitutional Court (*Bundesverfassungsgericht*) had interpreted s.22 and s.23 of the Copyright (Arts Domain) Act in such a way that Princess Caroline was characterised as a figure of contemporary society ‘par excellence’, enjoying



public figures had to be clear and obvious so that an individual had precise indications about the behaviour he or she should adopt. In the taxonomy of this thesis it is the difference between both ascribed and achieved celebrities on the one hand and attributed celebrities on the other. Individuals needed to know exactly when and where they were in a protected sphere and when they were in a sphere in which they must expect interference from the tabloid press. It decided that the German criterion of spatial isolation<sup>294</sup> was

in reality too vague and difficult for the person concerned to determine in advance. In the present case merely classifying the applicant as a figure of contemporary society “par excellence” did not suffice to justify such an intrusion into her private life.<sup>295</sup>

In terms of the proportionality balancing exercise, the Court considered the decisive factor in balancing Article 8 against Article 10 lay in the contribution that the published photos and articles made to “a debate of general interest”. Here they made no such contribution because Princess Caroline exercised no official function. The photographs and articles related exclusively to details of her private life.<sup>296</sup> There was no legitimate interest in knowing where she was and how she behaved generally in her private life even if she appeared in places that could not always be described as “secluded” and despite the fact that she was well known to the public.<sup>297</sup> Even if there was a public interest, within the commercial interest of the magazines publishing the photographs and articles, that interest had to give way Princess Caroline’s right to the effective protection of her private life.<sup>298</sup>

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the protection of her private life even outside her home but only if she was in a secluded place out of the public eye (*in eine örtliche Abgeschiedenheit*) ‘to which the person concerned retires with the objectively reasonable aim of being alone and where, confident of being alone, behaves in a manner in which he or she would not behave in public’.

<sup>294</sup> The court, in the footnote above, took account of two criteria: one was functional and the other spatial (seclusional).

<sup>295</sup> Ibid [75].

<sup>296</sup> Ibid [76].

<sup>297</sup> Ibid [77].

<sup>298</sup> See Chapter 1.2.3.3.

### 3.3 The Protected Right develops....proportionately

None of the cases discussed so far resulted in pre-publication injunction applications, anonymised or otherwise. Mr Mosley – as was quite clear from his position at Strasbourg – believed he should have had the opportunity to take this course. As things developed in the cases examined next, issues of anonymity became a dominant theme. The parameters of what was expected of any party seeking an injunction in this area became clearer and more rigorous.<sup>299</sup>

The starting point for many claimants when seeking a privacy injunction, then but much less now, was suppression of the fact that an injunction was being sought at all by anyone and against anyone. The tactic was for claimants to apply *ex parte*, seeking no public judgement, without notice to anyone (often in the form “a person unknown”) seeking to serve the resulting injunction on media third parties so that they were bound in accordance with the *Spycatcher* principle.<sup>300</sup> This was the area of the much-derided and now rarely sought “super-injunction”. The true nature of such injunctions restrained publication of information concerning the applicant which was claimed to be confidential or private *as well as* restraining publication of the existence of the application or order. Given the adverse publicity that occurred with the *Trafigura*<sup>301</sup> saga – with later (non-super) injunctive revelations<sup>302</sup> under the protection of Parliamentary Privilege<sup>303</sup> - there was the inevitable potential for a clash in the

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<sup>299</sup> This was thanks largely – even in cases of total anonymity - to the combined efforts of Tugendhat J and Eady J and their colleagues. They maintained and developed a reportable and open dialogue giving their reasons for allowing what they were or were not doing. They used transparent and proportionate reasoning to describe how they arrived at their conclusions. As will be seen, *JIH v News Group* [2010] EWHC 2818 (QB) demonstrated that first-instance conclusions favouring identifying the claimant which, when it found no favour on appeal in *JIH v News Group* [2011] EWCA Civ 42, did not jeopardise the claimant’s identity because of the process used.

<sup>300</sup> *AG v Newspaper Publishing* (1988) 1 Ch 333.

<sup>301</sup> *RJW and SWJ v Guardian News and Media* [2009] EWHC 2540 (QB).

<sup>302</sup> See, in particular, *Goodwin v NGN* [2011] EWHC 1309 (QB) and Tugendhat J’s remarks to the media on the nature of super-injunctions [9 – 18].

<sup>303</sup> In March 2011 John Hemming MP revealed that Fred Goodwin had obtained an injunction. In April 2011 Mr Hemming named Vicky Haigh as the subject of an injunction which had been granted by the Family Division of the High Court and which prevented the names of the parties being identified. In May 2011 further details about Fred Goodwin’s injunction were revealed in the House of Lords by Lord Stoneham of Droxford.

future on this issue between Parliament and the courts if a member of either House sought to use such privilege to identify celebrities. This issue, and its current resolution, is discussed later at 3.2.

### 3.3.1 Celebrity identification and anonymity: proportionality in action

Proportionality and anonymity, in this area of preliminary injunctions, became a major feature. The Court of Appeal, in *Ntuli v Donald*,<sup>304</sup> lifted an anonymity order and publicity ban granted to a pop star to stop a former girlfriend selling her story about their relationship.<sup>305</sup> The media were free to identify Howard Donald – an attributed celebrity and member of *Take That* (a “Boy Band”) - as the claimant, and report the fact that he had obtained an injunction, but the court kept in place an order banning singer Adakini Ntuli from publicising what had happened during their nine-year relationship. Maurice Kay LJ, delivering the judgement, said he was “simply unpersuaded”<sup>306</sup> that any greater restriction was necessary. In terms of proportionality he noted that Eady J had found there was a conflict about how “private” the relationship actually was. Eady J had been reluctant, in injunctive proceedings, to resolve that because

....the Applicant has failed to persuade me that he is ‘likely’ to establish at trial that the relationship between them had been kept so private that he retained a reasonable expectation of privacy in respect of the mere fact that it existed. To put it another way, it has not been demonstrated that it is necessary and proportionate to extend the injunction so far as to restrict the Defendant’s freedom of expression in this respect.<sup>307</sup>

In *JIH v News Group Newspapers*<sup>308</sup> Tugendhat J decided that issues relating to JIH’s private life were engaged with no suggestion of any public interest in disclosure of the information. JIH was an attributed celebrity footballer. He said

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<sup>304</sup> *Ntuli v Donald* [2010] EWCA Civ 1276: an appeal against a decision by Eady J allowing Howard Donald initial anonymity.

<sup>305</sup> Ms Ntulli had sent Mr Donald a text: “Why shud I continue 2 suffer financially 4 the sake of loyalty when selling my story will sort my life out?”

<sup>306</sup> *Ntuli* [54].

<sup>307</sup> *Ibid* [36].

<sup>308</sup> *JIH v News Group Newspapers* [2010] EWHC 2979 QB.

that it was not possible “to do perfect justice to all parties and to the public at the same time”, but an order which identified *JIH* but kept information about the subject matter confidential would be effective to achieve justice and give all necessary protection to the private lives of those concerned.<sup>309</sup> The Court of Appeal changed its *Ntuli* stance<sup>310</sup> and disagreed.<sup>311</sup> Lord Neuberger MR,<sup>312</sup> who had been part of the *Ntuli* court, pointed out that if the claimant remained anonymous then it would almost always be appropriate to permit more details of the proceedings to be published than if the claimant was identified.

At least on the face of it, there is obvious force in the contention that the public interest would be better served by publication of the fact that the court has granted an injunction to an anonymous well known sportsman...than by being told that it has granted an injunction to an identified person to restrain publication of unspecified information of an allegedly private nature.<sup>313</sup>

He approved a 10-point list,<sup>314</sup> originally developed by Tugendhat J earlier in the case, which set out the principles relating to requests for anonymity. The *JIH* principles now operate generally.<sup>315</sup> In terms of proportionality, privacy is better protected by shielding the identity of the individual(s) engaged in conduct that can be disclosed rather than identifying them and giving no detail of the conduct or activity in issue.

In *Gray v UVW* Tugendhat J noted that requests for anonymity coupled with the derogation from open justice and the need for “intense factual analysis” and

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<sup>309</sup> Almost immediately contempt proceedings were considered by Tugendhat J on 12 November 2010 against the *Daily Telegraph* and another newspaper. They had inadvertently breached the terms of the original order – identifying the “well-known sportsman” and their apologies were accepted.

<sup>310</sup> *Ntuli* was decided on 16 November 2010 and *JIH* was decided on 31 January 2011.

<sup>311</sup> *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42

<sup>312</sup> He subsequently issued the Practice Guidance (Interim Non-disclosure Orders) [2012] 1 WLR 1003 in August 2011.

<sup>313</sup> *JIH v NGN* [2011] EWCA Civ 42 [33].

<sup>314</sup> *Ibid* [21].

<sup>315</sup> Particularly since the Practice Guidance was issued.

“justification” led to a range of measures the court could use to protect Article 8 rights. These included a

variety of measures to prohibit or prevent the disclosure of the information sought to be protected, and an order prohibiting disclosure of the identity of one or both parties. But each measure is cumulative. The fact that one such measure may be necessary is not a reason for concluding that they are all necessary. On the contrary, the measures as a whole must be no more than is necessary and proportionate, and if one measure is adopted, then that may mean that an additional measure is not necessary.<sup>316</sup>

In the second half of 2012 *JIH* returned to the High Court<sup>317</sup> All the joined cases were discharged by consent, with anonymity retained except for Fred Goodwin (formerly *MNB*).<sup>318</sup> In discharging the injunctions Tugendhat J remarked that this did not mean “that it would be lawful for anyone to publish the information disclosure of which had been prohibited...”. Injunctions may be discharged because there is no longer a threat of publication, or because the claimant has decided not to proceed with the action. Those who think they know the information cannot use it. Tugendhat J explained:<sup>319</sup>

It follows that no reader of this judgment or of the orders can know simply from reading the judgment or order whether or not it would be lawful for someone other than the defendant to disclose the information in question now or in the future. If anyone knows, or believes that they know, what the information in question in any given case may be, then they would need to take advice as to whether publication of that information in the future would be lawful or not.

A significant practical factor to all elements of anonymity orders is that the in-house legal teams and duty lawyers on all media need to know about the existence of such orders to make certain that their publications do not infringe the terms of any injunction. In addition, editorial staff on all such publications

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<sup>316</sup> *Gray v UVW* [2010] EWHC 2367 (QB) [56].

<sup>317</sup> *JIH v NGN* [2012] EWHC 2179 (QB): six other cases were also involved, one of which did not involve anonymity, and all related to News Group Newspapers as the Defendant.

<sup>318</sup> Identification was permitted on 23 May 2011: [2011] EWHC 1309 (QB).

<sup>319</sup> *JIH v NGN* [2012] EWHC 2179 (QB) [25].

are circulated with the information, for the same reason. This creates an unusually well-informed collection of individuals with greater knowledge than the rest of the public, with all the attendant risks.

The fact that one publication may have revealed the identity of a claimant who has been given anonymity will not, without more, be enough to open the floodgates of general media identification. This issue was considered in *NEJ v BDZ*<sup>320</sup> which subsequently became *NEJ v Helen Wood*.<sup>321</sup> The *Daily Mail* and the *Daily Telegraph* had briefly identified the actor who had paid £195 to Helen Wood for her sexual services. She had gone to *The Sun* with a “kiss and tell” account which included additional detail about him being a “disgusting kisser” and having “eagerly agreed” to her using sex toys on him. She did not seek anonymity. King J was unimpressed by the argument that, with the actor’s identity in the public domain, the *Spy Catcher* principle meant that the information was available to everyone. King J decided that

there has not been such widespread publication of that which appears in the *Daily Mail* today as to lead to the inevitable conclusion that there is no justification either in law or in terms of practicality in continuing the order of Mr Justice Blake. I much prefer to approach this case on the basis I have, which is to assess and weigh against each other the competing rights of the applicant to privacy (and indeed those of his family), and those of the respondent and the media in freedom of expression.<sup>322</sup>

He decided that the media should be allowed to publish the fact that he was a leading actor and world famous celebrity who had paid for sex with Ms Wood<sup>323</sup> and that he was a married man who was also a father.<sup>324</sup> Similar “floodgates” reasoning was used by Eady J and Tugendhat J to maintain the anonymity of

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<sup>320</sup> *NEJ v BDZ* unreported injunction granted by Blake J on 9 April 2011.

<sup>321</sup> *NEJ v Helen Wood* [2011] EWHC 1972 (QB) on the return day of 13 April 2011.

<sup>322</sup> *Ibid* [22].

<sup>323</sup> Ms Wood had earlier sold a similar story about paid sex with the footballer Wayne Rooney.

<sup>324</sup> See also Robin Callender Smith *Privacy Law is Madness* Sunday Express 17 April 2011.

*CTB*<sup>325</sup> despite the fact that he<sup>326</sup> had been identified in Parliament and on the internet.

It is internet publication and the subsequent searchable availability of the private information that causes the greatest damage in terms of the loss of the individual's original reasonable expectation of privacy. In these circumstances it was quite reasonable for Ryan Giggs, as *CTB*, to want assurances in his injunctive proceedings that NGN had "clean hands" and had not leaked the identification information about him. Eady J<sup>327</sup> said he was concerned that, for NGN to demonstrate that, it might "suggest that one or more employees of NGN was committing contempt of court". He then anticipated the Supreme Court decision in *Mulcaire v Phillips*<sup>328</sup> by remarking

Although the law relating to self-incrimination in this context cannot be said to be crystal clear, it would seem that the modern approach adopted by the courts is that such a risk cannot be regarded as an absolute bar when the court is invited, as a matter of discretion, to order disclosure, but it remains a factor to be taken carefully into account: see e.g. *Cobra Golf Inc v Rata* [1996] FSR 819, 830-832; *Dendron GmbH v University of California* [2005] 1 WLR 200; *C Plc v P (Att.-Gen. intervening)* [2008] Ch 1.

Eady J added that, if Mr Giggs had specific information about leaks, he should give it to the Law Officers because it was their responsibility to represent the public interest in such matters, particularly criminal contempt.<sup>329</sup> Tugendhat J then had to address the problem which played out a few hours later<sup>330</sup> following John Hemming MP's naming of Mr Giggs in the House of Commons.<sup>331</sup> The newspaper wanted Mr Giggs' anonymity removed on the basis that everyone

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<sup>325</sup> *CTB v NGN* [2011] EWHC 1326 (QB) and *CTB v NGN* [2011] EWHC 1334 (QB).

<sup>326</sup> Ryan Giggs as in *Giggs v NGN* [2012] EWHC 431 (QB).

<sup>327</sup> *CTB v NGN* [2011] EWHC 1326 (QB) [11 – 13].

<sup>328</sup> *Mulcaire v Phillips* [2012] UKSC 28.

<sup>329</sup> Shortly afterward the Attorney General— dealing with identification on *Twitter* and other social media – said, in respect of overseas enforcement: "Those who take an idea that modern methods of communication mean that they can act with impunity may well find themselves in for a rude shock": *Hansard* 23 May 2011 Col 637.

<sup>330</sup> Sitting at 1730, after Eady J had concluded his judgement at 1600.

<sup>331</sup> *CTB* [2011] EWHC 1334 (QB) [2 – 3].

now knew that he was *CTB* and that “as it has been repeated thousands of times on the internet, *NGN* now wanted to join in”. The judge rejected this argument. He accepted that, if the object of the injunction was to preserve a secret, it had failed. But that was only one of two purposes of the injunction: the other was to prevent intrusion or harassment.

The fact that tens of thousands of people have named the claimant on the internet confirms that the claimant and his family need protection from intrusion into their private and family life. The fact that a question has been asked in Parliament seems to me to increase, and not to diminish the strength of his case that he and his family need that protection. The order has not protected the claimant and his family from taunting on the Internet. It is still effective to protect them from taunting and other intrusion and harassment in the print media.

Prior to this hearing,<sup>332</sup> a suit had been filed against Twitter in California.<sup>333</sup> Twitter brushed the attempt aside on the basis that the High Court’s powers did not extend to the immediate enforcement of injunctions on US territory.<sup>334</sup> Almost immediately it became apparent that Twitter would, in fact, reveal identities of account holders as the result of action taken by South Tyneside councillors seeking the identity of a “whistle-blower” tweeting under the identity of “Mr Monkey” in the context of defamatory material.<sup>335</sup>

### **3.3.2 Two Conundrums: Parliamentary Privilege and Internet/Social Media Identification**

Despite English court orders granting claimants anonymity in misuse of private information claims there are two leakage points where identification may occur and subvert the whole process. The first, identification of claimants under the

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<sup>332</sup> On 23 May 2011.

<sup>333</sup> On 18 May 2011, issued out the High Court in London: *An athlete known as CTB v. Twitter Inc and others*, QBD HQ11X01814 18 May 2011.

<sup>334</sup> See also *Eldrick Tont (Tiger Woods) v X & Y* (Persons unknown who have taken or obtained or offered for publication photographs of the intended claimant in circumstances described in the confidential schedule to this order)  
<http://www.scribd.com/doc/23989817/Tiger-Woods-Injunction-2009> .

<sup>335</sup> <http://www.telegraph.co.uk/technology/twitter/8544350/Twitter-reveals-secrets-Details-of-British-users-handed-over-in-landmark-case-that-could-help-Ryan-Giggs.html> : the case was brought in the 9<sup>th</sup> Circuit Court in California, gave the whistle-blower 21 days to respond before disclosing his details and reportedly cost the Council around £75,000.



protection of Parliamentary Privilege became a vogue for a while with interesting constitutional questions that had not properly been considered in a contemporary context. Namely, in a battle between the Supreme Court of Parliament and the Courts themselves, who had the last word? The second, drawing on identification which may have occurred in Parliament but also elsewhere in terms of general rumour and speculation, has proved more intractable.

### 3.3.2.1 *Parliamentary Privilege*

It is clear that court orders do not inhibit Parliamentary debate although both Houses of Parliament are subject to *sub judice* rules.<sup>336</sup> The rules are not absolute and are aimed at two areas. The first is to strike a balance between the principle that the rights of parties in legal proceedings should not be prejudiced by discussion of their case in Parliament and that Parliament should not prevent the courts from exercising their functions. The second is the principal that Parliament has a constitutional right to discuss any matter it pleases.<sup>337</sup> It is still unclear whether any court order could prohibit the reporting of what was said in Parliament, particularly in the context of information that breaches super-injunctions.<sup>338</sup>

The Parliamentary Joint Committee on Privacy and Injunctions considered the matter and concluded on 12 March 2012:<sup>339</sup>

[230] We regard freedom of speech in Parliament as a fundamental constitutional principle. Over the last couple of years a few members have revealed in Parliament information covered by injunctions. We have considered carefully proposals for each House to instigate procedures to prevent members from revealing information subject to privacy injunctions. The

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<sup>336</sup> See Erskine May *Parliamentary Practice* 24<sup>th</sup> Edn LexisNexis 2011 441 – 443 (House of Commons) and 518 (House of Lords).

<sup>337</sup> *Report of the 1999 Joint Committee on Parliamentary Privilege* [191].

<sup>338</sup> The *Report on the Committee on Super-Injunctions* concluded at [6.33]: "It therefore appears to be an open question whether.... the common law protects media reporting of Parliamentary proceedings where such reporting appears to breach the terms of the court order and is not covered by the protection provided by the Parliamentary Papers Act 1840.... What is clear is that unfettered reporting of Parliamentary proceedings (in apparent breach of court orders) has not been established as a clear right)."

<sup>339</sup> <http://www.publications.parliament.uk/pa/jt201012/jtselect/jtprivinj/273/27309.htm> .

threshold for restricting what members can say during parliamentary proceedings should be high. We do not believe that the threshold has yet been crossed.

[231] If the revelation of injuncted information becomes more commonplace, if injunctions are being breached gratuitously, or if there is evidence that parliamentarians are routinely being “fed” injuncted material with the intention of it being revealed in Parliament, then we recommend that the Procedure Committees in each House should examine the proposals made to us for new restrictions with a view to implementing them.

This led Lord Judge, commenting on that report, to ask the media to consider whether it was

a very good idea for our lawmakers to be in effect flouting a court order because they disagree with the order or, for that matter, because they disagree with the law of privacy which parliament has created.<sup>340</sup>

There were two particular celebrity situations which had crystallised this issue. On 10 March 2011 John Hemming MP used Parliamentary Privilege to name Sir Fred Goodwin, Chief Executive of RBS, as the banker who had obtained an anonymised injunction preventing *The Sun* revealing details of an extra-marital affair he had been having with another individual at the bank.<sup>341</sup> Lord Stoneham used the similar privilege in the House of Lords to name him two months later.<sup>342</sup> John Hemming then named Ryan Giggs as the footballer *CTB* who had obtained an injunction against *The Sun* preventing it revealing his affair with Imogen Thomas.<sup>343</sup> He did so in the context of this question:

With about 75,000 people having named Ryan Giggs on *Twitter* it is obviously impracticable to imprison them all and with reports that Giles Coren also faces imprisonment...the question is what

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<sup>340</sup> <http://www.theguardian.com/politics/2011/may/21/judges-challenge-use-parliamentary-privilege> .

<sup>341</sup> *MNB v NGN* [2011] EWHC 528 (QB).

<sup>342</sup> On 19 May 2011.

<sup>343</sup> On 23 May 2011. He was warned by the Speaker, John Bercow, not to misuse the privilege but no action was taken against him.

the Government's view is on the enforceability of a law which clearly does not have public consent?

There have been no recent examples of the privilege being used as described above. There is one ascribed celebrity situation for the future that could bring the courts and Parliament into conflict: mental capacity issues relating to the Queen. If an application was made to the Court of Protection in respect of her then the matter is likely to be treated under the provisions of an anonymity order.<sup>344</sup> The press and the media might want to be present for any court hearing.<sup>345</sup> The general issue of anonymity might be raised in Parliament, in a way that breached any anonymity order that had been granted by the court, on the basis that Parliament was entitled to debate the issues consequent on a Regency. It would create a complex constitutional battle for supremacy between the effectiveness, enforcement and proportionality of orders of Her Majesty's judges and the competing free speech and privilege issues latent within the Court of Parliament.<sup>346</sup> However the Duke of Edinburgh's episodes of recent ill-health over Christmas 2011 and during the 60th Jubilee celebrations were dealt with openly and publicly and may be a pointer to how such things would be dealt with, even in terms of the Queen, in the future.<sup>347</sup>

### **3.3.2.2 Internet/Social Media Identification**

The *Goodwin* and *Giggs* cases led the Lord Chief Justice, Lord Judge, to suggest that ways would be found to curtail the "misuse of modern technology" in the same way that those involved with online child pornography were pursued by the police.

Are you really going to say that someone who has a true claim for protection perfectly well made has to be at the mercy of

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<sup>344</sup> Under rule 91 of the Court of Protection Rules 2007.

<sup>345</sup> The President of the Family Division and Court of Protection, Sir James Munby, announced new guidelines in January 2014 encouraging a greater media presence at such proceedings: <https://inform.wordpress.com/2014/01/16/new-guidance-transparency-in-the-family-courts-and-the-court-of-protection-publication-of-judgments/>

<sup>346</sup> See generally Erskine May *Parliamentary Practice* 24<sup>th</sup> Edn 2011 LexisNexis 251 – 270.

<sup>347</sup> A detailed discussion of the inflexibility of the Regency Act 1937 – and its potential pitfalls in contemporary terms – can be found in Rodney Brazier *Royal incapacity and constitutional continuity: the Regent and Counsellors of State* CLJ 2005, 64(2), 352-387.

modern technology? I'm not giving up on the possibility that people who peddle lies about others through using technology may one day be brought under control, maybe through damages, very substantial damages, maybe even injunctions to stop them peddling lies.<sup>348</sup>

Two other senior judicial figures have also considered the practicalities and problems in this area. Lord Leveson<sup>349</sup> said he understood why celebrities might not want to take enforcement action against bloggers breaching injunctions. It was a time-consuming and expensive, individuals were difficult to track down and it could add to the *Streisand* effect where

further attempts to stop the publication of the information on the internet might well have simply inflamed the situation and led to even greater dissemination.<sup>350</sup>

He characterised bloggers and tweeters as “no more than electronic versions of pub gossip” compared to the established media and established journalists who had a “powerful reputation for accuracy” and for acting within the law. The established media conformed to the law, and when they did not they were liable to the law. Web-based publications could be faced with “take down” notices and to pay damages. He was concerned, however, that the lawlessness of bloggers and tweeters could infect the standards of the established media. It might lead to journalists adopting an approach which was “less than scrupulous” in the pursuit of stories.

In order to steal a march on bloggers and tweeters, they might be tempted to cut corners, to break or at least bend the law to obtain information for stories or to infringe privacy improperly to the same end.

What worried him was that the media might attempt to compete with bloggers by providing information in breach of injunctions by established newspapers

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<sup>348</sup> <http://www.theguardian.com/law/2011/may/20/superinjunction-modern-technology-lord-judge>

<sup>349</sup> Lord Leveson *Hold the front page: News-gathering in a time of change* University of Melbourne 12 December 2012.

<sup>350</sup> *Ibid* [49].

moving entirely online and out of the jurisdiction in which the target readership was based.<sup>351</sup> He accepted that States all had different approaches to freedom of expression across the world which could make the reciprocal enforcement of judgements difficult. The solution he suggested was to “establish cross-border recognition and enforcement of judgments”. Accepting that the “mainstream, professional media” was moving towards a business model based around the internet it followed that

in the not-too-distant future a large percentage, if not the majority, of the print media will be entirely online: that it will no longer be a print media. [That would] require us to...develop a cosmopolitan approach and one which supports the rule of law through a fair and effective international framework. It might be said that if we facilitate or condone breaches of the law, and thereby weaken the rule of law by failing to act and to recognise judgments and court orders which emanate from other countries, we encourage the weakening of the rule of law at home too.<sup>352</sup>

Significantly, although he identified the problem, he did not suggest the mechanism or the outlines of the framework through which any of this could be progressed towards a solution.

Then came the response – on behalf of the judiciary to the Law Commission consultation on contempt of court - from Tugendhat J and Treacy LJ.<sup>353</sup> Although the focus of this was in relation to prejudice to fair trials in criminal proceedings, in terms of published material and material that might be accessible to jurors on the internet, it considered s.12 (3) HRA and Article 10 issues, particularly in terms of archived news reports. It observed that courts were “generally unlikely” to be satisfied that archive material would create the substantial risk of serious prejudice unless the court has first considered whether the risk could satisfactorily be overcome by some less restrictive means than an interference with freedom of expression. One such measure

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<sup>351</sup> Ibid [55].

<sup>352</sup> Ibid [59 – 61].

<sup>353</sup> A judicial response to Law Commission Consultation Paper 209.

would involve asking prospective jurors whether they had read the material, and, if they had, then standing them down. The matter would depend on the facts of the case, and whether there is a practical solution which would avoid an interference with the right of freedom of expression.<sup>354</sup>

Experience from the defamation and privacy injunction area showed that

applications and enforcement, while generally trouble free, can in some cases be very costly, time consuming and uncertain as to outcome. With the financial constraints that exist for parties in the Crown Court it is difficult to envisage how a procedure for orders that material be removed from the internet can work fairly.

In *R v Harwood*<sup>355</sup> Fulford J had ordered the removal of two articles from the internet. He described the UK based publishers as “co-operative” and the circumstances as “straightforward”, and said that injunctions to remove archive material “are rarely appropriate”. Even so, one blog with inadmissible material remained accessible. Fulford J did not seem to have considered asking jurors in waiting if they had read the material, and empanelling only those who had not which, it is suggested, would have been a proportionate approach.

With Tugendhat J’s experience evident in the drafting, the judicial response noted there was a

small but significant number of individuals who are so convinced of their right to publish what they want to publish that coercive measures against them will either be ineffective, or effective only following the expenditure of time and money which is not available.... Some such people are motivated by a conviction that they are right (and everyone else wrong), others by a desire to inflict injury at almost any price.<sup>356</sup>

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<sup>354</sup> Ibid [40].

<sup>355</sup> *R v Harwood* [2012] EW Misc 27 (CC).

<sup>356</sup> A judicial response to Law Commission Consultation Paper 209, [46] referencing *Cruddas v Adams* [2013] EWHC 145; *McCann v Bennett* [2012] EWHC 2876 and *ZAM v CFW* [2011] EWHC 476 (QB). In *McCann* and *ZAM* the injunction had been ineffective or only partly effective, and contempt proceedings have since been brought in *McCann*: [2013] EWHC 283 (QB) and [2013] EWHC 332 (QB) resulting in a 3-month prison sentence

In *Contostavlos v Mendahun*<sup>357</sup> the injunction to remove indecent images of the claimant from the internet had been wholly effective but “at a cost in time and money so vast that only the very richest” could afford.<sup>358</sup> This underlines the fact that access to justice in this area of private information favours well-resourced celebrities.

As far as contempt and the internet is concerned, the Attorney General’s expressed view is that it – and the social media in particular - pose continuing challenges for enforcement.

Characterising the major news organisations as, on the whole, acting responsibly and in a measured manner

the inhabitants of the internet often feel themselves to be unconstrained by the laws of the land. There is a certain belief that so long as something is published in cyberspace there is no need to respect the laws of contempt or libel. This is mistaken. And it does not follow that because law enforcement cannot be perfect, consistent and universal, that there is no point in doing anything at all. I have to consider each case on its merits. Just because in one case I might consider that a tweet, however improper, is unlikely to seriously prejudice or impede the course of justice, it would be wrong to assume that another tweet about another case could not engage the law.<sup>359</sup>

None of this alters the fact that, domestically and in terms of overseas media platforms, publication of private information or information which a UK court or UK law believes should not be made public can only be punished after the event. It cannot prevent it but only discourage the consequences of it.<sup>360</sup> This creates significant problems in terms of prosecution choosing how to proceed

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suspended for one year. In *ZAM* the contempt proceedings had been brought only against the English based defendant and not the foreign based defendant. See also *ZAM* and the *Streisand* effect: [http://www.pressgazette.co.uk/node/47205?qt-most\\_read\\_most\\_commented=0](http://www.pressgazette.co.uk/node/47205?qt-most_read_most_commented=0)

<sup>357</sup> *Contostavlos v Mendahun* [2012] EWHC 850 (QB).

<sup>358</sup> A judicial response to Law Commission Consultation Paper 209, [47].

<sup>359</sup> 8 February 2012: <http://www.theguardian.com/commentisfree/2012/feb/08/contempt-of-court-act-internet>

<sup>360</sup> *AG v Associated Newspapers and MGN* [2012] EWHC B19 (QB): each fined £10,000 (plus Attorney General’s costs of £25,000).

against an evolving background<sup>361</sup> and of potential inequalities in sentencing policy. The “tweeters” who identified a rape victim<sup>362</sup> were prosecuted for a summary-only offence and other recent cases have presented a litany of anomalies.<sup>363</sup> With sentencing policy the same anomalies are apparent. The most extreme example of this is the disparities disclosed within the ultimately successful appeal against conviction of the man originally convicted of the “Robin Hood airport” tweets.<sup>364</sup> As different modalities of social media develop – with the potential for UGC platforms and corporate headquarters to be sited or re-located to less process-amenable jurisdictions – the difficulties in this area may become more complex, less enforceable and a greater encouragement to those who wish to distribute private information, act unlawfully and ignore their responsibilities.<sup>365</sup>

As identified above, the determined “breachers” of anonymity orders who convince themselves they can act with impunity or who can feed the prohibited information to those who can publish it out of the jurisdiction on the internet and via the social media are an intractable and, for the near-term, unsolvable problem. If the route toward the solution is in reciprocal enforcement provisions it takes the law into areas where the law of unintended consequences can produce more problems than it solves.<sup>366</sup> The UK experience of the European Arrest Warrant is but one example. For different reasons the Australian attributed celebrity and internet cause célèbre Julian Assange - currently a political refugee in the Ecuadorian Embassy in London- is there because he

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<sup>361</sup>The current CPS policy was announced by the DPP on 20 June 2013:  
[http://www.cps.gov.uk/news/latest\\_news/dpp\\_publishes\\_final\\_guidelines\\_for\\_prosecution\\_s\\_involving\\_social\\_media\\_communications/](http://www.cps.gov.uk/news/latest_news/dpp_publishes_final_guidelines_for_prosecution_s_involving_social_media_communications/)

<sup>362</sup> Prosecution under s.5 of the Sexual Offences (Amendment) Act 1992 requires the consent of the Attorney General in any event.

<sup>363</sup> See Lilian Edwards *Section 127 of the Communications Act 2003: Threat or Menace?*  
[http://blogs.lse.ac.uk/mediapolicyproject/2012/10/19/section-127-of-the-communications-act-2003-threat-or-menace/October 22, 2012.](http://blogs.lse.ac.uk/mediapolicyproject/2012/10/19/section-127-of-the-communications-act-2003-threat-or-menace/October%2022,%202012)

<sup>364</sup> *Paul Chambers v DPP* [2012] EWHC 2157 (Admin). See also the author’s decision in *Sittampalam v IC and CPS* (EA/2014/0001), an FOIA appeal related to how the case came to be prosecuted and why the matter had to go before the Administrative Court for the law to be clarified.

<sup>365</sup> For a less apocalyptic view, see Jacob Rowbottom *To rant, vent and converse: protecting low level digital speech* CLJ 2012, 71(2), 355-383.

<sup>366</sup> See also Elaine Fahey *How to be a third pillar guardian of fundamental rights? The Irish Supreme Court and the European arrest warrant* Ent.L. Rev. 2008, 33(4), 563-576.



does not want to be sent to Sweden by the UK because of what he fears the US could then do to him.

### 3.3.3 Children of Celebrities

It might be suggested that the privacy issues relating to the children of celebrities, in the context of the taxonomy of this thesis, straddles two celebrity categories. In Malvolio's terms they are born famous – simply by the association with a celebrity parent – and as such are ascribed celebrities as well as being attributed celebrities. That is to categorise most of them incorrectly: their parents are only either attributed celebrities or (at best) achieved celebrities. Prince George, however, can properly claim to be an ascribed celebrity child within the taxonomy.

#### 3.3.3.1 *Starting Point: Images of Children*

The first case involving a child and the misuse of private information was *Murray v Express Newspapers & Big Pictures*.<sup>367</sup> A covert, long-lens photograph of the writer J K Rowling's infant son – being pushed by his father down an Edinburgh street in a buggy with his mother walking alongside - was published in the *Sunday Express*. His parents took action on their child's behalf and the *Sunday Express* paid £800 to settle the action. Patten J, the first instance judge, struck out the claim. He said that he had to consider:

whether and to what extent the application of the principles set out by the House of Lords in *Campbell v MGN Limited* [2004] 2 AC 457 need to be re-considered or amended in the light of the more recent Strasbourg jurisprudence and in particular the decisions of the ECHR in *Von Hannover v Germany* [2004] EMLR 21 and *Sciacca v Italy* (2006) 43 EHRR 20.

He concluded:

I propose to strike out or dismiss the claim based on breach of confidence or invasion of privacy for two reasons: firstly, that on my understanding of the law including *Von Hannover* there remains an area of innocuous conduct in a public place which does not raise a reasonable expectation of privacy; and

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<sup>367</sup> *Murray v Express Newspapers & Big Pictures* [2007] EWHC 1908 (Ch).

secondly, that even if the ECtHR in *Von Hannover* has extended the scope of protection into areas which conflict with the principles and the decision in *Campbell*, I am bound to follow *Campbell* in preference. Because I regard this case as materially indistinguishable from the facts in *Hosking v Runting*<sup>368</sup> I am satisfied that on that test it has no realistic prospects of success. In these circumstances it is not necessary for me to consider the wider issues of freedom of expression or to perform the balancing exercise required by reason of Art. 10.

In the Court of Appeal Patten J's decision was overturned and a trial on the issues was ordered.<sup>369</sup> The Court noted in particular<sup>370</sup> (in connection with a PCC complaint made by former Prime Minister Tony Blair and his wife about pictures of their children) that the PCC stated that

the acid test to be applied by newspapers in writing about the children of public figures who are not famous in their own right (unlike the Royal Princes) is whether a newspaper would write such a story if it was about an ordinary person.

The Court decided it was at least arguable that a similar approach should be adopted in respect of photographs. If a child of parents who were *not* in the public eye could reasonably expect not to have photographs of their child published in the media then so too should the child of a famous parent. The only reason David Murray had his picture taken was because he was the son of J K Rowling. This reasoning has set up a specific line of celebrities-and-their-children settlements typified by the resolution of a complaint made by Coleen Rooney, the wife of footballer Wayne Rooney, after a picture of their five-month-old son Kia being held in her arms at Aintree Grand National 2009 was

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<sup>368</sup> *Hosking v Runting* [2004] NZCA 34. Extended, most recently in the sphere of intrusion into an adult's privacy, in *C v Holland* [2012] NZHC 2155.

<sup>369</sup> *Murray v Big Pictures* [2008] EWCA Civ 446. Sir Anthony Clarke MR at [36] stated that the "question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher." The fact that a child was involved was clearly additionally significant: [45]. The re-trial never took place because *Big Pictures* settled the case.

<sup>370</sup> *Ibid* [46].

published in the *Sunday Express*.<sup>371</sup> This was notwithstanding the fact that Ms Rooney had been paid a £50,000 celebrity attendance fee to be at the event and had held Kia up for the public to take pictures of him.<sup>372</sup> Complaints about other pictures of Kia have been made in May 2014 despite Wayne Rooney posting a video of him on Facebook playing football with his father.<sup>373</sup>

### **3.3.3.2 *Anonymity for indiscreet adult celebrities to prevent “playground bullying” of their (anonymous) children***

The development of case law in relation to the children of celebrities was inevitable as the effects of the tide of senior court decisions in respect of ECHR Article 8 private life rights were given effect particularly by Baroness Hale. Her judgements in a series of key immigration decisions in the House of Lords and the Supreme Court involving children followed a logical and inexorable line.<sup>374</sup> Her phrase in the 2011 decision of *ZN (Tanzania)* that the “*best interests of the child must be a primary consideration. This means that they must be considered first*” is now woven into the fabric of all decisions about children, celebrity or otherwise. It would be going too far to suggest that the children of celebrities have now become litigation “accessories”. It is clear, however, that it helps to be able to draw on their existence – and the effect on them of an adverse presentation of their adult parents’ private lives - in the proportionality balancing exercise.

In *ETK v NGN* – a case involving an affair which had turned sour between two actors in a well-known television drama - Ward LJ felt that it could tip the balance “where the adverse publicity arises because of the way the children’s father has behaved”.<sup>375</sup> The rights of children were not confined to their Article

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<sup>371</sup> £10,000 settlement and apology: unreported.

<sup>372</sup> Presumably for the public’s private – rather than commercial - use.

<sup>373</sup> <http://www.pressgazette.co.uk/wayne-rooney-condemns-disgusting-uk-press-after-pics-published-young-sons-playing-golf> .

<sup>374</sup> *Beoku-Betts v SSHD* [2008] UKHL 39 at [4] reaffirmed in *Chikwamba v SSHD* [2008] UKHL 40 at [8] and reaching its apotheosis in her leading judgement in *ZN (Tanzania) v SSHD* [2011] UKSC 4 at [33], pointing out that children could not be blamed for the deficiencies of their parents.

<sup>375</sup> *ETK v NGN* [2011] EWCA Civ 439, [13] Ward LJ: “Then there are the children. The purpose of the injunction is both to preserve the stability of the family while the appellant and his wife pursue a reconciliation and to save the children the ordeal of playground

8 rights.<sup>376</sup> While it was clear that the interests of children did not automatically take precedence over the Convention rights of others, particular weight should be accorded to the Article 8 rights of any children likely to be affected by the publication, if that would be likely to harm their interests.

Where a tangible and objective public interest tends to favour publication, the balance may be difficult to strike. The force of the public interest will be highly material, and the interests of affected children cannot be treated as a trump card.

He followed *Re S* but added to it significantly because *Neulinger v Switzerland* post-dated Lord Steyn's analysis. The "intense focus" on the comparative importance of the specific rights being claimed also required the privacy rights of children to be reflected in the Article 8 side of the scale. In terms of the weight of the Article 10 considerations there was no "political edge" to the publication, and nothing "so crucial to democracy" was enhanced by the publication.<sup>377</sup>

The intellectual, artistic or personal development of members of society is not stunted by ignorance of the sexual frolics of figures known to the public...the benefits to be achieved by publication in the interests of free speech are wholly outweighed by the harm that would be done through the interference with the rights to privacy of all those affected, especially where the rights of the children are in play.<sup>378</sup>

He asked whether there was really a debate of public interest into why the woman had left the series and concluded this was not the case. While

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ridicule when that would inevitably follow publicity. They are bound to be harmed by immediate publicity, both because it would undermine the family as a whole and because the playground is a cruel place where the bullies feed on personal discomfort and embarrassment."

<sup>376</sup> Ibid [18]. He cited *Neulinger v Switzerland* (2010) 28 EHRC 706 and article 3(1) of the Convention of the Rights of the Child 1989 (UNCRC) and from article 24 of the European Union's Charter of Fundamental Rights. Article 3(1) UNCRC provided: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

<sup>377</sup> *ETK v NGN* [2011] EWCA Civ 439, [20].

<sup>378</sup> Ibid [21 – 22].

“publication may satisfy public prurience” that was not a sufficient justification for interfering with the private rights of those affected.<sup>379</sup>

This careful and proportionate articulation of the issues in relation to children of celebrities was followed in a less obvious example in *Edward RockNRoll v NGN*.<sup>380</sup> The Claimant<sup>381</sup> married Kate Winslet, the actress, in circumstances of some novelty in December 2012. Both had recently divorced their previous spouses. *The Sun* came into possession of pictures of Mr RockNRoll taken in July 2010 at a relative’s private fancy dress party at a private estate. The photographs were taken by another guest at the party. Some of them showed him partially naked from the waist down. The guest posted them on his Facebook page. They had subsequently been viewed by around 1,500 of his friends, but not by the general public, until taken off the Facebook site.<sup>382</sup> *The Sun* put Mr RockNRoll on notice that it was about to publish one of the pictures with pixilation obscuring the lower half of his body in the photograph but with descriptive text of what, apart from obvious genitalia, had been there.

Briggs J went through a careful, judicially well-trodden catechism, referring to another case the result of which turned on the Article 8 rights of children of the celebrity actors involved.<sup>383</sup> Despite the extensive – but arguably restricted – Facebook viewing by 1,500 people over an 18-month period the decisive factor in the decision related to protecting the Article 8 interests of Kate Winslet’s children. He stated:<sup>384</sup>

there is in my view good reason to suppose that, if the Photographs or a description of their content were published in a national newspaper with the circulation of the *Sun*, there is real reason to think that a grave risk would arise as to Miss Winslet’s children being subjected to teasing or ridicule at school about the behaviour of their newly acquired step-father,

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<sup>379</sup> Ibid [23].

<sup>380</sup> *Edward RockNRoll v NGN* [2013] EWHC 24 (Ch) [43 - 46].

<sup>381</sup> A nephew of Sir Richard Branson who had changed his name by Deed Poll.

<sup>382</sup> The copyright was assigned from James Pope, who had taken the photographs, to the Claimant before the injunction was sought.

<sup>383</sup> Set out in *ETK v News Group Newspapers Ltd* [2011] EWCA Civ 439 at [10].

<sup>384</sup> *Edward RockNRoll* [2013] EWHC 24 (Ch) [36].

within a short period after his arrival within their family, and that such teasing or ridicule could be seriously damaging to the caring relationship which, on the evidence, the claimant is seeking to establish with them.

He had reminded himself about the importance of the Article 10 rights in the context of the proportionality test.<sup>385</sup> He noted that, in *Axel Springer AG v Germany*,<sup>386</sup> additional factors such as the public profile of the claimant, his conduct prior to the threatened publication, the manner in which the information about his private affairs was obtained, the content, form and potential for harm of the publication, and the severity of the sanction proposed were all matters to be taken into account, in addition to the contribution which the publication might make to genuine public debate.<sup>387</sup> He saw nothing

disproportionate in permitting a derogation from the defendant's Article 10 rights by enforcing the claimant's Article 8 rights in the present case. This appears likely to be a case where at trial it will be shown that the defendant's Article 10 rights are at the weakest end of the hierarchy to which I have referred, whereas the claimant's Article 8 rights are powerfully engaged.<sup>388</sup>

*The Sun* had sought unsuccessfully to persuade him from pictures available on the internet of Miss Winslet's appearances "scantily clad, in films, that this would not be a new or therefore particularly upsetting experience for her children."<sup>389</sup> The fact that the children in question might be subject to "teasing or ridicule at school" because their mother had just begun her third marriage to someone with the self-devised surname of RockNRoll clearly did not alter

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<sup>385</sup> Ibid [31].

<sup>386</sup> *Axel Springer AG v Germany* [2012] EMLR 15, [89-95].

<sup>387</sup> See also R Callender Smith *From von Hannover (1) to von Hannover (2) and Axel Springer AG: do competing ECHR proportionality factors ever add up to certainty?* Queen Mary Journal of Intellectual Property, Vol. 2 No. 4 2012, 388–392.

<sup>388</sup> *Edward RockNRoll* [2013] EWHC 24 (Ch) [40].

<sup>389</sup> Ibid [37]: "I am entirely unpersuaded by that submission. Whatever may be the difficulties facing a mother in bringing up children while, at the same time, pursuing a career as an actress, whether on stage or in film, that provides no possible reason for exposing her children to a real risk to additional embarrassment or upset from the nationwide publication of photographs (or their contents) depicting their other carer behaving in a foolish and immature manner when half naked." And, at [39]: "...If I had concluded that...the balance between the parties' respective Article 8 and Article 10 rights was even, I would have concluded that the real risk of harm to those children was sufficient to tip it in the claimant's favour."

matters. As Baroness Hale had, in effect, observed in *ZN (Tanzania)* children cannot be blamed for their parents' actions when their Article 8 rights are in play. The argument that 1,500 people had already viewed the picture on Facebook – which on a common-sense view destroyed its private nature – was discounted by the Judge on the basis that consent to them being viewed in these circumstances did not imply consent to widespread newspaper publication. Outside the judgement – but as a matter of fact – *The Sun* made it clear that it was the textual description of the pixelated lower half of the picture which made the proposed story because of the bizarre nature of the private information it disclosed. Editorially it was never considered that the whole picture could have been used.<sup>390</sup>

The 2013 Court of Appeal decision relating to the Article 8 rights of celebrity children demonstrates – however - just how fact-sensitive the publication of photographs, and the private information they represent, is in the judicial analysis. *AAA v Associated Newspapers*<sup>391</sup> relates to pictures of the illegitimate child of Boris Johnson,<sup>392</sup> the Mayor of London, being wheeled in a buggy by her mother Helen Macintyre, an unmarried professional art consultant.<sup>393</sup> The *Daily Mail* published a series of articles,<sup>394</sup> three of which included that photograph and all of which referred to the private information. Nicola Davies J awarded £15,000 damages for breach of the child's right of privacy by the repeated publication of the photographs. She refused to grant an injunction or award damages for publication of the private information but accepted an undertaking from the newspaper restricting future publication of the photographs of the claimant.

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<sup>390</sup> Set in the context not of the picture *per se* but the text describing the picture this seems to be a particularly strict view of the private information in question. See also the “Tulisa Sex Tape” litigation: *Contostavlos v Mendahun* [2012] All ER (D) 152 (Apr).

<sup>391</sup> *AAA v Associated Newspapers* [2013] EWCA Civ 554.

<sup>392</sup> An achieved celebrity.

<sup>393</sup> An attributed celebrity: <http://www.theguardian.com/politics/davehillblog/2010/jul/15/boris-johnson-daily-mirror-olympic-tower-helen-mcintyre> .

<sup>394</sup> Beginning on 16 July 2010: <http://www.dailymail.co.uk/news/article-1295403/Why-DO-classy-women-falling-Mayor-Boris-bumblng-cad.html>

The Court of Appeal reviewed in considerable detail the Judge’s carefully structured reasoning.<sup>395</sup> It concluded that the core information in the story – that Boris Johnson had an adulterous affair with the mother, deceiving both his wife and the mother’s partner, and resulting in the child being born nine months later – was a matter of public interest which the electorate was entitled to know when considering his fitness for high public office. This Article 10 conclusion outweighed the Article 8 current and prospective private life interests of the child.<sup>396</sup>

The Court of Appeal judgement also made it clear that the “fade factor” argued on behalf of the child carried little weight. Much of the information published by the media in relation to her paternity remained available online. The permanent injunction sought by the child would only restrain the *Daily Mail* from referring to the information while many other media organisations had published it. It was fanciful to expect the public to forget the fact that Boris Johnson, a major public figure, had fathered a second illegitimate child. The child’s mother had accepted in cross-examination that any woman who embarked on an affair with him was “playing with fire” and that such an affair was bound to attract “a very considerable media attention in both the national media and the London press”.<sup>397</sup>

The Court of Appeal decision in *AAA* came out on 20 May 2013 after Briggs J’s decision in *RockNRoll* on 17 January 2013. The first instance decision *AAA* of Nicola Sharpe J was published on 25 July 2012. There are two oddities. The first is that the first-instance decision of *AAA* six months earlier was not cited to Briggs J by Desmond Browne QC (who had also been leading counsel for

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<sup>395</sup> This included a description of Mr Johnson. “As to his private life, he is a man who has achieved a level of notoriety as the result of extramarital adulterous liaisons.... The claimant is alleged to be the second such child conceived as a result of an extramarital affair of the supposed father. It is said that such information goes to the issue of recklessness on the part of the supposed father, relevant both to his private and professional character, in particular his fitness for public office. I find that the identified issue of recklessness is one which is relevant.... Specifically, I find that it goes beyond fame and notoriety.” *Ibid* [118].

<sup>396</sup> *AAA v Associated Newspapers* [2013] EWCA Civ 554 [55].

<sup>397</sup> *Ibid* [54].



Associated Newspapers there and in the Court of Appeal). The second is that *RockNRoll* was not drawn to the attention of the Court of Appeal by Desmond Browne QC or James Price QC who was acting for the litigation friend of AAA.<sup>398</sup> It may have been thought to be irrelevant because, although Nicola Sharpe J refused to grant an injunction or award damages for publication of the private information, she did accept an undertaking from Associated Newspapers that they would not be republished. Reading the Court of Appeal judgment in *AAA* against *RockNRoll* leaves a distinct impression that one judgement should have – but did not - help inform the other.

### **3.3.3.3 Style over Substance? *Weller v Associated Newspapers*<sup>399</sup>**

The celebrity musician Paul Weller<sup>400</sup> brought misuse of private information and Data Protection Act claims,<sup>401</sup> on behalf of three of his children, in respect of photographs of them published online. He contended that their faces should have been pixelated. The pictures, taken by an unnamed photographer in Santa Monica, showed the Weller family out shopping and relaxing at a cafe on the edge of the street. Dylan Weller was 16 years old at the time: the other two children were 10 months old twins. Dingemans J reviewed all the relevant legal principles.<sup>402</sup> Having stated categorically that English law did not recognise “image rights”<sup>403</sup> he found that the children had a reasonable expectation of

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<sup>398</sup> This analysis was made by comparing the information in the official transcripts of each judgement on *Westlaw*.

<sup>399</sup> *Dylan, John Paul and Bowie Weller v Associated Newspapers* [2014] EWHC 1163 (QB). Naming the children as an *homage* to the achieved celebrity of other musicians carries a hidden catch here: Dylan Weller is girl not a boy.

<sup>400</sup> A former member the bands *Style Council* and *The Jam*.

<sup>401</sup> The parties agreed that the Data Protection Act claim stood or fell with the misuse of information claim.

<sup>402</sup> *Ibid* [15 - 79].

<sup>403</sup> *Ibid* [19]. However at [60 – 63] he relied on the ECtHR “image rights” decisions in *Reklos v Greece* [2009] EMLR 16 (where taking a photograph for sale of a new born child without parental consent at a clinic breached the child’s Article 8 rights) and the words from that judgment at [40] “a person’s image constitutes one of the chief attributes of his or her as it reveals the person’s unique characteristics and distinguishes the person from his or her peers” repeated again in *Von Hannover 2* at [95] to conclude that the “particular importance attached to photographs in the decided cases” demonstrated the difference between simply seeing someone and “the publication of a permanent photographic record” of them.

privacy. Applying the balancing test, their Article 8 rights overrode the Article 10 rights engaged.

These were photographs showing the expression on faces of children, on a family afternoon out with their father. Publishing photographs of the children's faces, and the range of emotions that were displayed, and identifying them by surname, was an important engagement of their Article 8 rights, even though such publication would have been lawful in California. There was no relevant debate of public interest to which the publication of the photographs contributed. The balance of the general interest of having a vigorous and flourishing newspaper industry does not outweigh the interests of the children in this case.<sup>404</sup>

The two sides approached the quantification of damages from completely opposite perspectives. For the children it was argued that they were entitled to "vindicatory damages" applying *Mosley* and at least £15,000 based on AAA. The newspaper argued for nominal or minimal damages. The judge held that "vindicatory damages" were inappropriate and "unhelpful" for misuse of private information claims.<sup>405</sup> This was because of the risk of overcompensation (because of double counting) or under-compensation (because factors could be missed). The principles to be followed in this area were twofold: damages should compensate the children for the misuse of their private information and aggravated damages could be awarded where appropriate.<sup>406</sup> Dylan was awarded £5,000 and the twins John Paul and Bowie received £2,500 each with "nothing in the case" to suggest that aggravated damages were appropriate.<sup>407</sup> The newspaper undertook not to publish the photographs again.

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<sup>404</sup> Ibid [182], commenting also that his approach was consistent with the PCC's Editor's Code which recognized that "private activities can take place in public and that editors should not use a parent's position as sole justification for the publication of details of a child's private life".

<sup>405</sup> Ibid [190] applying *R (Lumba) v SSHD* [2011] UKSC 12.

<sup>406</sup> Ibid [192–193]: he noted, citing the review of such damages in the Northern Ireland by McCloskey J in *McGaughey v Sunday Newspapers Ltd* [2010] NICH 7, that *Mosley* was the exception not the rule. In *Campbell* the award was £2,500 (with £1,000 aggravated damages), £3,500 in *Archer v Williams* [2003] EWHC 1670 (QB) for medical information, £3,500 for each claimant in *Douglas v Hello* (No.3) and £2,000 in *Applause Store Productions v Raphael* [2008] EWHC 1781.

<sup>407</sup> Ibid [196–197], limiting the awards only to the children's facial features.

On one view the result of this case is what could be expected from *Murray*, updated by the case law of the intervening eight years. The author's view, however, is that there are significant differences such as the photographs having been taken lawfully according to US law, Dylan had modelled for *Teen Vogue*, images of the twins' naked bottoms had been tweeted by their mother and their father had discussed the children in promotional media interviews. Despite Dingemans J's declaration that "image rights" do not exist in England – and the next section of this thesis challenges that vis-à-vis actions within all the other EU member states – he was not referred to the CJEU decision in *Martinez*.<sup>408</sup> He did, however, rely specifically on statements from ECtHR case law identified above in *Reklos* and *Von Hannover 2* relating to images of children and individuals. It is difficult to read this decision in a way that does not grant general image rights to children.<sup>409</sup> Rather like earlier judicial denials about a law of privacy this case demonstrates that, providing judges focus only on the image and photographs in the context of misuse of private information (and data protection) actions, English law achieves the protection of image rights by the style of the legal packaging rather than the substance of the legal action. Associated Newspapers is appealing against the decision and Hannah Weller is now campaigning to have the publication, without parental consent, of pictures of children made a criminal offence.<sup>410</sup>

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<sup>408</sup> C-509/09 and C161/10 *eDate Advertising GmbH v X and Martinez v MGN Ltd*.

<sup>409</sup> See also Judith Janna Märten *The Weller Case: England and Germany getting closer by protecting children in the media* <http://inform.wordpress.com/2014/06/08/the-weller-case-england-and-germany-getting-closer-by-protecting-children-in-the-media-judith-janna-marten/> and Hugh Tomlinson QC *Paul Weller, Article 8 and the recognition of "image rights"* <http://inform.wordpress.com/2014/04/30/weller-article-8-and-the-recognition-of-image-rights-hugh-tomlinson-qc/>

<sup>410</sup> On 12 June 2014 Mrs Hannah Weller called for a specific change in the law "give children better protection from the prying eyes of the press. It should be a criminal offence to violate any child's right to grow up free from media intrusion," she said <http://www.bbc.co.uk/news/uk-27810069> . On 30 July 2014 the *Daily Mail* website took down pictures of the infant son of David Walliams and Lara Stone – taken in France – following a complaint from the parents. That complaint was on the basis that there should be no pictures of the child published "even if his face was pixelated", suggesting that the totality of image of the child has its own integrity requiring protection.

### 3.4 Permitted Interference

Unsurprisingly the permitted interferences evidenced in this tort come from the celebrity cases that fall on the other side of Article 8 and Article 10 balancing exercise. However the fact that celebrities may court or allow publicity does not mean that they have given up all rights to their intimate private lives. The Leveson Inquiry noted there was

ample evidence that parts of the press have taken the view that actors, footballers, writers, pop-stars – anyone in whom the public might take an interest – are fair game, public property with little, if any, entitlement to any sort of private life or respect for dignity, whether or not there is a true public interest in knowing how they spend their lives. Their families, including their children, are pursued and important personal moments are destroyed. Where there is a genuine public interest in what they are doing, that is one thing; too often, there is not.<sup>411</sup>

The fine line in this area is emphasised by dissenting voices of Lord Hoffmann and Lord Nicholls in *Campbell* held that the Article 10 issues in the case prevailed over Ms Campbell's Article 8 rights. In particular, Lord Hoffmann pointed to the "practical exigencies of journalism" which required that editorial decisions "be made quickly and with less information than is available to a court which afterwards reviews the matters at leisure".<sup>412</sup>

The permitted interferences will be examined in two groups. Firstly, the cases involving private information that the court decided contained sufficient public interest to warrant an Article 10 freedom of speech conclusion and, secondly, the cases involving pictures which – in the *Campbell* sense – had been claimed to be unwarranted intrusions and, therefore, a misuse of private information.

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<sup>411</sup> *An Inquiry into the Culture, Practice and Ethics of the Press* (HC 780 – 1, 2012) Executive Summary [33].

<sup>412</sup> *Campbell v MGN* [2004] UKHL 22, [62].

### 3.4.1 Disclosable Private Information

One of the first cases in this category started its life anonymised as *KGM v NGN*<sup>413</sup>. At first instance Eady J described the factual background of the claimant thus:

In 1968 he married a lady with whom he had four children, who are now grown up. The marriage still subsists. In the meantime, from about 1976 he developed a relationship with another woman with whom, in 1979 and 1981 respectively, he had two children. Obviously, they too are now adults. For many years, however, the Claimant managed to keep the information about his “second” family secret, to a greater or lesser extent. How far he succeeded in this intention has been a matter of debate in the light of the limited evidence available. The position now is that, finally, all members of the Claimant’s “first” family are aware of the situation, although I am told that one of his daughters was only informed two or three weeks ago. She was told by her husband, who himself had known of the “second” family only since the beginning of last year.<sup>414</sup>

The claimant’s case was that knowledge of this information was confined to his two families and that it was not public knowledge. He claimed to have a reasonable expectation of keeping his “second” family secret, in the sense that he should not be identified as being the father of the two children in question or as having had a relationship with their mother. One of his daughters had only recently found out about the “second” family and her husband was the chef, businessman and attributed celebrity Gordon Ramsay. The claimant had been – but was no longer - chief executive of the Gordon Ramsay Group. Gordon Ramsay – in a series of public exchanges about his father-in-law (the claimant) and their business disputes had referred to the claimant’s “complex” lifestyle in the *Evening Standard*.<sup>415</sup>

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<sup>413</sup> *KGM v NGN* [2010] EWHC 3145 (QB).

<sup>414</sup> *Ibid* [10].

<sup>415</sup> The parallel universe of second, hidden families was also explored in *SKA and PLM v CRH and Persons Unknown who have threatened to reveal private information about the Claimants* [2012] EWHC 2236 (QB). There, a wealthy 70-year-old EU businessman claimant’s mistress was about to give birth to twins and his grown-up children from his first marriage – working in the same business – along with his second wife were likely to

It was put to Eady J that, although newspapers like the *Mirror* and the *Daily Mail* were aware of this background, they had no immediate intention of publishing anything about it. Counsel for the claimant wanted any injunction to cover them as well. On grounds of proportionality, Eady J declined on the basis that it was a requirement to show

that it is necessary and proportionate to impose restraint on MGN Ltd and Associated Newspapers Ltd because of evidence of an apprehended wrong on their parts. It would be a new, and rather retrograde, development if one could obtain an injunction against someone merely because he claimed the right to exercise his freedom of speech. In that context, the jurisdiction to grant an injunction has always been regarded as “delicate”.<sup>416</sup>

On the generalities of the claim itself he also declined to make the anonymity order sought. This was on the basis that it was “not necessary or proportionate” either in the interests of the administration of justice or “for the protection of the claimant’s legitimate expectations in respect of Article 8” to restrict the freedom of expression of any of the newspapers. He did, however, grant an interim anonymity order to give the claimant time to consider whether he wanted to appeal. In due course, he did and the Court of Appeal in *Hutcheson v NGN*<sup>417</sup> upheld Eady J’s decision, particularly in respect of his proportionality assessment of the issues.<sup>418</sup>

In *Rio Ferdinand v MGN*<sup>419</sup> the issue was the attributed celebrity footballer’s status as a “role model” and the “false light” cast on this by his extra-marital sexual exploits. The *Sunday Mirror* published an article, repeated on its website, under the headline *My Affair with England Captain Rio*. It had not put him on warning about the publication. It described his relationship with Ms Carly Storey. They had met in 1996 or 1997 when he was a teenager and she was 17. They drifted apart from 2000, when he moved to Leeds United, until 2002.

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be told of this situation if £150,000 was not paid. Nicola Davies J found the information was private and that “no good grounds have been advanced which could justify disclosure pursuant to Article 10”.

<sup>416</sup> *Ibid* [8].

<sup>417</sup> *Hutcheson v NGN* [2011] EWCA Civ 808.

<sup>418</sup> *Ibid* [10], [23], [44] and [50].

<sup>419</sup> *Rio Ferdinand v MGN* [2011] EWHC 2454 (QB).

Thereafter they had an on-off relationship consisting of occasional meetings, texts and telephone calls and messages. The last time they had met was May 2005. When he was appointed as captain of the England football team, replacing John Terry, Ms Storey had sent him a congratulatory text to which he responded on 6 February 2010.

Nichol J determined that the issue he had to decide was whether the *Sunday Mirror's* article, in Article 10 terms, reasonably contributed to the debate about Rio Ferdinand's suitability for the role of captain of the England football team.<sup>420</sup> The footballer claimed to have reformed and was no longer the "boozier, love cheat and drug-test dodger", an earlier characterisation of him in other newspapers. Nichol J noted that the qualifications needed to be the England captain had a "perennial interest" and that the suitability of the "captain of the moment" had been debated in an article in another paper where seven former England captains discussed their views of the role.<sup>421</sup> Ms Storey's account allowed for the correction of a false image and the suitability of him to be England captain

namely the Claimant's admission that on occasions he either did, or tried to, sneak Ms Storey into a hotel where he and the other members of his team were staying. He acknowledged that this was against the rules set by the team's management.<sup>422</sup>

A picture of the couple together had been used to illustrate the article. They were clothed and Rio Ferdinand was speaking on a mobile phone. It was an "unexceptionable picture". It was taken in a private room but its publication "could have caused nothing comparable to the additional harm that was referred to in *Campbell*".<sup>423</sup>

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<sup>420</sup> Ibid [92]: Also, "During the course of the hearing I asked the parties whether it was incumbent on me to decide whether the Claimant was fit to be England captain. Thankfully they agreed that it was not."

<sup>421</sup> Ibid [94].

<sup>422</sup> Ibid [96].

<sup>423</sup> Ibid [102].

In finding that the newspaper's Article 10 rights prevailed over Rio Ferdinand's Article 8 rights Nichol J did not place the lack of prior notice to him anywhere in the proportionality balancing exercise.

[The] emphasis on the absence of prior notice ....was in my view, with respect, a red herring. [It was] suggested that this was only explicable on the basis that the Defendant feared being subject to an interim injunction if notice had been given and this fear betrayed a lack of confidence in the reliance that they now placed on freedom of expression. I do not find this line of argument helpful. Partly, that is because it is entirely speculative as to why no notice was given to the Claimant. More importantly, I have to decide where the balance lies between these competing rights as an objective matter. The arguments which the Defendant now advances will either succeed or fail. The Defendant's internal assessment of their merits at some earlier stage is neither here nor there.

This decision was not appealed. However, what was published concerned a "relationship" which had begun when the parties were teenagers and, at the time of the article, they had not met for nearly 5 years. The "false image" of being a "family man" who had cast aside his past wild ways was, on any view, rather stale. It related only to text messages initiated by Ms Storey which the newspaper then dressed up as a "kiss and tell" piece. The "role model" element was used as the platform to maintain that anyone who accepted that kind of job permitted a greater degree of intrusion into his private life, allowing a contribution to a debate as to his suitability to be this kind of role model. That seems less like a strong Article 10 element and more like what Baroness Hale once called "vapid tittle tattle about the activities of footballers' wives and girlfriends".<sup>424</sup>

In *McClaren v NGN*<sup>425</sup> there were three children of the McClaren's family – two adult and one aged 15 – but that did not prevent publication of surreptitiously-taken pictures of the former England football team manager Steve McLaren that had been set up by the "kiss-and-teller". A significant factor was that he had sold a story seven years earlier to *The Sun* for £12,500 about an earlier marital

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<sup>424</sup> *Jameel v Wall Street Journal* [2006] UKHL 44, [147].

<sup>425</sup> *McClaren v NGN* [2012] EWHC 2466 (QB).



infidelity while his children had been much younger. In essence, their Article 8 rights in respect of having a father who was unfaithful to their mother were already impaired.

And, in case it is thought that the only permitted intrusions occur because of sexual activity, *Spelman v Express Newspapers*<sup>426</sup> extended matters into performance-enhancing and pain-relieving drugs and young sportsmen. Jonathan Spelman was a 17-year-old who had played rugby for the England Under-16 team and for Harlequins RFU. He was injured and had not been able to play since then. His mother, Caroline Spelman MP, was a Cabinet Minister. Initially Lindblom J granted the injunction although the *Daily Star Sunday* was able to run a story headlined *We are gagged by Cabinet MP: Minister wins injunction* with a photograph of Jonathan, the fact that he was at a boarding school and had two siblings without breaching it.<sup>427</sup> Tugendhat J had more information when the matter came back before him. Jonathan was nearly 18 and was a sportsman who had played, and wanted to play again, at national and international level. Tugendhat J observed that

Children (other than heirs to a throne) rarely appear as public figures in politics. But in sport and the performing arts they appear very frequently. Some athletes win an Olympic Gold Medal or a Tennis Championship while aged 16 or under. Some sports are dominated by competitors under 18. Even in sports where peak performance is reached in a person's 20s or 30s, it is necessary for aspiring performers to start their dedication to the sport as children. Much the same is true in many of the performing arts. Children can be world class performing artists, and performing artists often are children.<sup>428</sup>

He pointed out that the material benefits to those few children who succeeded at the highest level "can be fabulous" but they could come at a high price. The effort to achieve the highest honours in sport could damage a person's health

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<sup>426</sup> *Spelman v Express Newspapers* [2012] EWHC 239 (QB) before Lindblom J and *Spelman v Express Newspapers* [2012] EWHC 355 (QB) before Tugendhat J.

<sup>427</sup> In terms of *JIH* this is an example of the opposite - Article 10 balance - allowing initial identification without specifying the conduct and then, as the case progressed, allowing further details of the conduct in question to be discussed for the reasons given by Tugendhat J.

<sup>428</sup> *Spelman v Express Newspapers* [2012] EWHC 355 (QB), [67 - 68]].

and family life, lead to an early death “or even to a life of misery when careers end early and in disappointment”. The public interest was engaged in this area and it also had a relevance in terms of his reasonable expectation of privacy.

....those engaged in sport at the national and international level are subject to many requirements which are not imposed on other members of the public. Matters relating to their health have to be disclosed and monitored, and they may have little if any control over the extent to which such information is disseminated. It is a condition of participating in high level sport that the participant gives up control over many aspects of private life. There is no, or at best a low, expectation of privacy if an issue of health relates to the ability of the person to participate in the very public activity of national and international sport.<sup>429</sup>

Before his injury he had spent 30 to 40 hours each week in training in addition to his school studies. He had little social life with his contemporaries outside his sport. If he could not train he would lose “both the main interest in his life, and most of his friends at the same time, because they are boys who train as he does”.<sup>430</sup>

He is nearly 18. And even if he were still under 16, as he was when he first played for England, his status as an international player means that discussion of his sporting life, and the effect that it may have upon him, is discussion that contributes to a debate of general interest about a person who is to be regarded as exercising a public function.<sup>431</sup>

He decided that each party had an equal chance of success at trial and that he would not continue the injunction as requested. He warned, however, that this was not a licence to publish whatever the *Daily Star Sunday* chose. The matter never came to trial. The Spelman family decided it could not afford more than the £61,000 it had cost to reach the stage it had. Subsequently Jonathan, who was then suspended from playing rugby for taking anabolic steroids, made an

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<sup>429</sup> Ibid [69].

<sup>430</sup> Ibid [71].

<sup>431</sup> Ibid [72].

internet appeal for people to support him to keep him “fed”. His parents were “not happy” about his subsequent decision to become a bodybuilder and had warned him he would have to leave home.<sup>432</sup>

Finally, sometimes the permitted intrusion results from self-revelation. Andrew Marr had obtained an anonymity injunction in 2008 in respect of an affair he had with a female journalist. By 2011, after two challenges by *Private Eye* in respect of it, he admitted the facts in an interview with the *Daily Mail*.<sup>433</sup> Also Jeremy Clarkson, who had featured as AMM in *AMM v HXW*,<sup>434</sup> accepted that he was the claimant who had prevented his former wife Alex Hall revealing they had an affair after he had divorced her and married someone else. Memorably he stated:

....injunctions don't work. You take out an injunction against somebody or some organisation and immediately news of that injunction and the people involved and the story behind the injunction is in a legal-free world on Twitter and the internet. It's pointless.....you used to be able to take out an injunction and then just sit on it. But as a result of a recent court case you are now ultimately forced by the courts to go to trial – which is unbelievably expensive. If you win, news leaks out on the internet. If you lose, you then get raped by your opponent's legal fees.<sup>435</sup>

### 3.4.2 *John Terry: reputation alone will not be protected*

Tugendhat J in *RST v UVW*<sup>436</sup> identified a problem that finally manifested itself, four months later, in the *John Terry* case.<sup>437</sup> A court could grant an interim injunction to prevent a threatened misuse of private information on Lord Nicholls' “more likely than not” test in *Cream Holdings Ltd v Banerjee*.<sup>438</sup>

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<sup>432</sup> <http://www.telegraph.co.uk/news/9337691/MP-Caroline-Spelmans-son-claims-parents-are-not-happy-after-he-chose-bodybuilding-as-my-life.html>

<sup>433</sup> <http://www.bbc.co.uk/news/uk-13190424>

<sup>434</sup> *AMM v HXW* [2010] EWHC 2457 (QB).

<sup>435</sup> <http://www.dailymail.co.uk/news/article-2053800/Jeremy-Clarkson-injunction-Top-Gear-star-lifts-gag-ex-wife-Alex-Hall.html>

<sup>436</sup> *RST v UVW* [2009] EWHC 2448 (QB).

<sup>437</sup> *Terry (formerly LNS) v Persons Unknown* [2010] EWHC 119 (QB).

<sup>438</sup> *Cream Holdings v Banerjee* [2004] UKHL 44, [22].

However the rule in *Bonnard v Perryman*<sup>439</sup> presented an equal and opposite principle: interim injunctions in defamation cases would not be granted if the truth of what was to be stated would be relied on by the Defendant at full trial of the action. Judges needed to decide which one of the two types of action was before them.

John Terry was captain of Chelsea FC and, at the time, also the England football team captain. A married man, he applied for an interim injunction – without giving prior notice to any Respondent – seeking to prohibit “persons unknown” from publishing “information or purported information” about him having had an intimate personal relationship with a woman who was not his wife (VP).<sup>440</sup> Also that VP had become pregnant and that he had contributed to the cost of terminating the pregnancy.

Tugendhat J refused to continue an interim injunction granted earlier, noting that John Terry accepted the truth of some of the information.<sup>441</sup> He set out his reasons in eight specific points.<sup>442</sup> The eighth, relating to proportionality, determined that

....an interim injunction [was not] necessary or proportionate having regard to the level of gravity of the interference with the private life of the applicant that would occur in the event that there is a publication of the fact of the relationship, or that LNS can rely in this case on the interference with the private life of anyone else.

He decided that the claim was actually a reputational claim in defamation and not a seclusional claim, as it had been presented, rooted in breach of confidence and private information. In essence, John Terry appeared to be more worried about losing sponsorship deals in the light of the news, an impression not aided by the way his supporting affidavits had been drafted. Tugendhat J regarded himself as bound by the rule in *Bonnard v Perryman*,

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<sup>439</sup> *Bonnard v Perryman* [1891] 2 Ch 269 (CA).

<sup>440</sup> Vanessa Perroncel, the ex-girlfriend of an England and former Chelsea FC team mate.

<sup>441</sup> *Ibid* [6].

<sup>442</sup> *Ibid* [149].

affirmed in *Greene v Associated Newspapers*.<sup>443</sup> Since then nearly every judge has had no difficulty in deciding the difference between misuse of private information and defamation claims.<sup>444</sup>

### 3.5 Pictures of Adult Celebrities

Following *Campbell*, *Von Hannover 1*, *Theakston* and *Murray* it might have been thought that the bar had been set very high in terms of pictures of celebrities either out and about or going about their private business. Yet it is notable that the robustness of the English “intense focus” within the balancing exercise - apparent from the cases already examined above as permitted intrusion - has recently been echoed in a more Article 10-weighted set of decisions in the developing Strasbourg case law. This section also deals the image and photograph in greater detail. It will consider the position of celebrity pictures in English law as misuse of private information, the consequences of CJEU decision in *Martinez*<sup>445</sup> and finally in the developing ECtHR Convention jurisprudence.

#### 3.5.1 Celebrity “out and about” pictures

*Weller*, discussed in the previous section, is a decision that protects the digital images of celebrity children’s faces in terms of misuse of personal information. When dealing with the images of adults it is possible to mine and recast the *Douglas* case as a commercial image rights case. The exclusivity of the wedding together with the ability to contract to sell that privacy<sup>446</sup> and then take action to protect the commercial right from being diluted and spoiled was at the

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<sup>443</sup> *Greene v Associated Newspapers* [2004] EWCA Civ 1462.

<sup>444</sup> There has been one unfortunate exception. On 3 October 2012 Freddie Starr obtained an *ex parte* injunction from the duty QBD Judge, Laura Cox J, preventing the media making any reference to a libellous allegation made against him by a woman following revelations about Jimmy Savile. The injunction was overturned the following day by Tugendhat J because, in the light of the rule in *Bonnard v Perryman*, it should never have been granted. Starr also had to pay £10,000 indemnity costs in respect of the media: <http://www.theguardian.com/uk/2012/oct/04/freddie-starr-itv-injunction>

<sup>445</sup> See Chapter 4.5.2.

<sup>446</sup> Strictly there was no commercial right to contract for the images until the House of Lords recognised this in the final appeal in 2007 and – until then – it was a commercial “interest”.

root of all the manifestations of the case as it progressed through its many litigation iterations.<sup>447</sup> It was only by surreptitious use of a mobile phone that the pictures at the heart of the litigation were obtained in the first place. The case – stripped of all the complexities of the legal arguments it contained – is as much about image rights as it is about privacy.<sup>448</sup> As Lord Phillips MR stated in the *Douglas* case:

Recognition of the right of a celebrity to make money out of publicising private information about himself, including his photographs on a private occasion, breaks new ground. It has echoes of the *droit à l'image* reflected in the French Civil Code<sup>449</sup> and the German “tort of publicity” claim.<sup>450</sup> We can see no reason why equity should not protect the opportunity to profit from confidential information in the nature of a trade secret.<sup>451</sup>

However, in the context of a misuse of private information claim, Sir Elton John found himself unable to restrain pictures taken of him walking from his Rolls Royce to the front gate of his West London home wearing a baseball cap and a tracksuit.<sup>452</sup> The attained celebrity argued that he had not consented to the taking of the pictures, they were surreptitiously acquired and made no contribution to any debate on a matter of public interest and he relied on *Von Hannover 1* principles. Eady J found he had no reasonable expectation of

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<sup>447</sup> But see particularly *Douglas v Hello (CA)* [2005] EWCA Civ 595.

<sup>448</sup> One practitioner disagrees: “It is about as much to do with privacy as a programme like *Celebrity Love Island* has to do with celebrity or love or, indeed, reality.” Christina Michalos *Image Rights and Privacy: After Douglas v Hello!* [2005] EIPR 384.

<sup>449</sup> This originated from the “Mademoiselle Rachel” case. She was a famous French tragic actress of the *Comédie-Française* who had been photographed on her deathbed in 1858 and sketches were then made of her from those photographs. The court held that the images should be destroyed and that no deathbed images could be reproduced without the consent of the family, no matter how famous the person: Trib.civ.Seine, 16.6.1856 D1858, 3, 62.

<sup>450</sup> After Count Otto von Bismark died in 1898, two photographers broke into the room where his corpse was laid out and took pictures which were then offered for sale to the highest bidder. The Bismark family was able to get the pictures handed over to them by the oblique use of the Roman Law principle *condictio ob turpem vel iniustam causam*. Partly in response to the furore this created the German *Kunsturhebergesetz* (“KUG”) was created which – in Paragraph 22 – required individuals’ consent to the use of their images. See also, more recently, the *Axel Springer* case discussed at 3.3.3.2. and 3.5.3.1.

<sup>451</sup> *Douglas v Hello (CA)* [2005] EWCA Civ 595 [113]

<sup>452</sup> *John v Associated Newspapers* [2006] EWHC 1286 (QB).

privacy and any rights he did have would not outweigh freedom of expression. The photo was not like those at issue in *Campbell* but akin to Sir Elton ‘popping out for some milk’.<sup>453</sup> An important element in *Von Hannover 1* was harassment, denied in this case by the Defendants, and there was no reason to suppose their evidence was untruthful.<sup>454</sup> The case did not involve any of the obvious categories of private information such as health or sexual life. There was nothing remotely comparable to *Peck*.<sup>455</sup> The lack of Sir Elton’s consent was merely a factor to weigh in the balance.

The photograph was not taken with consent, but...there is, as yet, [no] doctrine operative in English law whereby it is necessary to demonstrate that to publish a photograph one has to show that the subject of the photograph gave consent. It may be a relevant factor, but it is to my mind one of relatively little weight in these particular circumstances.<sup>456</sup>

In this decision Eady J allows for the most positive interpretation of the background circumstances surrounding the picture being taken. That the photographer just happened to be in the street with an appropriate camera and lens, without realising Sir Elton lived there, because he was searching for a better internet connection tests the limits of credibility in the evidential standard of the balance of probabilities.

### **3.5.2 Recent ECtHR Celebrity Images Decisions**

The judicial approach in the ECtHR over the last two years reflects more positive and permissive Article 10 outcomes in respect of pictures and personal information. The Article 8 losers in this process have been members of the Grimaldi family, the ascribed celebrities of the royal family in Monaco, in their

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<sup>453</sup> Ibid [15].

<sup>454</sup> Ibid [17]: The photographer who had taken the photographs gave evidence that he just happened to be in the street – without knowing Sir Elton lived there – because he could get a good internet connection there from his car where he had been using his laptop for around 20 minutes. He happened to notice Sir Elton and got out of his car to take the photographs.

<sup>455</sup> *Peck v United Kingdom* (2003) 36 EHRR 41: images of someone trying to kill himself.

<sup>456</sup> *John v Associated Newspapers* [2006] EWHC 1286 (QB), [21].

various persona.<sup>457</sup> This trend has been reinforced recently in a case involving the marriage ceremony of attributed Norwegian celebrity folk singers.

### 3.5.2.1 *Von Hannover 2*

In *Von Hannover v Germany 2*,<sup>458</sup> a Grand Chamber decision of the ECtHR, the court applied a five-point criteria test in respect of the pictures of Princess Caroline: the contribution to a debate of general interest; how well-known the person concerned was and what the subject of the report related to; the prior conduct of the person concerned; the content, form and consequences of the publication; and, finally, the circumstances in which the photos were taken.<sup>459</sup>

The 'news' element in the text that surrounded the photographs involved in this case related to the ill-health Princess Caroline's father, Prince Rainier III of Monaco. Her younger sister, Princess Stephanie, was seen pictured as the dutiful daughter helping her frail father while Princess Caroline was pictured with her husband and daughter on holiday at the fashionable ski resort of St Moritz in Switzerland. This situation was characterized in the magazine *Frau Aktuell*<sup>460</sup> with the headline 'That is genuine love. Princess Stéphanie. She is the only one who looks after the sick prince'.

The Grand Chamber found that the illness affecting Prince Rainier, the reigning sovereign of the Principality of Monaco, was 'an event of contemporary society'.<sup>461</sup> It accepted that the photos in question 'considered in the light of the accompanying articles, did contribute, at least to some degree, to the debate of general interest'. It emphasized that not only did the press have the task of imparting information and ideas on all matters of public interest, but also the

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<sup>457</sup> See generally R Callender Smith *From von Hannover (1) to von Hannover (2) and Axel Springer AG: do competing ECHR proportionality factors every ever add up to certainty?* Queen Mary Journal of Intellectual Property Vol 2 No 4 2012, 389 – 393.

<sup>458</sup> *Von Hannover v Germany 2* 40660/08 [2012] ECHR 228.

<sup>459</sup> Following the Grand Chamber decision on surreptitious photography in *Söderman v. Sweden* Appln 5786/08 [2013] ECHR 1128 it may be that the UK has to consider legislation – which could impact on paparazzi photography – clarifying the domestic law on this issue: <http://ukhumanrightsblog.com/2013/11/21/uk-may-need-law-against-secret-filming-and-photography-after-european-court-ruling-james-michael/#more-20439>

<sup>460</sup> 20 February 2002.

<sup>461</sup> *Ibid* [118].



public had a right to receive that information.<sup>462</sup> It also noted that Princess Caroline had not adduced evidence of ‘unfavourable circumstances’ in respect of how the photographs had been taken. There was nothing to indicate that the photos had been taken ‘surreptitiously or by equivalent secret means such as to render their publication illegal.’<sup>463</sup>

In the linked case before the Grand Chamber, *Axel Springer AG v Germany*,<sup>464</sup> the court used the basic five-point criteria test from *von Hannover (2)* together with one additional factor. In terms of proportionality it also had to consider the severity of the sanctions already imposed by the German courts. It emphasized that the outcome should not vary whether the appeal came under Article 10 or under Article 8. Where the balancing exercise between the two rights had been conducted in conformity with the criteria laid down in the Court’s case law, ‘the Court would require strong reasons to substitute its view from that of the domestic courts’.<sup>465</sup> The Grand Chamber’s proportionality review gave weight to the fact that the arrest and conviction of an actor [not named in the judgment] was a public judicial event of general interest,<sup>466</sup> that he was sufficiently well-known to qualify as a public figure,<sup>467</sup> that he had revealed details about his private life in the number of interviews and had therefore sought the limelight,<sup>468</sup> that there were no sufficiently strong grounds for believing that his anonymity should be preserved,<sup>469</sup> and that the articles did not reveal details about his private life but concerned the circumstances following his arrest and conviction.<sup>470</sup> In relation to the severity of the sanctions imposed, the Grand Chamber considered that although these were lenient they were capable of

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<sup>462</sup> Ibid [118].

<sup>463</sup> Ibid [122].

<sup>464</sup> *Axel Springer AG v Germany* 39954/08 [2012] ECHR 227.

<sup>465</sup> Ibid [87].

<sup>466</sup> Ibid [96].

<sup>467</sup> Ibid [97 – 100].

<sup>468</sup> Ibid [101].

<sup>469</sup> Ibid [107].

<sup>470</sup> Ibid [108].

having a chilling effect and were not justified in the light of all the other elements it had considered.<sup>471</sup>

### 3.5.2.2 *Von Hannover 3*

Next came *Von Hannover v Germany 3*.<sup>472</sup> The publication at issue dated from 20 March 2002. The German magazine *7 Tage* published an article relating to the trend among celebrities of renting out their holiday homes. It went on to describe in detail the von Hannover family villa, located on an island off the Kenyan coast, setting out the furnishings, daily rental cost and activities in the area. The article featured alongside several photographs of the villa, as well as one photograph showing Princess Caroline and her husband on holiday in an unidentifiable location. The unsuccessful challenge brought by Princess Caroline related only to that photograph.

The Court unanimously held that the German Federal Court's refusal to grant an injunction prohibiting any further publication of the photograph did not constitute a breach of the applicant's privacy rights as enshrined in Article 8.<sup>473</sup> The Court applied the five considerations set out in *Von Hannover 2* and *Axel Springer* for balancing the right to respect for private life against the right to freedom of expression. The purpose of the article was to relay the trend among celebrities of renting their holiday homes. This could "generate reactions and a dialogue among readers", thereby "contributing to a debate of general interest".<sup>474</sup> The Court concluded that the German courts' qualification of the subject as an event of contemporary society "could therefore not be described as unreasonable".<sup>475</sup> The text of the article gave practically no details relating to the private life of the Princess Caroline and her husband, focusing instead of

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<sup>471</sup> Ibid [109]: *Bild* had been enjoined and fined €11,000 in respect of identifying the actor Bruno Eyrone, known primarily for his role as *Kriminalhauptkommissar* (Superintendent) Balko in the *Balko* television series, as someone who had been arrested for possession of cocaine at the Munich *Oktoberfest* and who had subsequently pleaded guilty and been fined €18,000.

<sup>472</sup> *Von Hannover v Germany 3* no. 8772/10 ECHR 264 (2013). Permission to appeal to the Grand Chamber was refused in February 2014.

<sup>473</sup> Ibid [58].

<sup>474</sup> Ibid [51].

<sup>475</sup> Ibid [52].

the characteristics of the von Hannover villa.<sup>476</sup> It was not a “mere pretext for publishing the photograph”. The link between the two was not “purely artificial”.<sup>477</sup> The Court could

accept that the photograph in question, considered in light of the accompanying article, did contribute, at least to some degree, to a debate of general interest.<sup>478</sup>

Princess Caroline and her husband were public figures, unable to claim the same protection for their private life as ordinary private individuals.<sup>479</sup> She had failed to adduce evidence before the German courts that the photograph had been taken “surreptitiously or by equivalent means”.<sup>480</sup>

The change in the ECtHR’s approach from *Von Hannover 1* to *Von Hannover 3* is marked. Where the balancing exercise has been undertaken in conformity with the criteria laid down in the Court’s case law, the Court will require “strong reasons” to substitute its view for that of the domestic courts.<sup>481</sup> It gives publishers substantially greater protection than *Von Hannover 2* did. The distinction turns on the analysis of the criterion “contribution to a debate of general interest” and the comparative importance of this value within the right to freedom of expression.<sup>482</sup> It could be argued that the court should have explored this linkage in greater detail rather than simply making the bare finding. In stating that the court could “not support the contention that the article was merely a pretext for publishing the photo” and that “a purely artificial link exists between the two”<sup>483</sup>the court conflated several principles that should have been dealt with separately. The photographs were found to contribute to a debate of general interest, not because they supported and illustrated the information being conveyed, as in *Von Hannover 2*, but because it could not be

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<sup>476</sup> Ibid [51].

<sup>477</sup> Ibid [52].

<sup>478</sup> Ibid [52].

<sup>479</sup> Ibid [53].

<sup>480</sup> Ibid [56].

<sup>481</sup> Ibid [47].

<sup>482</sup> Ibid [50–52].

<sup>483</sup> Ibid [51].

said the article was a mere pretext for publishing the photograph. There is no explanation offered as to why a photograph showing Princess Caroline and her husband at an unidentified location was sufficiently linked to the article, which, by the Court's own admission, "focused mainly on the practical details relating to the villa and its location".<sup>484</sup> Publishers now need only show that the article contributes to a debate of general interest, not how or why the photograph in question supports such a contribution.

Even measured against English standards of the time<sup>485</sup> it is difficult to see how this case would have succeeded if litigated here. The photograph itself is anodyne and, although taken without her consent, it seems unlikely that our courts would have found that she had a reasonable expectation of privacy in relation to its publication without any kind of harassing circumstances in the *Murray* sense.

### **3.5.2.3 *Lillo-Stenberg and Sæther v Norway***

This case related to the wedding of two Norwegian attributed celebrities, a rock musician and an actress, at an outdoor private ceremony on a Norwegian islet at Tjøme.<sup>486</sup> The bride and her bridesmaids had been rowed to the islet. The Norwegian magazine *Se og Hor* published a two-page article about the wedding accompanied by six long-lens photographs (taken surreptitiously from about 250m away) without the couple's consent. The pictures showed the bride, her father and bridesmaids arriving on the islet, the bride being brought to the groom by her father and the bride and groom returning to the mainland on foot by crossing the lake on stepping stones. The final photograph showed the bride barefoot with her wedding dress raised above her knees to avoid getting the dress wet. The article described the ceremony, the guests' emotions and the fact that the magazine had been told the couple did not want to comment on their wedding. Their Article 8 claim was dismissed by the Norwegian Supreme Court by a 3:2 majority because the text and the photographs contained nothing offensive or damaging to their reputation, the wedding was in a place which

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<sup>484</sup> Ibid [51].

<sup>485</sup> First publication 1 March 2002.

<sup>486</sup> *Lillo-Stenberg and Sæther v Norway* [2014] ECHR 59.

was accessible to the public and the photographs did not show the actual ceremony. The couple had arrived in a spectacular fashion in a manner which would attract public attention.

The ECtHR applied the *Axel Springer* criteria. In terms of contributing to a debate of general interest the wedding involved performing artists and it had a public aspect.<sup>487</sup> The couple were well-known but

the mere fact of having cooperated with the press on previous occasions cannot serve as an argument for depriving the party concerned of all protection against publication of the article and the photographs at issue.<sup>488</sup>

Although they had not consented to the pictures obtained by a photographer who was “hiding and using a strong telephoto lens”.<sup>489</sup> It was relevant that

the ceremony took place in an area that was accessible to the public, easily visible, and a popular holiday location, it was likely to attract attention by third parties.<sup>490</sup>

The article was not unfavourable to the applicants and did not involve photographs of the actual ceremony.

The ECtHR concluded there was no violation of Article 8 and

both the majority and the minority of the Norwegian Supreme Court carefully balanced the right of freedom of expression with the right to respect for private life, and explicitly took into account the criteria set out in the Court’s case-law which existed at the relevant time.<sup>491</sup>

This result has been criticised.<sup>492</sup> The domestic court concluded that the article made no contribution to a debate of general interest, a positive Article 8 point,

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<sup>487</sup> Ibid [36–37].

<sup>488</sup> Ibid [38].

<sup>489</sup> Ibid [39].

<sup>490</sup> Ibid [43].

<sup>491</sup> Ibid [44].

<sup>492</sup> I acknowledge the assistance of discussion with Professor Bjørnar Borvik of the University of Bergen about his as-yet unpublished paper, delivered on 9 May 2014, at the University of Helsinki Freedom of Speech conference.

and all the other points were either neutral or resulted from “surreptitious photography”. None of the judges involved were of the view that the “public accessibility” of the wedding was a decisive factor. There should, arguably, have been a re-balancing of the Norwegian decision to favour the couple’s Article 8 rights in Strasbourg.

The litmus test, in terms of English law, would be the weight given to this decision in any subsequent misuse of private information claim brought by celebrities here on similar facts where actually getting to or within a venue (rather than what happens later, privately) puts the couple in public view.

#### **3.5.2.4 *Courdec and Hachette Filipacchi v France***

This case relates to Prince Albert II of Monaco and a *Paris-Match* interview with C, the mother of a son the Prince had fathered<sup>493</sup> with her.<sup>494</sup> The interview detailed the relationship between C and the Prince with several photographs showing him beside C or the child. The photographs had been taken by C, in her apartment, with Prince Albert’s consent. The Tribunal de Grande Instance in Nanterre awarded him €50,000 by way of damages and ordered *Paris-Match* to publish a full-feature front-page extract of the judgment.

*Paris-Match* appealed on Article 10 grounds. By a majority of 4:3 the ECtHR held that there had been a violation of Article 10. There had been a failure to distinguish between the information which formed part of a debate of general interest and what related to Prince Albert’s private life. The *Axel Springer* criteria were used to reset the proportionality balance between Articles 8 and 10 to favour *Paris-Match*.

There was a contribution to a debate of public interest because although, under the current state of the Constitution of Monaco, the Prince’s child could not succeed to the throne, his very existence was such as to interest the public and notably the citizens of Monaco. In the context of a hereditary constitutional monarchy the birth of a child was of particular interest. In addition, the Prince’s

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<sup>493</sup> After publication Prince Albert publicly admitted paternity.

<sup>494</sup> *Courdec and Hachette Filipacchi v France* [2014] ECHR 604.

behaviour could be an indicator of both his personality and ability to perform his functions properly. The need to protect Prince Albert's private life had to be balanced against the debate on the future of the hereditary monarchy. There was a legitimate public interest in knowing about the child in the context of the implications he had on Monegasque political life.<sup>495</sup> The Prince was Head of State when the interview was published: his son had rights to affirm his existence and to make his identity known to the world, and his mother had consented to that.<sup>496</sup> The information and the photographs were true and authentic and had been volunteered by C.<sup>497</sup> The publication of the interview and photographs permitted Prince Albert's son to emerge from secrecy.<sup>498</sup>

It is an interventionist ECtHR decision in its recasting of the result of the proportionality balancing exercise. It affirmed the ascribed celebrity of the Prince's son, however "unconstitutionally" illegitimate. In this sense the Article 10 elements that touch on any constitutional debate about succession in relation to ascribed celebrities and their progeny are likely to prevail whether in Monaco or – for the future – in terms of the English throne. It should also apply in English law for children who are the illegitimate offspring of achieved or attributed celebrity parents where inheritance issues, or a celebrity's default on issues of maintenance and support of a child with unchallengeable paternity or maternity, is in play.

The combined effect of *Von Hannover 2*, *Von Hannover 3* and *Axel Springer* – with the two most recent cases above - have arguably rebalanced issues relating to all classes of celebrities and the use of images of and about them. *Axel Springer* sets a trap for celebrities in that an individual's character as an actor in a television police series may receive greater Article 10 weight when balanced against the actor's Article 8 real – and less upstanding - private life.

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<sup>495</sup> Ibid [59].

<sup>496</sup> Ibid [63].

<sup>497</sup> Ibid [64].

<sup>498</sup> Ibid [73]: "La Cour note qu'en faisant ces révélations, le but de la mère de l'enfant était manifestement d'obtenir la reconnaissance publique du statut de son fils et de la paternité du Prince, éléments primordiaux pour elle pour que son fils sorte de la clandestinité."

## 3.6 Trends

### 3.6.1 Prevalence of Article 8 success over Article 10

The effect of the proportionality exercise in the balancing of Article 8 and Article 10 issues in misuse of private information cases raises an issue of whether there has been, cumulatively, too broad an accommodation given to the Article 8 privacy rights of celebrities of any class.

To test the first point, the author analysed reported English privacy decisions over a four and a half year period from January 2010 to June 2014. This can only give indicative rather than precise results and that weakness is acknowledged in the information presented. However some indicative information in respect of this area is better than a vacuum. The information came from the Table of Media Law Cases on the *Inform* website, disregarding libel and non-privacy actions.<sup>499</sup> The cases were given a simple score which depended only on whether the Article 8 or Article 10 argument prevailed.<sup>500</sup> In some cases – as with *CBT/Giggs* – this changed during the course of the proceedings. Each judicial decision in respect of any privacy case during this period was identified and counted separately. It is probably not surprising that Article 8 rights have prevailed at an approximate ratio of 4:1 over Article 10 rights.

<b>Total Privacy Cases</b>		<b>Art 8</b>	<b>Art 10</b>	<b>Anon</b>	<b>Photos</b>
JAN/JUN 2014	5 cases	5	0	3	1
JAN/DEC 2013	7 cases	4	3	5	3
JAN/DEC 2012	23 cases	16	7	13	5
JAN/DEC 2011	27 cases	24	4	23	5
JAN/DEC 2010	11 cases	10	1	9	2
<b>Total for a four and a half year consecutive period</b>		<b>62</b>	<b>15</b>	<b>55</b>	<b>16</b>

<sup>499</sup> <http://inform.wordpress.com/table-of-cases-2/> .

<sup>500</sup> Whether the court preserved anonymity for one or both parties and whether photographs or videos were an issue was also noted.



There are a number of reasons that can be suggested for that. Those seeking the courts' protection are professionally advised and are claimants staking out the injunctive territory. The physical presence of the claimant in court, seeking protection for personal information – particularly intimate or sexual information - can be powerful because the value of the rights of the individual are concrete while the value of freedom of expression is more abstract. At the preliminary, injunctive stage claimants need only show that is where the balance of convenience or justice lies<sup>501</sup> and that the claim is more likely than not to succeed at trial.<sup>502</sup> If they have no chance of success they will have been told of the risks. The results, in that sense, are likely to favour the success of Article 8 arguments. However Article 10 results do emerge in cases like *AAA*, *McLaren*, *Giggs* (eventually), *Hutcheson* and *Ferdinand*. This is despite the fact that each of those cases involved private sexual information, an element given special weight in the Article 8 side of the balance. On the face of these results, however, the respect given by the English courts to Article 8 rights makes it worthwhile for celebrities at least to seek such protection because they have a significant chance of success.

### **3.6.2 Ministry of Justice Figures**

There are however, post-Leveson, fewer misuse of personal information actions coming before the High Court.<sup>503</sup> From August 2011 to December 2013 there were 23 applications for new interim privacy injunctions; an injunction was granted in each case (save for the single one in June/December 2013) and 4 of the injunctions were granted by consent. Of those 23 applications, all but 2 involved one or more derogations from open justice in respect of the hearing and/or the proceedings. 14 were heard in private, 12 involved party anonymity, 15 restricted access to statements of case by non-parties and 1 application resulted in a super-injunction clause being included in an interim injunction (granted in the period Aug-Dec 2011). There were 18 hearings concerning the

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<sup>501</sup> *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL).

<sup>502</sup> *Cream Holdings Ltd v Banerjee* [2004] UKHL 44.

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/289254/privacy-injunctions-stats-jul-dec-2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/289254/privacy-injunctions-stats-jul-dec-2013.pdf)

continuation or variation of interim injunctions. In 15 cases the injunction was continued and/or varied. It was discharged in 3. There were 9 hearings in respect of final privacy injunctions. Final injunctions were granted in all but 1 of the cases. Each hearing involved one or more elements of derogation from open justice; all but 1 involved hearings in private, 6 involved anonymity. A super-injunction was granted on a final basis in 1 case (granted in the period January to June 2013). There was no super-injunction granted on an interim basis in either 2012 or 2013.

From January 2013 – December 2013 there were 7 applications for new interim injunctions. 5 were applications on notice, 3 without. Of those that were made on notice, all were resisted, either completely or in some of the terms sought. 6 of the 7 injunction applications granted that year involved derogations from open justice

The Ministry of Justice data available now covers almost 2 ½ years (29 months).<sup>504</sup> However the figures reveal that every application for a new interim privacy injunction since August 2011 – until the single one in June/December 2013 - resulted in an injunction being granted. Interim super-injunctions are almost extinct. The last one that was granted was in 2011.

Other derogations from open justice, or combinations of them, were deployed frequently by the courts. 60% of applications for new interim privacy injunctions were heard in private, party anonymity was ordered in 50% of the cases and access to statements of case by non-parties was restricted in 86% of cases.

Two things are clear. The first is that, numerically, the two years that showed the greatest number of misuse of private information litigation were 2011 (27 cases in court) and 2012 (23 cases in court). 2013 showed a drop to 7 cases being litigated and the first six months of this year has seen 5. The statistics also confirm the near-extinction of the true “super injunction” and the slowdown of litigation in this area. The diminution of activity in this area may be because the self-help remedies are working effectively and because there is a greater

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<sup>504</sup> The Ministry of Justice cautions that the statistics are not complete for earlier periods and did not cover every application.

willingness for celebrity claimants' lawyers and those acting for the media to negotiate more openly with each other before resorting to litigation. With the general practice now of the media putting celebrity targets on pre-publication warning of the generality of what may be published about them the two sides often reach accommodations which avoid injunctions and litigation but which rely on written or recorded undertakings.

### **3.7 Summary**

From the range and diversity of the topics and issues explored in this chapter it should be clear that the various ways in which private information may – and may not – be misused in a world where the technology surrounding communication and publication was changing exponentially would have required new approaches to develop with or without the HRA. The issues could no longer comfortably or realistically be contained within the traditional action for breach of confidence. However “flexible” that had been it had its obvious limits. The logic and practicality of the proportionality balancing exercise explained in *Re S* led to the development of an active new tort that tested, and still tests, both judicial articulation and the skills of practitioners acting for all categories of celebrity and the media.

Once the messages from *Campbell*, *Mosley* and *Von Hannover 1* were absorbed it was the celebrities' litigation which further fashioned its boundaries particularly with the realisation that early injunctive action could protect not only the private information but also the celebrities' identities associated with such information. The media, carrying the Article 10 freedom of speech banner, met the challenge – particularly in terms of attributed and achieved celebrity stories in the context of the tabloid press – and, by persistence, were able to reveal information that because of its public interest tipped the balance in their favour in a number of significant cases that have been examined above.

The use of parliamentary privilege to unlock celebrity identification that had been given anonymity in legal proceedings became something of a vogue for a period until Parliament – and parliamentarians – realised that a more considered and responsible attitude needed to be demonstrated. Where things

are still unresolved is the unrestrained publication of private information – which may or may not be correct - on the Internet and in social media. Action following such publications do not appear to have diminished and, anecdotally, appear to have increased.

Celebrity pictures – whether personal videos and photographs showing private sexual activity or taken by others more openly and professionally – are a continuing battle ground particularly when uploaded to the Internet and on social media sites or published in online editions of newspapers. This issue will be revisited in Chapter 5 on Protection from Harassment.

In the background it is now a general practice for newspapers to pre-warn celebrities in advance of revelations about private information, *pace* Mr Mosley, so that judgements can be made about whether litigation is likely or whether – if the story is true and tips the proportionality balance to favour an Article 10 result at trial – the matter can be run with a “balancing” comment or sympathetic editorial treatment. The clue that this has happened is a “My Drugs Hell” soft treatment of a celebrity story rather than an “X’s Drug Shame” exposé.

The diminution of litigation in this area should not be surprising. In the early years of any new cause of action it is necessary for practitioners and the judiciary to test the boundaries of both the law and procedure. If a ten-year period is taken from the *Campbell* decision in the House of Lords in 2004 then the elements of the law in relation to misuse of private information have become much more certain by 2014. That is not to say that the on-going proportionality balancing test between Articles 8 and 10 is not being conducted on a daily basis between practitioners representing all categories of celebrity and the press and the media wishing to publish information. What it does mean is that only the most intractable disputes about what should be protected and where the interference is lawful are now coming to court.

## CHAPTER 4

# Copyright as a Privacy Remedy and Image Rights

### 4.1 Introduction

In the previous chapter it was clear that the main issue in the recent *RockNRoll* case was misuse of private information. In this chapter the same case re-appears on the adjunct claim that *The Sun's* proposed publication was also a breach of copyright. This is an example of the bridge and linkage between the different forms of action open to all classes of celebrities to assert their privacy rights. As will be seen, if a celebrity has the copyright or can acquire it by assignment, then publication of the material can be restrained. This is an area where all classes of celebrities can seek to exert specific control over material in ways which reinforce their privacy rights. For the future this is likely to become an increasingly important area because social media pictures are now regularly “scraped” for unauthorised use in the media or more general publication elsewhere.<sup>505</sup> Also covered at the end of this chapter is an associated topic - image rights - the European and Roman Dutch civil law concept that individuals have rights to control the use and prevent the misuse of the integrity of their image.

The first substantive chapter of this thesis, on breach of confidence, highlighted the importance, in the 175-year historical arc of the development of privacy law, of the royal celebrity case of *Prince Albert v Strange*.<sup>506</sup> This chapter will not revisit the copyright issues already described as latent in that case. It will however

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<sup>505</sup> <http://globalnews.ca/news/1057365/experts-warn-about-dangers-of-web-photo-scraping/>

<sup>506</sup> *Prince Albert v Strange* [1849] EWHC Ch J 20 (08 February 1849) and Chapter 2.2.1 and footnotes 95 and 96.

examine how copyright has been used to assert or protect privacy issues for ascribed, attained and attributed celebrities from then to the present.

Copyright, as a protected right, will be outlined first. Then the permitted interference – the areas where the protected right gives way to other interests either within the statutory regime or by development of Article 10 elements – will be identified. The primary focus in this chapter, however, is the section that then examines the development of the case law – the litigated issues – in this area. This chapter seeks to show the dynamics and development of a clear shift away from simple protection of the right to a more nuanced and proportionate approach that reflects respect for Article 10 arguments in a way that was not evident before the HRA.

UK copyright law has at its heart the CDPA, enacted 26 years ago.<sup>507</sup> The CDPA is supplemented and buttressed by additional contemporary statutory

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<sup>507</sup> A pre-CDPA celebrity example of copyright as a privacy remedy from 1914 – demonstrating pragmatism without any trace of proportionality - comes from the royal “kiss and tell” threats made by Daisy, Countess of Warwick. *Probyn v Logan* was heard before Low J in the King’s Bench Division in 1914 (P. No 1594). The file cannot be located in the National Archives. The only fragment of the case that exists is the final order staying the proceedings – dated 5 July 1915 – recorded in Fritz Lang’s *My Darling Daisy* (Michael Joseph 1964, 184 – 185). The case involved the perpetually-impecunious attributed celebrity “Daisy”, a former mistress of Edward VII, when she confronted the ascribed celebrity of George V. He was keen to protect what was left of his father’s (in European terms “post-mortem”) privacy. In March 1914 she hatched a plot with US writer Frank Harris for a “kiss-and-tell” autobiography she hoped would net around £100,000. Earlier, in 1908, she had promised Edward VII that she had destroyed all his letters. Then she had ‘discovered’ a bundle of 30 of them when the bailiffs turned up to distraint on her property. George V’s advisors believed the letters would “blast” Edward VII’s reputation and could damage the monarchy more generally. George V was neither prepared to be blackmailed nor to allow Daisy to humiliate his mother (Queen Alexandra) so Daisy was served with an injunction forbidding her from publishing, circulating or divulging the letters. Her response was that she would relate her story in court at the full trial of the action. She had not anticipated the Defence of the Realm Act 1914 (DORA). She had allowed Frank Harris to take some of the letterletters with him to the United States. Buckingham Palace claimed copyright in them. DORA, among its other provisions, prohibited the export of intellectual property which could damage the national interest. Daisy was threatened with committal to Holloway Prison for breaching the injunction. She capitulated and retrieved the material from Frank Harris in the US together with the manuscripts of her memoirs. One fragment of this legal action remains for posterity. In her final affidavit she stated: “*I am handing back with splendid generosity the letters King Edward wrote me of his great love, and which belong to me absolutely. I... have never dreamed of publishing such things. My memoirs are my own affair, and every incident of those 10 years of close friendship with King Edward are in my own brain and memory.*” In return she received a “loan” of £64,000 from Arthur du Cros, the chairman of the Dunlop

domestic<sup>508</sup> and European legislation.<sup>509</sup> UK law is the primary focus in this chapter. The development of public interest arguments in the context of “fair dealing” that at least test, if not instantly to permit, publication by others of material relating to all classes of celebrities, has matured in this area as a result of decisions taken by English judges post-HRA.

## 4.2 The Protected Right

Copyright is an exclusive right which vests in original literary, dramatic, musical and artistic works as well as broadcasts, films, sound recordings and typographical arrangements. The right vests automatically on creation and does not require formalities. The right is of limited duration<sup>510</sup> and the essence of copyright is that it gives the right to prevent others from using the work. The exact scope of the exclusive right varies slightly between types of work, but the rights include a right to prevent reproduction and distribution of the work to the public, rental or lending, public performance of the work, its communication to the public and its adaptation or translation.

Despite the existence of copyright in a work there are a number of activities that require a balancing against other rights that may permit more general and public use. These include making of temporary copies,<sup>511</sup> “fair dealing” for purposes of private study or research,<sup>512</sup> criticism, review and reporting,<sup>513</sup> and “incidental inclusion in an artistic work, sound recording, film or broadcast”.<sup>514</sup>

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Rubber Company, acting as an intermediary for royal interests. He was knighted two years later in 1916.

<sup>508</sup> Such as the Enterprise and Regulatory Reform Act 2013 and the Intellectual Property Bill 2013 – 2014 currently before the House of Lords.

<sup>509</sup> The latest European Commission draft of a White Paper on *Copyright Policy for Creativity and Innovation in the European Union* was leaked on 24 June 2014: <http://ipkitten.blogspot.co.uk/2014/06/super-kat-exclusive-heres-commissions.html>

<sup>510</sup> Copyright in a literary work, for example, ceases to exist 70 years after the death of the author.

<sup>511</sup> s.28A, as inserted by the Copyright and Related Rights Regulations 2003/2498

<sup>512</sup> CDPA s.29.

<sup>513</sup> CDPA s.30.

<sup>514</sup> CDPA s.31.

The CDPA gives the author of a copyright literary, dramatic, musical or artistic work, and the director of a copyright film, the right to be identified as the author or director of the work.<sup>515</sup> There is also a right not to have the work subjected to derogatory treatment,<sup>516</sup> something that can occur when a (usually) attained celebrity's literary or artistic work is "hijacked" for other purposes.<sup>517</sup> There is a specific privacy provision covering the situation where someone who - for private and domestic purposes - commissions "the taking of a photograph or the making a film".<sup>518</sup> This creates the protected right – in respect of the commissioner - not to have copies of the work issued to the public, exhibited or shown in public or to have the work communicated to the public.

Copyright is a property right that can be sold and dealt with in the same way as other forms of property.<sup>519</sup> It is a right that can be assigned and a person can be licensed to do things that could otherwise be done only by the copyright owner. An infringement of copyright is actionable by the copyright owner who can seek damages, injunctions and accounts for usage as well as delivery up and destruction of infringing copies.<sup>520</sup> There are also criminal offences relating to counterfeiting and piracy. These may involve goods branded or endorsed by celebrities of all categories.<sup>521</sup>

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<sup>515</sup> CDPA s.77 (1). The right is not infringed unless it has been asserted in accordance with s.78.

<sup>516</sup> CDPA s.80 – 83: so called "moral rights". The Open Rights Group ORG are currently campaigning to gain statutory exceptions for parody, caricature and pastiche: <http://www.righttoparody.org.uk>

<sup>517</sup> As occurred in Alan Clark MP's successful litigation in respect of passing off and protecting his moral rights under s. 84 (1) CDPA: *Clark v. Associated Newspapers Ltd* [1998] EWHC Patents 345. Articles in the *Evening Standard* parodied his well-known *Diaries* published in the early 1990s.

<sup>518</sup> CDPA s.85: in *Trimingham v Associated Newspapers* [2012] EWHC 1296 (QB) photographs had been taken by a professional photographer at Ms Trimingham's civil partnership ceremony in 2007. The photographer, a friend of hers, agreed - as a wedding present - not to charge for the work. The term "commissioned" is not defined in s.85. Tugendhat J concluded that there was no commissioning. He noted that the editors of two practitioners' works suggested that the lack of a definition was an oversight as it had existed in the 1956 Copyright Act but he found that "commissioning" carried with it an obligation to pay.

<sup>519</sup> CDPA s.90.

<sup>520</sup> CDPA s.96 and 97.

<sup>521</sup> <http://www.ipso.gov.uk/ipenforce/ipenforce-crime/ipenforce-role/ipenforce-report.htm>



### 4.3 The Permitted Interference

The key elements in the CDPA that can alter the balance of the permitted right in the context of this thesis are found in s.30 and relate to criticism, review and news reporting and in s.171 (3) which preserves the public interest defence.<sup>522</sup> In essence, “fair dealing” with a work for the purpose of criticism or review - provided that the work has been made available to the public - does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement.<sup>523</sup> Similarly, fair dealing with a work (other than a photograph) for the purpose of reporting current events is permitted.<sup>524</sup> More generally, Article 10 now exists to reinforce balance within this area.<sup>525</sup>

### 4.4 Proportionality develops

#### 4.4.1 The Queen’s Speech

A classic example of copyright infringement involving an ascribed celebrity occurred when *The Sun* published the full text of the Queen’s annual Christmas broadcast to the nation two days before transmission in 1992.<sup>526</sup> The Queen’s solicitors wrote<sup>527</sup> seeking damages and costs for breach of copyright. It is hard to find any fair dealing, public interest or Article 10 argument that might have justified that particular event – were it to occur now - unless, perhaps, there had been a newsworthy and substantial difference between what was written and what was ultimately broadcast.<sup>528</sup>

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<sup>522</sup> In respect of s.171 (3) see Alexandra Sims *Strangling their creation: the courts’ treatment of fair dealing in copyright law since 1911* IPQ 2010 2 192-224.

<sup>523</sup> CDPA 1988 s.30 (1).

<sup>524</sup> *Ibid* s.30 (2).

<sup>525</sup> In *Unilever plc v Nick Griffin* [2010] EWHC 899 (Ch) Arnold J granted the manufacturer of Marmite an injunction preventing it being used in a “Love Britain Vote BNP” advertisement about to be broadcast by the BNP’s attributed or achieved celebrity leader Nick Griffin. But he observed at [18] about the s.171 (3) defence if used by the BNP: “...as it presently exists in English law it is somewhat limited...[but] there may be room for further development, particularly in a political context such as this.”

<sup>526</sup> *The Sun* – having originally claimed that it came by the transcript legitimately – subsequently printed an apology on 16 February 1993, paid all costs and made a £200,000 donation to a charity nominated by the Queen.

<sup>527</sup> 13 February 1993.

<sup>528</sup> Punishment was the withdrawal of *The Sun*’s press accreditation to photograph the Royal family attending church at Sandringham on Christmas Day.

#### 4.4.2 Newspaper Spoilers

Celebrity copyright issues can arise when celebrities sell their stories exclusively to one newspaper or media outlet. Strictly these are not examples of copyright being used as a privacy remedy save that, while the celebrities have often chosen to benefit commercially from such exclusive agreements, they are also exercising their private life rights to control how and what is – and is not – put into the public domain or their moral rights not to have such matters misrepresented or distorted. Even before *Douglas v Hello* there was a line of cases which dealt with the protection of the exclusive copyright owner's rights against rival media "spoilers" claiming s.30 CDPA "fair dealing" to defend – with variable success – what was or was not "fair", something that was always going to turn on the individual facts of each case.

In *Associated Newspapers Group plc v News Group Newspapers Ltd*<sup>529</sup> shortly after the death of the Duchess of Windsor, *The Daily Mail* acquired the copyright in letters between the late Duke and Duchess and was publishing them. *The Sun* acquired copies and published a "spoiler". The "reporting current events"<sup>530</sup> provision was prayed in aid – unsuccessfully - by *The Sun* on the basis that the current events were the death of the Duchess, her motives and intentions in seeking publication of her 15 letters, and the fact that the undisclosed letters themselves had been published, casting light on matters of historical interest. This was given short shrift by Walton J:

[Counsel for *The Sun*] has tried to make a great deal of play on the lines that to grant the injunction would be to interfere with the press's freedom of speech or publication. It seems to me that that is total nonsense. A person is not in any way prohibited from saying exactly what he likes, or publishing exactly what he likes, if he cannot publish it in the precise words which somebody else has used, which is the essence of copyright. Freedom of speech is interfered with when somebody is not allowed to say what is the truth: and the truth here is that the Duchess wrote a large number of letters to the Duke and the Duke wrote a large number of letters to the Duchess and anybody is free to say that and also to

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<sup>529</sup> *Associated Newspapers Group plc v News Group Newspapers Ltd* [1986] RPC 515.

<sup>530</sup> CDPA s. 30(2).

say, on the one hand, that they are the most tender love letters they have ever read or, on the other hand, that they consider them about the most banal letters they have ever read. There is no interference of any description in the present application with freedom of speech.

#### 4.4.3 The Public Interest pre-HRA

Celebrities (of all three categories), a royal link and *The Sun* were at the heart of *Hyde Park Properties v Yelland*.<sup>531</sup> This case also introduced the public interest issues – in terms of freedom of speech - that developed the exploration of the proportionality balancing exercise in cases which followed. A few hours before Diana Princess of Wales and Dodi Fayed were killed in the car crash in the Pont de l’Alma Tunnel in Paris on 31 August 1997 they had visited the Villa Windsor in Paris, a property leased by Mohammed Al Fayed, Dodi’s father. They were recorded on video tape. Photographic prints (the “driveway stills”) were subsequently made from the tape. Security at the Villa Windsor was the responsibility of a company controlled by Mr Al Fayed. *The Sun* subsequently received copies of the prints and published them - without consent – on 2 September 1998 as part of an article entitled “*Video That Shames Fayed*”. It was argued (successfully before Jacobs J at first instance) that “fair dealing” within the s.30 CDPA defence carried an implicit public interest defence on the basis that the images disproved certain claims made about the whereabouts of Dodi Fayed and Diana Princess of Wales at a particular time.<sup>532</sup> The argument failed in the Court of Appeal because the Court held the information could have been relayed to the public without infringing copyright.<sup>533</sup> In relation to whether a public interest defence should apply, Aldous LJ determined:<sup>534</sup>

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<sup>531</sup> *Hyde Park Properties v Yelland* RPC (1999) 116(18) 655 – 672 and Case No 1999/0459/3 Court of Appeal.

<sup>532</sup> *Hyde Park Properties v Yelland* RPC (1999) 116(18), 659: "The gist of the falsehoods [were] concocted for the purpose of divorcing Mr Al Fayed in the public eye from any responsibility for the deaths of Diana and Dodi (it was one of his employees at the Paris Ritz who was the driver and is said to have been drunk), and possibly also to give credence to the view that but for the crash, Mr Al Fayed would have become the step-grandfather to a future King."

<sup>533</sup> A precursor of *Campbell* without the pictures.

<sup>534</sup> At [64].

....the basis of the defence of public interest in a breach of confidence action cannot be the same as the basis of such defence to an action for infringement of copyright. In an action for breach of confidence the foundation of the action can fall away if that is required in the public interest, but that can never happen in a copyright action. The jurisdiction to refuse to enforce copyright....comes from the court's inherent jurisdiction. It is limited to cases where enforcement of the copyright would offend against the policy of the law.

He went on to say that such circumstances were not capable of definition but included where the work was immoral, scandalous or contrary to family life; injurious to public life, public health and safety or the administration of justice or incited or encouraged others to act in such a way. He concluded:<sup>535</sup>

....the submission that the driveway stills needed to be published in the public interest to expose the falsity of the statements made by Mr Al Fayed has no basis in law or in logic. Perhaps the driveways stills were of interest to the public, but there was no need in the public interest in having them published when the information could have been made available by *The Sun* without infringement of copyright and was in any case in the public domain after the statement by Mr Cole on behalf of Mr Al Fayed.

This is best considered as a decision of its time. It failed to anticipate the more tightly-focused emphasis and analysis on proportionality that emerged from the developing jurisprudence resulting from the Human Rights Act 1998. This recognised the importance of reflecting ECHR Article 10 freedom of speech issues, particularly in the light of Walker LJ's remarks *Ashdown v Sunday Telegraph* (see below).

#### **4.4.4 Towards the Identification of Article 10**

The *Ashdown v Sunday Telegraph* litigation in 2001 was a test that related more to an attained political celebrity seeking to retain the commercial benefit of what he had written about in relation to his time as a former leader of the Liberal Democratic Party than about litigation to preserve his privacy rights. But the

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<sup>535</sup> At [67].

Court of Appeal's findings on the tension between copyright and ECHR Article 10 freedom of expression established an important principle: Article 10 *could* override the CDPA. The *Sunday Telegraph* published extensive extracts from a confidential record which Paddy Ashdown had made of an important meeting at 10 Downing Street in 1997. Ashdown sued for copyright infringement and breach of confidence. The High Court awarded Ashdown summary judgment, dismissing the *Telegraph's* defences including defences based on freedom of expression and fair dealing. The *Telegraph's* appeal failed. The circumstances in which freedom of expression will prevail over copyright are rare.<sup>536</sup> Copyright protects the expression of ideas, not the ideas themselves. The public interest which newspapers serve in disclosing information such as the matters referred to in Ashdown's confidential record can normally be protected without the newspaper copying the *exact* words. To establish credibility, however, the press and media often publish the verbatim detail of documents. In such instances the form of the document is of equal importance to the content and a newspaper may still have a fair dealing defence under the CDPA. In the absence of a s.30 "fair dealing" defence, could it still be right for a newspaper to publish substantial verbatim extracts from a document? The Court of Appeal decided that the newspaper need only have published one or two short extracts to establish authenticity. It had gone much further and "deliberately filleted" material in order to extract colourful passages that were most likely to add flavour to its article. This was furthering the newspaper's commercial interests in a manner which was "essentially journalistic". The Court, however, distanced itself from Aldous LJ's decision in *Hyde Park Residence Ltd v Yelland* that the CDPA 1988 represented a comprehensive code which adequately performed the balancing process between competing rights of property interests and freedom of expression leaving no room for a free-standing defence of public

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<sup>536</sup> In a non-copyright situation, the "over-stretch" was recently articulated in *Kennedy v The Charity Commission* [2014] UKSC 20 where the present state of ECtHR decisions on Article 10 were described by Lord Mance at [98] as "unsatisfactory".

interest.<sup>537</sup> The court also considered the meaning of “reporting current events” and confirmed that a liberal interpretation should be put on the word “current”.<sup>538</sup>

In *Pro Sieben Media AG v Carlton Television*<sup>539</sup> the attributed celebrity was a mother 17-weeks pregnant with eight live embryos as the result of fertility treatment. Ms Mandy Allwood gave an exclusive interview to the German broadcaster Pro Sieben’s 30-minute daily *TAFF* program. Carlton TV used a 30-second “lift” of Ms Allwood and her partner from *TAFF* as part of a critical piece on cheque-book journalism. In relation to s.30 (2) CDPA Walker LJ, held:

I consider that Ms Allwood’s multiple pregnancy, its progress and its eventual outcome were on any view current events of real interest to the public. The volume and intensity of media interest was sufficient to bring the media coverage itself within the ambit of current events. The fact that Mr Clifford had sold an interview....to German television for £30,000....was an event of limited and ephemeral interest, but it was in my view a current event.

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<sup>537</sup> Walker LJ at [58]: “...we do not consider that Aldous L.J. was justified in circumscribing the public interest defence to breach of copyright as tightly as he did. We prefer the conclusion....that the circumstances in which public interest may override copyright are not capable of precise categorisation or definition. Now that the Human Rights Act is in force, there is the clearest public interest in giving effect to the right of freedom of expression in those rare cases where this right trumps the rights conferred by the Copyright Act. In such circumstances, we consider that s.171 (3) of the Act permits the defence of public interest to be raised. We do not consider that this conclusion will lead to a flood of cases where freedom of expression is invoked as a defence to a claim for breach of copyright. It will be very rare for the public interest to justify the copying of the form of a work to which copyright attaches. We would add that the implications of the Human Rights Act must always be considered where the discretionary relief of an injunction is sought, and this is true in the field of copyright quite apart from the ambit of the public interest defence under s.171(3).

<sup>538</sup> *Ibid* [64]: “The meeting between the claimant, the Prime Minister and others in October 1997 was undoubtedly an event, and while it might be said that by November 1999 it was not current solely in the sense of recent in time, it was arguably a matter of current interest to the public. In a democratic society, information about a meeting between the Prime Minister and an opposition party leader during the then current Parliament to discuss possible close co-operation between those parties is very likely to be of legitimate and continuing public interest. It might impinge upon the way in which the public would vote at the next general election. The 'issues' identified by the Sunday Telegraph may not themselves be 'events', but the existence of those issues may help to demonstrate the continuing public interest in a meeting two years earlier.”

<sup>539</sup> *Pro Sieben Media AG v Carlton Television* [1998] EWCA Civ 2001.

He was, in effect, enunciating the public interest test in terms to read – pre-HRA – a proportionality element into the statutory defence. Post-HRA this is then reflected in *Frazer-Woodward plc v BBC*.<sup>540</sup> The Claimant – whose principal director was successful former-paparazzo turned picture-agent - brought copyright infringement proceedings against the BBC for the use of 14 photographs of Victoria Beckham and her family in a television programme. The BBC relied on the s.30 CDPA “fair dealing” defence for the purposes of criticism and review. The Court applied *Pro Sieben* and dismissed the claim.<sup>541</sup>

The use of copyright for privacy protection – echoing what could not be found overtly in *Albert v Strange* - returned unequivocally in 2006 within the litigation surrounding the *Mail on Sunday’s* attempts to publish the Prince of Wales’ private journals including the one relating to his visit to Hong Kong.<sup>542</sup> In *HRH The Prince of Wales v Associated Newspapers (No.3) (CA)*,<sup>543</sup> shortly after a state visit by the Chinese President to London, the newspaper published extracts from a journal written by the Prince about his official visit to Hong Kong in 1997. It had obtained this from a former employee in the Prince’s private office, together with seven other journals. Blackburne J, at first instance, granted the Prince summary judgment in relation to the Hong Kong journal only. In relation to the copyright portion of the claim in the appeal the newspaper argued, unsuccessfully, that its publication was fair dealing or in the public interest. It was common ground that the Prince owned the copyright in the Journal.<sup>544</sup> Publication of substantial parts of it had occurred. None of the statutory defences relied on succeeded. The s.30 (2) CDPA “fair dealing” for the purpose of reporting current events failed because,<sup>545</sup> while it was just

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<sup>540</sup> *Frazer-Woodward plc v BBC* [2005] EWHC 472 (Ch).

<sup>541</sup> The decision also gives guidance as to the meaning of “sufficient acknowledgement”: Mann J [76]: “What matters for these purposes is how the material appears in the programme, and there is a sufficient link to make the identification. This is sufficiently clearly a repetition of the previous photograph for the identification to carry over for the purposes of the acknowledgment provision.”

<sup>542</sup> The breach of confidence elements of this case have already been discussed in Chapter 2.

<sup>543</sup> *HRH The Prince of Wales v Associated Newspapers (No.3) (CA)* [2006] EWCA Civ 1776.

<sup>544</sup> *Ibid* [75].

<sup>545</sup> *Ibid* [78].

arguable that part of the published articles related to current events,<sup>546</sup> the majority of the article had no bearing on such matters at all.

The quotations from the Journal that infringed copyright had been chosen for the purpose of reporting on the revelation of the contents of the Journal as itself an event of interest and not for the purpose of reporting on current events. In these circumstances...including the fact that the Journal had been obtained in breach of confidence, it could not be argued that the publication of the articles constituted fair dealing for the purpose of reporting current events.<sup>547</sup>

As to whether the newspaper had a defence under section 30 (1) of the CDPA, in terms of sufficient acknowledgement and its availability to the public, that failed because its limited private circulation did not amount to “availability”.<sup>548</sup> In terms of the s.171 (3) CDPA “public interest” defence the newspaper had argued that, because Prince Charles had no intention of publishing the Journal, no commercial interest was at stake. In such circumstances Prince Charles’ only purpose in invoking the CDPA was to protect his privacy and it could not be right that he should be able to rely upon his copyright in order to protect his privacy. That argument – which had failed at first instance – gained no further traction on appeal.<sup>549</sup>

An example of the practical advantages to celebrities of using the property elements of copyright to protect their privacy rights to prevent intrusion formed a discrete part of Briggs J’s judgment in *Edward RockNRoll v NGN* that touches on Article 10 issues.<sup>550</sup> He had asked about the approach he should adopt in the balancing exercise where the copyright injunction impinged on Article 10 rights of freedom of expression. He observed that ownership of copyright was a private intellectual property right that – unlike Article 8 - was not expressly

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<sup>546</sup> Prince Charles’ failure to attend the banquet at Buckingham Palace for the Chinese state visit that had occurred just before the publication of the articles and his role as Heir to the Throne.

<sup>547</sup> Lord Phillips of Worth Matravers CJ, at [78].

<sup>548</sup> A similar situation to the etchings that Queen Victoria and Prince Albert circulated in a limited fashion to a few close friends.

<sup>549</sup> *Ibid* [84].

<sup>550</sup> *Edward RockNRoll* [2013] EWHC 24 (Ch) [43 – 46].



qualified. He cited *Appleby v UK*<sup>551</sup> as an instance where the ECtHR considered how to balance the private property right of a landowner to exclude political demonstrators from his land against the demonstrators' right to express political views under Article 10.

Although it was held that there had been no positive obligation on the state to restrict the landowner's property rights on the facts, it was recognised that enforcement might need to be restrained if it would completely have prevented any effective exercise by the demonstrators of freedom of expression.<sup>552</sup>

His view was that if a threatened breach of copyright impinged on upon Article 10 rights then the court might decline the discretionary remedy of an injunction, leaving the claimant to a claim in damages.<sup>553</sup> Reflexively applying issues within *Theakston*<sup>554</sup> he reasoned that - because the copyright claim would only prevent the actual copying of the photograph - there would be no disproportionate Article 10 fetter on text describing the photograph.<sup>555</sup> He concluded, in terms of the case before him:

The statutory requirement in an Article 10 context for an applicant for interim relief to demonstrate a probability of success at trial is nonetheless as applicable to a claim in copyright as it is to a claim to restrain misuse of private information. Applying that test...the claimant has a much better

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<sup>551</sup> *Appleby v UK* (2003) 37 EHRR 38 [41–48].

<sup>552</sup> *Edward RockNRoll* [42].

<sup>553</sup> The status of copyright as a property right also brings into play the rights provided for under Article 1 of the First Protocol ECHR which provides: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." See *Sporrong and Lonnroth v Sweden* Application 7151/75, (1982) 5 EHRR 35, [61]. The ECHR case law emphasises that, under Article 10, the vital means of the press as a "public watchdog" is underlined. The press' duty is to impart ideas and information of public interest: *The Observer and the Guardian v UK* application 13585/88, (1991) 14 EHRR 153, [59]. Also *Ashby Donald and others v France* (appeal number 36769/08) with its emphasis on the respect to be given to Article 10 rights.

<sup>554</sup> *Theakston* [2002] EWHC 137 (QB).

<sup>555</sup> Having asked the question of all counsel in the case, their silence meant he had to provide the answer himself.

than even chance of obtaining an injunction to restrain the breach of copyright inherent in the threatened publication of the Photographs as such.<sup>556</sup>

He then pointed out that Facebook's standard terms and conditions provided for a non-exclusive transferrable licence in Facebook's favour. That did not prevent Mr RockNRoll, as copyright owner by assignment of the rights of the original photographer,<sup>557</sup> restraining the potential copyright breach by *The Sun*. There had been no suggestion that *The Sun* had been assigned any rights by Facebook "and it seems very unlikely that the proprietors of Facebook would think it in their interests to do so in the future, at almost any price".<sup>558</sup> It is also clear from Paragraph 37 of the judgement that he had decided that a textual description – to avoid copyright problems - of the lower half of Mr RockNRoll in the photograph would have been too graphic in private information terms.

The dichotomy between the expectation of privacy in relation to the *information* in any photograph or picture as opposed to the copyright in the photograph or picture itself is an important one, with echoes of *Albert v Strange* and the description of the pictures in the proposed brochure. Outside the judgement – but as a matter of fact – *The Sun* had made it clear in the proceedings that it was the textual description of the pixelated lower half of the picture that made the proposed story because of the bizarre nature of the private information it disclosed. Editorially it was never considered that the whole picture could ever have been used.<sup>559</sup>

#### **4.4.5 ECtHR notes Article 10....in the margin of appreciation**

Outside the English law context of the CDPA – but staying in the realm of celebrities, their pictures and the proportionality balancing exercise – the ECtHR decision in *Ashby Donald and others v France*<sup>560</sup> saw the court holding

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<sup>556</sup> *Edward RockNRoll* [44].

<sup>557</sup> The friend who had originally posted it on his *Facebook* page.

<sup>558</sup> [2013] EWHC 24 (Ch) [46].

<sup>559</sup> See also the "Tulisa Sex Tape" litigation: *Contostavlos v Mendahun* [2012] All ER (D) 152 (Apr).

<sup>560</sup> *Ashby Donald and others v France* Appl. 36769/08 (5<sup>th</sup> Section) 10 January 2013.

that a conviction based on copyright law for illegally reproducing or communicating copyright-protected material *could* be regarded as an Article 10 interference. Any conviction fell to be tested against the “necessary” element of functionality in a democratic society and not just the fact that it was prescribed by law and apparently pursued a legitimate aim.<sup>561</sup> It was insufficient to justify a sanction or judicial order restricting artistic or journalistic freedom of expression simply because a copyright law has been infringed.<sup>562</sup> The three applicants were fashion photographers who published fashion pictures – taken at fashion shows in Paris during 2003 - on their internet site *Viewfinder*. The pictures were published without the permission of the fashion houses. The Court of Appeal in Paris fined them between €3,000 and €8,000 together with an award of €255,000 of damages and payment for publication in three publications of the judgement against them. They claimed the Court of Appeal had failed properly to consider the exception<sup>563</sup> within French law for reproduction, representation or public communication of works exclusively for news reporting and information purposes. The ECtHR found that the application was admissible and not manifestly ill-founded<sup>564</sup> but that the convictions did not breach Article 10 on the facts and merits of the case. Publication of pictures of models on the catwalk at fashion shows – and the fashion clothing they were modelling – was not an issue of general interest to society and related more to a kind of “commercial speech”.<sup>565</sup> The court’s articulation of the difference between matters that contribute to a debate of general interest to the public and the money-driven “commercial speech” elements it found in this case – and the subsequent margin of appreciation approval of significant financial penalties – came close to sanctioning a “chilling effect”.<sup>566</sup> If the context of the use of the pictures had been to demonstrate a point about women’s rights in the world of

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<sup>561</sup> Reinforced, on February 19 2013, by *Neij and Sunde Kolmisoppi v Sweden* Appl. 40397/124.

<sup>562</sup> Because of the wide margin of appreciation available to France in this particular case, the impact of Article 10 here was relatively modest.

<sup>563</sup> In Article 122-9° of the Code de la Propriété Intellectuelle.

<sup>564</sup> [25].

<sup>565</sup> [39].

<sup>566</sup> In the sense that it is the inhibition or discouragement of the legitimate exercise of natural and legal rights by the threat of legal sanction.

fashion or the exploitation of young, thin female models then the Article 10 exercise might have been more likely to have decided in the applicants' favour.<sup>567</sup>

## 4.5 Image Rights in English Law and the CJEU decision in *Martinez*

### 4.5.1 Image Rights in English Law

Image rights – as understood in European and Roman Dutch civil law systems - are not recognised as being available to celebrities of any category in English law. Instead, cases from *Irvine v TalkSport*<sup>568</sup> to Birrs J's *Rhianna* decision<sup>569</sup> have used “passing off” or “false endorsement” to allow celebrities to protect their commercial rights in this area. Birrs J left no room for misunderstanding about this:

It is important to state at the outset that this case is not concerned with so called “image rights”. Whatever may be the position elsewhere in the world, and however much various celebrities may wish there were, there is today in England no such thing as a free standing general right by a famous person (or anyone else) to control the reproduction of their image (*Douglas v Hello* [2007] UKHL 21). There is a developing law of privacy but no question of that arises in this case. The taking of the photograph is not suggested to have breached Rihanna's privacy. A celebrity may control the distribution of particular images in which they own the copyright but that right is specific to the particular photographs in question. Whether an image right can or should be developed is not what this case is concerned with.<sup>570</sup>

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<sup>567</sup> As in *MGN v UK* (2011) 53 EHRR 5 and *Von Hannover (2)* (2012) 55 EHRR 15.

<sup>568</sup> *Irvine v TalkSport* [2003] EWCA Civ 423. £25,000 damages awarded to F1 driver Eddie Irvine in respect of a doctored photo that made him appear to be endorsing “Talk Radio”.

<sup>569</sup> *Fenty v Arcadia Group Brands* [2013] EWHC 2310 (Ch). The fashion retailer *Topshop* sold T-shirts with the pop celebrity Rihanna's image on them produced from a photograph taken by an independent photographer. *Topshop* had a licence from the photographer to use the image but no licence from Rihanna. She successfully contended that sales of the T-shirts without her permission infringed her rights.

<sup>570</sup> *Ibid* [2].

His mention of *Douglas* reflects the fact that celebrities are able to protect their image rights in an economic sense and contractually at private weddings and receptions.<sup>571</sup>

#### 4.5.2 *Martinez*

The *Martinez* decision was not cited to Birrs J.<sup>572</sup> His remarks quoted immediately above suggest, however, that he was aware of it. The decision, it is maintained, allows for a wide interpretation permitting various options for those seeking to protect themselves against infringement of their image rights.<sup>573</sup> Its significance is that, as a CJEU decision from Luxembourg, it is binding on the 28 EU member states. Olivier Martinez, a French actor, claimed interference with his private life and infringement of his image rights as a result of a posting in the UK on the *Sunday Mirror's* website which was accessible in France. It stated 'Kylie Minogue is back with Olivier Martinez' together with details of their meeting. *MGN* argued that the Tribunal de Grande Instance de Paris lacked jurisdiction because there was insufficient connection between the act of placing the text and images online in the UK and the causation of any damage in France.

The CJEU considered first the interpretation of Article 5(3) of Regulation (EC) No 44/2001<sup>574</sup> and how the expression 'the place where the harmful event occurred or may occur' should be interpreted when the alleged infringement of personality rights occurred in content placed online on an internet website. It concluded that the phrase covered both the place where the damage occurred

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<sup>571</sup> Celebrity weddings are a specialist market and a revenue stream for celebrities: examples involving *OK!* include David and Victoria Beckham (£1m, 1999); Michael Douglas and Catherine Zeta-Jones (£1m, 2000); Jordan and Peter Andre (£2m, 2005); Ashley Cole and Cheryl Tweedy (£1m, 2006); and Wayne Rooney and Coleen McLoughlin (£2.5m, 2008).

<sup>572</sup> Linked cases C-509/09 and C161/10 *eDate Advertising GmbH v X and Martinez v MGN Ltd*.

<sup>573</sup> See R Callender Smith *Mirror, Mirror on the Wall...Are Those Image Rights I See Before Me?* *Queen Mary Journal of Intellectual Property*, Vol. 2 No. 2 2012, 195–197.

<sup>574</sup> This relates to jurisdiction and enforcement of judgements in civil and commercial matters and jurisdiction in 'matters relating to tort, delict or quasi-delict'.

(France) *and* the place of the event giving rise to it (England). This was because:

those two places could constitute a significant connecting factor from the point of view of jurisdiction, since each of them could, depending on the circumstances, be particularly helpful in relation to the evidence and the conduct of the proceedings.<sup>575</sup>

The Grand Chamber noted that *Shevill*<sup>576</sup> had established that defamatory statements in newspapers – which were distributed in a number of different member States – allowed the victim to seek damages both in the place of the original publication and from any of the courts in other countries where distribution, publication and damage had taken place. Did this principle go beyond print media and newspaper publication and apply to internet publications? Did it need to be distinguished on the basis that publication on an internet website meant that it could be accessed instantly by an indefinite number of internet users worldwide? The Court answered ‘yes’ to the first question. It properly limited the effect of the answer to the second question by deciding that the claimant had<sup>577</sup>

the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised.

The judgement introduces a new concept of a celebrity claimant’s ‘centre of interests’. It suggests<sup>578</sup> - perhaps optimistically - that both the claimant and the defendant will be able ‘easily to identify’ where the claimant may sue, as the

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<sup>575</sup> Ibid [41].

<sup>576</sup> C – 68/93 *Shevill and Others* [1995] ECR I – 415, paras [20–21..].

<sup>577</sup> Ibid [52].

<sup>578</sup> Ibid [49 – 51].

defendant will be 'in a position to know' where the centre of interests would be. In some cases this will be straightforward. It will be where he lives, his 'habitual residence', or where he does most of his business (where he pursues a 'professional activity').<sup>579</sup> However, the lives and business of many EU celebrities – particularly the attributed and achieved celebrity categories of musicians, actors and sports personalities – are unlikely to fit neatly or clearly into such a binary definition. They may be living in one state and perhaps regularly touring or playing in other EU states. Also of significance will be the nature of the information, the countries it will be reasonably foreseeable that the information will be of interest in, and the actual language of publication.

On the basis of *Martinez* this thesis asserts that, although the Duke and Duchess of Cambridge are taking action in France (and Italy, Sweden and elsewhere in the EU) in respect of the intrusive "balcony" photographs taken of them in September 2012 that were published on newspaper and magazine internet sites, they could have issued proceedings in the High Court in London for damages for misuse of private information as well as asserting damage to their image rights. Just as UK online publishers can be pursued in the courts of other EU member states, those principles must apply here to EU-based online publishers. There is no reason why UK claimants cannot use this decision as authority to protect their image rights in terms of privacy issues rather than simply seeking economic protection of their image rights more generally throughout the EU member states.

Additionally it is clear that Scots law, with legal roots traditionally aligned to European influences, already offers ways in which image and personality rights and remedies could be developed within that jurisdiction.<sup>580</sup> The legal principles could be "walked across" the border by any Supreme Court decision in much the same way the Scottish case of *Donoghue v Stevenson* created new law on

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<sup>579</sup> Ibid [49].

<sup>580</sup> See Elspeth Christie Reid *Personality, Confidentiality and Privacy in Scots Law* W Green 2010.

negligence and the scope of the duty of care that was then applied throughout the UK.<sup>581</sup>

As Black observes:<sup>582</sup>

Personality rights are “a separate category of rights, distinguishable from real, personal and immaterial property rights”. Long familiar in Civil law jurisdictions the term is now beginning to gain currency in Scotland. Where publicity rights are treated as a subset of personality rights there is likely to be an emphasis on the dignitarian aspects, for concepts such as privacy and human dignity are central to any legal protection of personality. This means that the commercial significance of infringement in publicity situations may be marginalised.

It is suggested that the bridge into the practical application of image rights as a protected privacy - rather than purely a commercial - issue within English law, and the potential unlocked by this area of continental and Scots law, exists already and has the potential for development as a result of *Martinez*.<sup>583</sup>

Also at the margins the Bailiwick of Guernsey has seen a gap in the legal market in this area.<sup>584</sup> It is the first jurisdiction in the world to offer registered image rights as a new form of intellectual property.<sup>585</sup> The protection of celebrities’ image rights – with associated privacy benefits - have the capacity to grow and develop rapidly in a world that allows for almost immediate and far reaching publication of images on the internet and the social media.<sup>586</sup>

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<sup>581</sup> [1932] UKHL 100 (26 May 1932).

<sup>582</sup> Gillian Black *Publicity and Image Rights in Scots Law* 373.

<sup>583</sup> C-509/09 and C-161/10 *eDate Advertising GmbH v X and Olivier Martinez and Robert Martinez v MGN Limited*: Judgement of the Grand Chamber.

<sup>584</sup> See Jason Romer and Kate Storey *Image is everything! Guernsey registered image rights* Ent LR 2013, 24(2), 51-56. The claimed benefits are legal certainty, publication to the world by the online Register of Personalities and Images, clarity for the marketing of image rights, tax advantages and wider scope of protection than that given by registered trade marks.

<sup>585</sup> Guernsey is a dependency of the British Crown but is not part of the United Kingdom. It has its own Government, legislature and court system. It is not part of the European Union. UK Privy Council decisions are binding and English case law is persuasive.

<sup>586</sup> Effective 3 December 2012.



## 4.6 Summary

Copyright can provide a flexible and additional privacy remedy for anticipated or actual breaches. As was argued earlier in the thesis, *Albert v Strange* is a copyright case in all but name and spans one edge of that proposition, particularly in terms of injunctive relief. At the other edge is the remedy of damages – with all the other sub-remedies associated with a full trial of an alleged breach – because even then the privacy interest can be protected as it was in the *Ashdown* and *Douglas* cases.

Fair dealing in the s.30 CDPA sense seemed to retain much of its “equitable” origins, even early in the life of the HRA. Walton J’s “total nonsense” conclusion in *Associated v NGN* decision in 1986 is representative of conservative and conventional judicial thinking. Only recently – along with s.171 (3) – has the rigour of the proportionality balancing test brought proportionality into the judicial consideration of fairness.

The digital age has brought with it recorded surveillance in volumes unimagined even a decade ago. Celebrities of all classes are captured on public and private CCTV systems.<sup>587</sup> Ownership of such images not only has a market potential for sales to the press and media but can also be used to restrain misuse which is not authorised or licensed. The potential imprecision of what is required in the commissioning of celebrity photographs needs careful thought to enhance privacy protection. Uncommissioned or “free” pictures taken by friends of aspiring attributed celebrities – before they hit the headlines for the first time – may need acquisition by payment, for an assignment of copyright, to protect the celebrity-to-be’s future rights in this area. European jurisprudence indicates that the Article 8/10 considerations within *Ashby Donald v France* provides scope for development at each end of the celebrity privacy spectrum but perhaps more particularly in the area of permitted intrusions and Arnold J’s observations in the *Marmite/BNP* case about the under-developed potential of the s.171 (3) public interest defence in a political context may be tested in future litigation.

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<sup>587</sup> As, for example, Dominique Strauss-Kahn found out to his cost after an incident in a New York hotel in May 2011.

## CHAPTER 5

### The Protection from Harassment Act 1997 as a privacy remedy

#### 5.1 Introduction

In the previous two chapters the *RockNRoll* case provided a thematic link between misuse of private information and copyright as privacy regimes available to celebrities. In this chapter it is the *Trimingham* case - which included celebrity copyright litigation – as part of a protection from harassment (and misuse of private information) claim which provides the thread of continuity. This chapter examines the ways in which anti-stalking legislation – created by the Protection from Harassment Act 1997 (PHA) which had its legislative roots as an anti-Domestic Violence measure – has become a potent weapon in the privacy armoury of celebrities of all categories.<sup>588</sup>

The PHA's remedies have matured potently over the last 15 years in ways beyond what could have been envisaged by the original legislators, the press or celebrities themselves. Importantly, it is pre-HRA in origin. It has had to develop to accommodate the proportionality balancing exercise within and between Articles 8 and 10, particularly in terms of complaints by celebrities about the targeting of individuals by newspapers. The Act contains no explicit public interest defence. As will be seen, for all practical purposes it has been the *Re S* proportionality formulation that has carved that out within the case law – by analogy - both in the Act's criminal and civil manifestations.

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<sup>588</sup> For a prescient assessment on the potential of this area for celebrities to assert their privacy rights see Andrew Scott *Flash Flood or Slow Burn? : Celebrities, Photographers and Protection from Harassment* (2009) *Media & Arts Law Review* 14 (4), 397 - 424.

The stalking of celebrities is as old as history. Greek mythology reflects gods and goddesses demonstrating unsettling obsessions for prominent human beings.<sup>589</sup> In the real world, the determined and the obsessed will always seek to breach the best efforts of security placed around the individual safety and seclusion of celebrities. It is clear, for instance, from historical<sup>590</sup> and Royal Protection Squad data<sup>591</sup> published in the US by researchers using Home Office data that the ascribed celebrities of the monarch and other members of the royal family are regular and specific targets (outside the terrorist spectrum) in respect of incidents which are likely to bring them into civil or criminal proceedings as potential victims, witnesses or complainants. In *Attacks on the British Royal Family* it was noted that – between 1778 and 1994 – there were 23 attacks<sup>592</sup> on the life or safety of the monarch or members of their immediate families.<sup>593</sup> As will be examined later in this chapter, there are unresolved issues that arise out of the constitutional position of the monarch should she wish to use the PHA to enforce her privacy rights.<sup>594</sup>

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<sup>589</sup> Zeus was – perhaps - the greatest mythical serial celebrity stalker/seducer starting, at a mortal level, with Europa (daughter of King Agenor of Sidon) followed by another seven: Io, Semele, Ganymede, Callisto, Maia, Metis, Dione and Danae.

<sup>590</sup> James, Mullen, Pathé, Meloy, Farnham, Preston and Darnley *Attacks on the British Royal Family: The Role of Psychotic Illness* J Am Acad Psychiatry Law, 36: 59 – 67, 2008.

<sup>591</sup> James, Meloy, Mullen, Pathé, Farnham, Preston and Darnley *Abnormal Attentions Towards the British Royal Family: Factors Associated with Approach and Escalation* J Am Acad Psychiatry Law 38: 329 – 340, 2010.

<sup>592</sup> “Attacks” were defined by the researchers as “any hostile act involving either a weapon or the making of physical contact by an individual”. Alarming intrusions that had no hostile intent – such as Michael Fagan’s appearance in the Queen’s bedroom in 1982 – were not classified. Neither were group events, such as the stoning of George III’s coach in London in 1795 and the attempted storming of the Prince of Wales’ convoy by anti-nuclear protesters in Barrow-in-Furnace in 1992. Events such as the unwelcome but non-hostile physical contact by model Jane Priest in her encounter with Prince Charles in the Australian surf in 1979 were also excluded.

<sup>593</sup> Of these, 83 per cent were on the monarch. George III was attacked six times, Queen Victoria eight times, Edward VIII once and Elizabeth II on three occasions. Of the remainder, four involved the monarch’s children and one the spouse of the heir to the throne. Only two attacks resulted in serious physical injury. In 1864, Queen Victoria’s son, Prince Alfred, was shot and seriously injured at a Grand Charity Picnic in Sydney. The attempted kidnapping of Princess Anne in the Mall in 1974 left the Princess unharmed but led to four people being shot and seriously injured. Minor injuries were sustained by King William IV when he was hit by a stone and Queen Victoria received a black eye and a bruise to the head when she was attacked while riding in her carriage. The remaining 19 attacks did not lead to any form of physical injury.

<sup>594</sup> See 5.3 in this Chapter: Can the monarch take action under the Act?

The list of UK celebrities who have been stalked, in the non-paparazzi sense, includes Gwyneth Paltrow,<sup>595</sup> ITN newsreader Julia Somerville,<sup>596</sup> Catherine Zeta-Jones<sup>597</sup> and David Walliams.<sup>598</sup> In 2007 the BBC presenter Emily Maitlis – who had been stalked over a lengthy period by a former University colleague<sup>599</sup> – appeared as a prosecution witness at his trial for s.2 PHA offences at West London Magistrates’ Court where she faced (before the court resolved the problem) the stalked person’s nightmare: cross-examination by the accused after her stalker sacked his defence advocate.

A now-annual royal anti-harassment notice to the press, media and photographers is but one example. In 2009 the monarch warned<sup>600</sup> and annually now reminds<sup>601</sup> the media and photographers about privacy issues<sup>602</sup> in relation to the royal estates at Sandringham and Balmoral. The first warning specifically mentioned taking action not only in relation to breaches of privacy, on the basis that members of the royal family spent private time at Sandringham and Balmoral often with invited friends and guests, but also under the provisions of the PHA. The 2009 warning complained that there had been a number of previous intrusions into the privacy of the royal family resulting from professional photographers using long distance lenses, not only to observe the royal family, but also to photograph them going about their activities on the Estates.<sup>603</sup> The media was requested – before publication - to review material

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<sup>595</sup> 2000: <http://news.bbc.co.uk/1/hi/entertainment/1071724.stm>

<sup>596</sup> 2001: <http://news.bbc.co.uk/1/hi/uk/1506465.stm>

<sup>597</sup> 2005: <http://news.bbc.co.uk/1/hi/wales/4666313.stm>

<sup>598</sup> 2008: <http://news.bbc.co.uk/1/hi/entertainment/7529652.stm>

<sup>599</sup> Edward Vines: <http://www.dailymail.co.uk/news/article-1101664/Schizophrenic-stalked-BBC-presenter-Emily-Maitlis-20-years-sent-secure-hospital.html>

<sup>600</sup> In October 2009.

<sup>601</sup> In November 2010, 2011, 2012 and in December 2013.

<sup>602</sup> In letters sent on her behalf by her solicitors headed: “Re: HM The Queen”.

<sup>603</sup> There had earlier been Sandringham-generated photographs including the Queen wringing the neck of a pheasant at a shoot on the estate (19 November 2000) and Prince Edward apparently beating a gun dog at Sandringham (28 December 2008: investigated by the RSPCA but with no prosecution) as well as an unsubstantiated report that Prince Harry had shot and killed a protected Hen Harrier at Sandringham on 24 October 2007. The Duke and Duchess of Cambridge with Prince George will use Anmer Hall, on the 20,000-acre Sandringham estate, as their private home when planning permission for adaptations is concluded early in 2014:

“photographic or otherwise” which was submitted and related to either estate in the light of the monarch’s “clear request for the harassment and breaches of privacy to cease.”<sup>604</sup> This royal adoption and endorsement of the protective elements of the PHA in terms of ascribed celebrities put the media on notice that, inevitably, attributed and achieved celebrities would follow the royal lead in adding this to the repertoire of remedies within the Act to protect their private life rights.

The Act is an unusual, possibly unique, piece of legislation in its range and flexibility. It incorporates criminal sanctions, as well as the potential for parallel civil protection, in respect of conduct that is essentially similar in nature. The standard of proof required varies depending on the court before which the prosecution or complaint is pursued. The Act has been developed both by statutory amendment and by adapting case law to cover a broad range of conduct, broader than originally envisaged, and now includes “stalking” offences which, arguably, only replicate conduct which was already subject to the Act. More subtle forms of harassment or potential harassment - beyond the original obvious purposes of the Act – will be identified as will be the remedies that arise from issues relating to publication, actual or anticipated. Although an undeveloped area at the moment, through the Act - and more general principles of aiding and abetting and vicarious liability - the media at a corporate level and photographic agencies who commission defendants who are photographers and others involved in intrusive surveillance could find themselves as co-defendants or caught by the effect of post-acquittal Restraining Orders (ROs). Also, ROs – created by the PHA - can also be imposed in respect of criminal

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[http://www.edp24.co.uk/news/anmer\\_hall\\_plans\\_approved\\_clearing\\_the\\_way\\_for\\_prince\\_william\\_kate\\_and\\_prince\\_george\\_to\\_move\\_in\\_1\\_2942863](http://www.edp24.co.uk/news/anmer_hall_plans_approved_clearing_the_way_for_prince_william_kate_and_prince_george_to_move_in_1_2942863)

<sup>604</sup> When Kate Middleton was photographed playing tennis during the Christmas holiday period 2009 (after the October 2009 warning) the Rex photographic agency agreed to pay £10,000 to charity in lieu of damages, plus an apology and costs for invading her privacy. The pictures were taken by a freelance photographer on Christmas Eve and Christmas Day 2009 in Cornwall. The pictures were not published in the United Kingdom but were syndicated overseas where some were published.

conduct that is not charged under the Act itself,<sup>605</sup> such as offences under the Data Protection Act 1998<sup>606</sup> or the CDPA.

## 5.2 The Protected Right

The Act<sup>607</sup> prohibits harassment in two generically different situations. The first type of clearly prohibited conduct<sup>608</sup> covers issues around stalking,<sup>609</sup> disputes between neighbours or between colleagues in the workplace. “Stalking” includes following a person; contacting, or attempting to contact, a person by any means; publishing any statement or other material relating or purporting to relate to a person, or purporting to originate from a person; monitoring the use by a person of the internet, e-mail or any other form of electronic communication; loitering in any place (whether public or private); interfering with any property in the possession of a person; watching or spying on a person. The second type of prohibited conduct covers campaigns by individuals or groups attempting to put unlawful pressure on others and is beyond the scope of this thesis.<sup>610</sup>

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<sup>605</sup> In *R v Buxton (Ivan David) & Others* [2010] EWCA Crim 2923.

<sup>606</sup> In particular sections 55, 56 (5) and – in respect of corporate liability – 66 of the DPA.

<sup>607</sup> As subsequently amended by the Serious Organised Crime and Police Act 2005, s.125 (1).

<sup>608</sup> Section 1 (1) “A person must not pursue a course of conduct (a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other.”

<sup>609</sup> Via s.111 and s.112 of the Protection of Freedoms Act 2012). That Act inserts s.2A and s.4A into the PHA, creating three new offences: s. 2A(1) stalking; s. 4A(1)(b)(i) stalking involving fear of violence and s. 4A(b)(ii) stalking involving serious alarm or distress. A person is guilty of the offence of stalking if, and only if, he or she is first guilty of harassment as set out in the PHA. The offence of stalking occurs where the course of conduct amounts to harassment and the acts or omissions involved are ones associated with stalking and the person knows or ought to know that the course of conduct amounts to harassment of the other person. The prosecution only have to prove that the defendant knew or ought to have known the course of conduct amounted to harassment, not that he or she knew or ought to have known that it amounted to stalking.

<sup>610</sup> Section 1 (1A) “A person must not pursue a course of conduct (a) which involves harassment of two or more persons, and (b) which he knows or ought to know involves harassment of those persons, and (c) by which he intends to persuade any person (whether or not one of those mentioned above) (i) not to do something he is entitled or required to do or (ii) to do something that he is not under any obligation to do.”

An objective "reasonable person" test operates to determine whether a course of conduct amounts to harassment.<sup>611</sup> A "course of conduct" excludes matters which can be shown to be being pursued for the purposes of preventing or detecting crime, under any enactment or rule of law or that – in the particular circumstances<sup>612</sup> – it was reasonable.<sup>613</sup>

### 5.2.1 Criminal Offences

The Section 1 offences in the Act are summary criminal matters carrying up to six months imprisonment and/or a fine of up to £5,000. Section 4 provides for more serious criminal instances when the target for the harassment is put in fear of violence – on at least two occasions – with the potential penalty, in addition to fines, of imprisonment for up to five years if the matter is committed for trial on indictment to the Crown Court or up to six months imprisonment as a summary offence in the Magistrates' Court. In terms of "stalking"<sup>614</sup> the following now exist: the summary offence of s. 2A (1) stalking and the either

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<sup>611</sup> Section 1 (2) "For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other."

<sup>612</sup> Examined recently in a non-celebrity context by the Supreme Court in *Hayes v Willoughby* [2013] UKSC 17.

<sup>613</sup> Section 1 (3): Subsection (1) does not apply to a course of conduct if the person who pursued it shows—(a) that it was pursued for the purpose of preventing or detecting crime, (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or (c) that in the particular circumstances the pursuit of the course of conduct was reasonable. *R. v Colohan* [2001] EWCA Crim 1251 "...1(3)(c)...poses even more clearly an objective test, namely whether the conduct is in the judgment of the jury reasonable. There is no warrant for attaching to the word "reasonable" or via the words "particular circumstances" the standards or characteristics of the defendant himself," per Hughes J.

<sup>614</sup> The *Oxford English Dictionary* definition is "the action, practice or crime of harassing or persecuting a person with unwanted, obsessive, and usually threatening attention over an extended period of time." Examples: "Stalking is generally defined as an ongoing course of conduct in which a person behaviourally intrudes upon another's life in a manner perceived to be threatening" (A. Nicastro, A. Cousins and B. Spitzberg *The Tactical Face of Stalking* (2000) 28(1) *Journal of Criminal Justice* 69); "A constellation of behaviours in which one individual inflicts on another repeated unwanted intrusions or communications" (M. Pathe and P. Mullen *The Impact of Stalkers on their Victims* (1997) 170 *British Journal of Psychiatry* 12).

way offence of s. 4A stalking involving serious alarm or distress.<sup>615</sup> There is no explicit public interest defence within the PHA.

Section 5 of the Act provides for Restraining Orders (ROs) on conviction. Section 5A<sup>616</sup> of the Act provides for ROs on acquittal. In criminal cases ROs can be imposed by reference to the civil standard of proof and can involve the use of hearsay evidence.<sup>617</sup> In either case the ROs may, “for the purpose of protecting the victim of the offence, or any other person mentioned in the order”, prohibit the defendant from further conduct which amounts to harassment or which would cause a fear of violence for a specified period or until further order. If the defendant does anything which is prohibited then a summary conviction carries up to six months imprisonment and/or a fine or – on indictment – up to 5 years imprisonment and/or a fine. A “course of conduct” is defined by Section 7 of the Act and must involve conduct on two or more occasions in relation to a single individual or at least on one occasion to each individual if the conduct is in relation to two or more individuals.<sup>618</sup>

### **5.2.1.1 Criminal Offences and Social Media**

The HRA, tensions between Articles 8 and 10 and prosecutions under the Act in respect of modern methods of communication are exemplified in *R v Debnath*.<sup>619</sup> The defendant appealed from an RO prohibiting her, among other things, from publishing any information about the man who was the focus of her attention and his fiancée, whether true or not. She had conducted a campaign against the man – a former work colleague – after a one-night stand with him. She believed he had given her a sexually transmitted disease although she had never actually had that disease. Her campaign ranged from criminal damage to

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<sup>615</sup> A person is guilty of the s.4 (A) offence where he engages in a course of conduct that amounts to stalking, and either causes another to fear, on at least two occasions, that violence will be used against him, or causes him serious alarm or distress which has a substantial adverse effect on his usual day-to-day activities. It must be shown that the defendant knows or ought to know that his course of conduct will cause another so to fear on each of those occasions or (as the case may be) will cause such alarm or distress.

<sup>616</sup> Domestic Violence, Crime and Victims Act 2004, s.12 (5).

<sup>617</sup> This mixing of criminal and civil standards of proof – in criminal matters where there has been an acquittal - creates the potential for a significantly disproportionate outcome.

<sup>618</sup> This is examined further in at 5.7.1 of this chapter.

<sup>619</sup> *R v Debnath* [2005] EWCA Crim 3472.



his car, registering him on gay contact websites, falsely complaining to his employers that he was harassing her and tampering with his e-mails and those of his fiancée. She argued that the wide terms of the RO infringed her Article 10 ECHR rights to publish the truth.

The Crown successfully argued that the terms of the RO were proportionate because they were no wider than was necessary to protect the victim, who has suffered a long-term campaign of harassment from her. The RO was only breached if its terms were contravened without reasonable excuse. The restriction on her Article 10 rights needed to be balanced against the rights of the victim, who was also a member of society. The purpose of the order was to afford protection to the victim and his fiancée. They had protection under the domestic law and also had Article 8 rights to private and family life. The correct test was whether the RO pursued a legitimate aim and whether the restriction imposed was proportionate and necessary to achieve that aim. She had two convictions relating to harassment of him, and was now facing a third indictment relating to his fiancée. The restriction on publishing the truth about two named individuals who were private citizens, not public figures, with whom she had no enduring connection was clearly proportionate to protect them from further interference and harassment. She had no need to publish any information about them. No offence would arise if, in the future, she could establish that there was a reasonable excuse. Balancing the relevant rights, the restriction that she was subject to was minor whereas the level of protection afforded to her targets was great.<sup>620</sup> The Court of Appeal upheld the order, commenting that the defendant seemed incapable of distinguishing truth from fiction and had continued her campaign even when on remand. There was, in effect, no public interest/Article 10 defence open to her for inaccurate information and her conduct consequent on it.

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<sup>620</sup> Ibid [18].

The issues in two summary prosecutions of web-site harassment, *R v Puddick*<sup>621</sup> and *R v Fredrics*,<sup>622</sup> demonstrate how fact-sensitive matters can become in terms of whether prosecutions – as opposed to court-imposed ROs - under the Act provide an effective privacy remedy. In *Puddick* the defendant had set up a number of different websites to highlight how a wealthy businessman – who, along with the defendant, became an attributed celebrity as a result of this case - had conducted an adulterous affair with the defendant’s (now-reconciled) wife. District Judge Elizabeth Roscoe concluded that simply setting up websites was not a "course of conduct" which caused "alarm and distress" to the alleged victim.<sup>623</sup> This case was one of the first to highlight the issue of whether someone, exercising Article 10 rights freely to express themselves widely online about something that had a genuine factual base, could be guilty of harassment in this criminal context. Because the standard of proof for the prosecution to satisfy the burden on it is “beyond reasonable doubt” in the light of a “not guilty” plea, the focus of the proportionality balance took place in the context of a more demanding Article 10 dynamic than in *Debnath*.<sup>624</sup> The issue in this and the next example related to individuals highlighting in a repetitious way what was true and what they believed they had a right to express and others had a right to consider. The proportionality balancing act, in terms of their “targets” Article 8 rights, are the reverse of *Debnath*. The public interest/Article 10 rights prevailed and resulted in acquittals.

In *Fredrics*, another District Judge<sup>625</sup> decided that the defendant – a composer and former Senior Lecturer of Music - had no case to answer in relation to s.2

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<sup>621</sup> Westminster MC 15 – 17 June 2011 and [http://www.2bedfordrow.co.uk/the\\_plumber,\\_the\\_lover\\_and\\_the\\_internet\\_-\\_michael\\_wolkind\\_qc\\_blogs/8](http://www.2bedfordrow.co.uk/the_plumber,_the_lover_and_the_internet_-_michael_wolkind_qc_blogs/8) Westminster MC 15 – 17 June 2011 and [http://www.2bedfordrow.co.uk/the\\_plumber,\\_the\\_lover\\_and\\_the\\_internet\\_-\\_michael\\_wolkind\\_qc\\_blogs/8](http://www.2bedfordrow.co.uk/the_plumber,_the_lover_and_the_internet_-_michael_wolkind_qc_blogs/8)

<sup>622</sup> Kingston MC July 2010. See also <http://www.sirpeterscott.com> and *Surrey Comet* 30 July 2010 <http://www.sirpeterscott.com/images/30.7.10comet.jpg>

<sup>623</sup> <http://www.ianpuddick.com> .

<sup>624</sup> Where she had pleaded guilty at Leicester Crown Court on 29 June 2004 to one s.2 PHA offence and two further counts of unauthorised modification of computer material contrary to section 3(1) of the Computer Misuse Act 1990.

<sup>625</sup> Deputy District Judge Shlomo Kreiman, quoted as saying: “Harassment laws were not intended to protect individual reputations.”

prosecution under the Act. He had set up a satirical whistle-blower website alleging wrongdoings by officials at Kingston University. The website used the Vice-Chancellor's name as the domain name and Sir Peter Scott (the Vice - Chancellor and an achieved celebrity) objected to this misrepresentation. The brief press report in relation to this case suggests that the District Judge found that the website contained material of public concern about alleged bullying, the role of external examiners and the retirement age policy. These cases suggest that, in the absence of any defined or overt public interest defence within the Act itself, fact-sensitive issues provide a judicial route to the delivery of pragmatic, fact-based conclusions, particularly in summary trials.<sup>626</sup>

Harassment in the form of cyber-stalking can take place on the Internet and through the misuse of email. It can include the use of social networking sites, chat rooms and other forums opened up by the new technology. Such campaigns can result in harassment prosecutions under the Act in a variety of ways such as:

- the way in which personal information is accessed (or communicated) about the victim
- as a means of surveillance of the victim
- identity theft by subscribing a victim to services and by purchasing goods and services in their name
- damaging the name of the victim
- electronic sabotage (spamming or sending viruses)
- tricking other internet users into harassing or threatening the victim.

The DPP's current guidance to Crown Prosecutors emphasises issues of proportionality.<sup>627</sup> It even reminds that there is, in this area, a "high threshold"

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<sup>626</sup> However – although currently untested - s.1 (3) (c) could be a quasi-public interest defence applicable to some news gathering activities by the media in any sustained activity or campaign to explore and publicise corruption or criminal wrong-doing. Whether it could be extended to cover reprehensible conduct short of outright criminality remains to be tested: there is a strong Article 10 argument that it should. See also *Fulton v Sunday Newspapers* at 5.2 in this Chapter.

<sup>627</sup> The advice includes prosecutions under the PHA and other provisions such as include offences under the Contempt of Court Act 1981, section 5 of the Sexual Offences (Amendment) Act 1992, breaches of an RO or breaches of bail:  
[http://www.cps.gov.uk/news/latest\\_news/dpp\\_publishes\\_final\\_guidelines\\_for\\_prosecution\\_s\\_involving\\_social\\_media\\_communications/](http://www.cps.gov.uk/news/latest_news/dpp_publishes_final_guidelines_for_prosecution_s_involving_social_media_communications/) and  
[http://www.cps.gov.uk/legal/a\\_to\\_c/communications\\_sent\\_via\\_social\\_media/](http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/) . This loads the first, evidential, stage of the prosecution assessment under the Code for Crown

at the evidential stage.<sup>628</sup> Prior to this Nicola Brookes – a private individual<sup>629</sup> who was subjected to a barrage of “trolling” abuse in 2012<sup>630</sup> when she posted a supportive comment about ascribed X-Factor celebrity Frankie Cocozza on Facebook – had been faced with the reluctance of CPS Kent to prosecute the matter “because it was too difficult”.<sup>631</sup> Ms Brookes was left to take action privately in the High Court to secure the trolls’ identities by way of a *Norwich Pharmacal* Order (NPO). Then, in 2014, the pendulum swung in a “chilling” fashion in respect of Article 10. In what might be seen as disproportionate police over-reaction to previous inactivity there were a series of examples of journalists and “tweeters” being issued with “prevention of harassment” letters or receiving police “warning” visits.<sup>632</sup> The Act provides no statutory recognition for such letters and – as the journalist recipients discovered – there was no process for getting them withdrawn.<sup>633</sup>

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Prosecutors with the adjectival “high threshold” element that might otherwise have been expected to appear at the second stage of the assessment, the public interest examination in relation to any prosecution.

<sup>628</sup> Ibid [34 – 34]: Because of the daily volume of “many millions of communications” sent via social media - and in the context of s.1 of the Malicious Communications Act 1988 and s.127 of the Communications Act 2003 – such comments create “the potential that a very large number of cases could be prosecuted before the courts. Taking together, for example, Facebook, Twitter, LinkedIn and YouTube, there are likely to be hundreds of millions of communications every month. In these circumstances there is the potential for a chilling effect on free speech and prosecutors should exercise considerable caution before bringing charges under” those two sections. “There is a high threshold that must be met before the evidential stage in the Code for Crown Prosecutors will be met. Furthermore, even if the high evidential threshold is met, in many cases a prosecution is unlikely to be required in the public interest....”. The trigger for this guidance was a s.127 Communications Act 2003 prosecution relating to a tweet and Robin Hood airport at Doncaster: *DPP v Chambers* [2012] EWHC 2157 (Admin).

<sup>629</sup> Who became an attributed celebrity by trying to support an existing attributed celebrity.

<sup>630</sup> One “troll” set up a Facebook profile in Ms Brookes’ name, with a picture of her and her email address, describing her as a drug dealer, prostitute and child abuser.

<sup>631</sup> <http://www.guardian.co.uk/technology/2012/jun/08/facebook-revealing-identities-cyberbullies>

<sup>632</sup> <http://www.pressgazette.co.uk/journalist-investigating-%C2%A3100m-investment-fraud-given-absurd-harassment-warning-met-police>

<sup>633</sup> The first one, relating to *Croydon Advertiser* journalist Gareth Davies, came from him making two telephone calls and a doorstep visit – a course of conduct – on a man convicted of fraud. The second related to Florida-based UK journalist David Marchant receiving a harassment warning as a result of his investigation into an alleged £100m investment fraud. Then Michael Abberton, who had tweeted something UKIP did not like, received a visit from Cambridge police whose Chief Constable subsequently agreed the visit had not been necessary : <http://inform.wordpress.com/2014/05/15/tweeting-about-ukip-political-expression-and-the-cambridge-police-tamsin-allen/>

There is an inevitable range and variation about what will be considered – as a matter of fact – to be a “course of conduct” under the Act. For instance – and admittedly in a domestic context rather than a situation involving a celebrity - in *R v Curtis*,<sup>634</sup> the Court of Appeal held that a series of six incidents, over the course of nine months during a volatile relationship where there had been aggression on both sides, did not constitute a course of conduct that amounted to harassment for the purposes of s.1 and did not form the basis of an offence under s.4 (1).

### **5.2.1.2 Corporate Crime: Implications of Harassing Surveillance**

The misuse of “surveillance” in the context of the Act<sup>635</sup> raises the question of whether Max Mosley could have complained to the police about the conduct of the *NOTW* in paying one of the participants in their sadomasochistic sessions to film these activities surreptitiously, for subsequent repeated use by the newspaper. The filming itself took place on more than one occasion and, on that basis, amounts to a course of conduct. The effect of the filming ultimately caused Mr Mosley harassment, alarm or distress.<sup>636</sup>

While the newspaper publications – and web postings of the videos – were the trigger for Mr Mosley's civil action in terms of the breach of his private life rights, the deep reach of criminal conduct spelled out in s.7 (3) and (3A) would have allowed for prosecution of those who aided, abetted, counselled or procured conduct falling within the terms of the Act.<sup>637</sup> It may be fortunate for all those involved on the editorial side of that story that he did not make a complaint in

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<sup>634</sup> *R v Curtis* [2010] EWCA Crim 123.

<sup>635</sup> *Ibid* [23].

<sup>636</sup> “Once such recording has taken place, however, a separate issue may need to be considered as to the appropriateness of onward publication....obviously the nature and scale of the distress caused is in large measure due to the clandestine filming and the pictures acquired as a result,” per Eady J *Mosley v NGN* [2008] EWHC 1777 [17].

<sup>637</sup> s.7 (3A): “A person's conduct on any occasion shall be taken, if aided, abetted, counselled or procured by another – (a) to be conduct on that occasion of the other (as well as conduct of the person whose conduct it is); and (b) to be conduct in relation to which the other's knowledge and purpose, and what he ought to have known, are the same as they were in relation to what was contemplated or reasonably foreseeable at the time of the aiding, abetting, counselling or procuring.”

those terms, given that he has recently succeeded in his litigation<sup>638</sup> in the French courts<sup>639</sup> where he recovered the equivalent of £32,000 in fines, damages and costs.

The spectre of corporate criminal liability for News International and its Directors - the indictments for which might have at their heart conspiracy to commit PHA, Computer Misuse Act 1990, Regulation of Investigatory Powers Act 2000 (RIPA) or Communications Act 2003 offences – awaits a prosecution decision.<sup>640</sup>

### 5.2.2 Civil Actions

Section 3 PHA provides a civil remedy in the form of a statutory tort with damages and the possibility of an injunction, for harassment as defined in s.1 of the Act. There is an important distinction available in civil proceedings permitting greater speed and flexibility. Action may be taken on the basis of only a *single* act provided that the court is satisfied that further breaches are anticipated.<sup>641</sup> Victims who experience harassment can seek an RO, the breach of which can lead directly to criminal proceedings under the Act.<sup>642</sup> However, no power of arrest can be attached to this civil order and, in order to enforce it through the civil courts, the victim needs to return to court to apply for a warrant of arrest.

The CPS has issued detailed guidance to prosecutors in an attempt to achieve a unified, holistic approach where there are parallel criminal prosecutions and

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<sup>638</sup> <http://inform.wordpress.com/2011/09/25/news-max-mosley-and-a-french-criminal-complaint-against-news-of-the-world-and-neville-thurlbeck/>

<sup>639</sup> <http://www.theguardian.com/media/2011/nov/08/news-group-fine-mosley-france>

<sup>640</sup> Since June 2014 – and the verdicts in the first phone-hacking trial at the Central Criminal Court - Rupert Murdoch is one such individual: <http://www.theguardian.com/uk-news/2014/jun/24/scotland-yard-want-interview-rupert-murdoch-phone-hacking>

<sup>641</sup> S.3 (1): An actual or apprehended breach of section 1 may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question. S.3 (2) allows for damages caused by (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.

<sup>642</sup> S.3 (6) (a): Where the High Court or a county court grants an injunction....and without reasonable excuse the defendant does anything which he is prohibited from doing by the injunction, he is guilty of an offence. Conviction on indictment carries up to 5 years' imprisonment. Summary conviction carries up to 6 months.

civil actions under the Act.<sup>643</sup> It recognises that the “needs of individual victims vary” and “to ensure their safety, the criminal and civil law may need to be used in conjunction.” Prosecutors are reminded of the options open to victims or other agencies under civil procedures so that an “all-encompassing approach can be taken in safeguarding and supporting victims”. Prosecutors are enjoined “routinely to make enquiries to see if there are any concurrent civil proceedings” and that, just because “civil proceedings are ongoing does not mean that criminal proceedings cannot be commenced or continued.”<sup>644</sup>

### **5.2.2.1 The Extent of the Act in Civil Proceedings**

An early case on the practical application of the Act in civil proceedings - *Turner v Microsoft*<sup>645</sup>- suggested that the PHA was directed at “stalking, anti-social behaviour by neighbours and racial harassment” and *not* for a course of conduct such as oppressive litigation.<sup>646</sup> Two later cases took an opposite approach and expanded the reach of the Act in its developing case law.<sup>647</sup> The *British Gas* case confirmed that the only difference between harassment as a tort and as a crime was the standard of proof but (per Jacob and Sedley LJ) it was 'strongly arguable' the British Gas's conduct was sufficiently grave to merit the intervention of the courts. Examples of web campaigns that led to attributed celebrity notoriety and which led to harassment being restrained in civil proceeding are *Cray v Hancock*<sup>648</sup> and *Law Society v Kordowski*<sup>649</sup> where it

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<sup>643</sup> [http://www.cps.gov.uk/legal/s\\_to\\_u/stalking\\_and\\_harassment/#a10](http://www.cps.gov.uk/legal/s_to_u/stalking_and_harassment/#a10)

<sup>644</sup> Ibid: “The availability of civil proceedings does not diminish a defendant's criminal behaviour and is not therefore a reason, in itself, to discontinue.”

<sup>645</sup> *Turner v Microsoft* (2000) *The Times* 15 November.

<sup>646</sup> See the Home Secretary's remarks (Michael Howard MP) on Second Reading of the Bill.

<sup>647</sup> *David Lloyd v Halifax Bank* (2007) *The Times* 25 September: an injunction was granted against Halifax Bank after a customer – who had become ill with lung cancer and got behind with repayments – received over 750 telephone calls from bank staff about the matter over a 10-month period. In *Ferguson v British Gas Trading Ltd* [2009] EWCA Civ 46 the Court of Appeal confirmed that the conduct of the defendant in sending the claimant 'bill after bill, and threatening letter after threatening letter' in error when she had ceased to be their customer and when they knew (or should have known) that she did not owe them any money was sufficiently grave for the conduct to be considered 'oppressive and unacceptable'.

<sup>648</sup> *Cray v Hancock* [2005] All ER (D) 66 (Nov): a campaign against a solicitor claimant, including e-mails, internet forum postings and spoof websites, amounted to harassment - with more extensive damages awarded for harassment (£10,000) - than for the defamatory elements (a further £9,000).

<sup>649</sup> *Law Society v Kordowski* [2011] EWHC 3182 (QB).

occurred by continued posting of defamatory remarks about solicitors on websites. In *CBL v Person Unknown*,<sup>650</sup> the claimant had a Twitter account and had received unpleasant, unwanted tweets which threatened to reveal information of an intimate sexual nature about his sexual interests and the impact that could have on his family and children. Nicola Sharp J noted that:

[Relief was sought] first of all, because the nature, content and indeed the number of tweets amount at least arguably to harassment within [the Act]; second, on the ground that the information.... is, information in which [CBL] has a reasonable expectation of privacy. It is said that there is no reason, certainly at this stage, to suppose that there will be any relevant “defence” which would justify the publication of that information.<sup>651</sup>

Tweeting in terms that harass as above is clearly caught within the Act. Equally – although pursued as a defamation claim by Lord McAlpine against (in particular) Sally Bercow<sup>652</sup> – celebrity (and other) Twitter users who repeatedly put defamatory or harassing material into the public domain against specific targets could find that the civil proceedings taken against them includes civil proceedings under the Act.

Two cases involving Abu Qatada’s family emphasise the Act’s flexibility in terms of protecting celebrities’ privacy and anti-harassment needs. They resulted from the media-enhanced attributed celebrity notoriety<sup>653</sup> of Abu Qatada<sup>654</sup> - of his wife and children<sup>655</sup> (to restrict demonstrations close to their home) and the family’s landlord’s home (to prevent further media harassment and publication of details that might promote demonstrations close to or outside it).<sup>656</sup>

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<sup>650</sup> *CBL v Person Unknown* [2011] EWHC 904 (QB).

<sup>651</sup> *Ibid* [5].

<sup>652</sup> *McAlpine v Bercow* [2013] EWHC 981 (QB).

<sup>653</sup> His real name is Omar Othman.

<sup>654</sup> Embodied in *The Sun’s* campaign headline of 15 February 2012: *Let’s try harder to kick out Qatada* <http://www.thesun.co.uk/sol/homepage/news/4116837/Boot-out-Abu-Qatada-Join-our-bid-to-kick-extremist-out-of-Britain.html>

<sup>655</sup> *The wife and children of Omar Othman v ENR*: injunction issued by Silber J on 25 February 2013, the terms of which were reported in an MoJ press release of the same date.

<sup>656</sup> *AM v News Group Newspapers* [2012] EWHC 308 (QB).



Protecting private life rights from workplace bullying was not one of the obvious purposes to which the Act could be turned. However the significance of *Majrowski v Guy's and St Thomas's NHS Trust*<sup>657</sup> – in the context of this thesis – is that it confirms that an employer (whatever its legal personality) can be vicariously liable for acts of harassment carried out by an employee within the scope of employment and can be, therefore, a proper defendant. The case is also important for an observation by Baroness Hale in the House of Lords that “conduct might be harassment even if no alarm or distress were in fact caused”. In *Green v DB Group Services (UK) Ltd*<sup>658</sup> Ms Green suffered from a nervous breakdown because of workplace bullying and succeeded in claims based on negligence and the Act. Owen J considered vicarious liability<sup>659</sup> and the nature and extent of the connection.<sup>660</sup> She was awarded £35,000 general and £25,000 specific damages.<sup>661</sup>

In respect of the monarch's (or any category of celebrities') threats to seek protection of private life rights by using the Act, such vicarious liability can be read across to the activities of photographers working for photographic agencies or journalists making intrusive and overly-persistent and disproportionate enquiries. Freelance photographers on retained contracts with photographic agencies and freelance or retained photographers on newspaper titles generate similar vicarious liability for their employers. Whether it could be extended further to “bullying” activities of reporters and television crews might also be relevant.<sup>662</sup> However in such situations it is likely that the potential employer/media outlet would point not only to its Article 10 rights but also to the

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<sup>657</sup> *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34.

<sup>658</sup> *Green v DB Group Services (UK) Ltd* [2006] EWHC 1898 (QB).

<sup>659</sup> *Bernard v Att. Gen. of Jamaica* [2005] IRLR 398 [18]. Lord Steyn: “...concentrate on the relative closeness of the connection between the nature of the employment and the particular tort, and .... ask whether in looking at the matter in the round, it is just and reasonable to hold the employer vicariously liable.”

<sup>660</sup> *Lister v Helsey Hall* [2001] UKHL 22.

<sup>661</sup> Other heads of damage remained to be quantified outside the judgment.

<sup>662</sup> *R v Broadcasting Standards Commission ex parte BBC* (1999) 0779/C QBCOF involved the secret filming of transactions in one of Dixons' stores as part of a BBC *Watchdog* programme wishing to show second-hand goods being sold as new (again). The Court of Appeal held the company had a stand-alone privacy right, enforceable to prevent such intrusions. Interestingly this decision pre-dates the commencement of the Human Rights Act 1998 in the UK.

"journalistic, literary or artistic" defence in s.32 of the Data Protection Act 1998.<sup>663</sup>

Before looking at the key celebrity cases where the Act has been employed there is a discrete issue that requires consideration: how might the monarch actually take action to use the Act either for criminal or civil proceedings. In all the other privacy regimes considered in this thesis – breach of confidence, misuse of private information, copyright and data protection breaches - it would be possible for the Attorney General to take action on behalf of the monarch by seeking appropriate interim relief or summary judgement. A prosecution or a civil claim under the PHA, however, would require more direct and personal engagement by the monarch because of the evidence that would need to be adduced and tested.

### **5.3 Can the Monarch take action under the Act?**

The Queen, as an ascribed celebrity, has put the royal seal of approval<sup>664</sup> on the protective potential of the criminal and civil aspects of the Act for all categories of celebrity. It may be, however, that she is the single celebrity in the UK who finds it most difficult to use in practice. Her annual warnings since 2009 to the media make clear her willingness to use its provisions to take action to protect her privacy rights.<sup>665</sup> The ability of the monarch, however, to take such action under the Act is far from straightforward. The focus here has been limited to whether she can and how she might do so in terms of the Act.

Blackstone – in the vivid language of another age – describes the law of the constitution clothing the person of the monarch with “supreme sovereignty and

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<sup>663</sup> <http://inform.wordpress.com/2010/10/15/opinion-privacy-claims-reasonable-belief-in-public-interest-public-domain-and-procedure-antony-white-qc/> and explored separately in Chapter 6.5.1. In terms of media activity, the provisions (and observance) of the relevant industry codes of practice created by the PCC and OfCom is a relevant factor here because it is specifically written in to s.32 (3). And see: Press Complaints Commission *Editors' Code of Practice* on Privacy (3) and, specifically, Harassment (4) (i): <http://www.pcc.org.uk/cop/practice.html>

<sup>664</sup> As well as her formal Royal Assent to the Act.

<sup>665</sup> <http://www.telegraph.co.uk/news/uknews/theroyalfamily/6736477/The-Queen-gets-tough-on-paparazzi-in-royal-privacy-row.html>

pre-eminence”.<sup>666</sup> In modern terms that description needs to be read subject to an understanding that the monarch can lawfully and constitutionally only act in certain ways. It is reasonable to assume that, as monarch, she has received detailed legal advice about what would be entailed before issuing such warnings.<sup>667</sup> The current royal position would seem to be that she is competent to appear in her own courts. Equally, it would seem to follow from the limited case law in the area that she is not compellable. This creates an, as yet, untested<sup>668</sup> dichotomy. It also places her in a position that differs from any other celebrity figure in the United Kingdom.<sup>669</sup> What cannot be ignored, however, is that issues of fairness and proportionality are now woven in to the English legal system by the HRA: her warnings post-date that Act coming into force. Consideration of these factors leads to the conclusion that, while she may not be compellable as a witness in respect of any complaint that she might now make, she would have to waive her conventional “immunity” in respect of any attendance at court if her complaint was to proceed to any kind of effective trial or remedy.<sup>670</sup> This “immunity”, once waived, could unravel the current convention in respect of her – and her successors - non-compellability. The cases examined below trace the historical trail used to arrive at this conclusion.

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<sup>666</sup> 1 BI Com (14<sup>th</sup>Edn) 241.

<sup>667</sup> While the Attorney General and Solicitor General are now appointed by the Government of the day they have an important traditional function in relation to the monarch. By the seventeenth century when they had become the legal advisers of the Crown. See generally James William Norton-Kyshe *Law and Privileges relating to the Attorney General and Solicitor General of England* Stevens & Haynes 1897 61 – 66.

<sup>668</sup> “Avoided” might be more accurate phrase because of what occurred in the 2002 Paul Burrell trial.

<sup>669</sup> All other members of the royal family are both competent and compellable as with Edward (“Bertie”), Prince of Wales’ compelled appearances in the *Mordaunt v Mordaunt, Cole and Johnson* divorce trial of 1870 and the *Gordon-Cumming v Wilson* libel trial of 1891.

<sup>670</sup> First formulated by Sir Ivor Jennings in *The Law and the Constitution*, 5<sup>th</sup> Edn London University Press 1959, 131, a constitutional convention exists if (i) there are precedents underpinning it, (ii) the parties to the relevant practice consider themselves to be bound by it and (iii) there is a reason for the existence of the convention. It has also been described, by G Marshall and G Moodie *Some Problems of the Constitution* 5<sup>th</sup> Edn 1971 22 – 26, as a “non-legal rule of constitutional behaviour which has been consistently accepted by those affected by it as binding on them, which is not enforceable in the courts”. These two descriptions were applied most recently in *Evans v IC and 7 Departments of State* [2012] UKUT 313 (AAC) [87].

It has been said<sup>671</sup> that the monarch may not give evidence in her own cause.<sup>672</sup> This issue was at the heart of the *Mylius*' trial in 1911, the most comprehensive examination of the position in relation to whether, firstly, the monarch is competent as a witness and, secondly, whether the monarch is compellable as a witness. There is no historical record of any monarch ever appearing as a witness. Early 20<sup>th</sup> century writers on the topic – in the days before the Human Rights Act 1998 – could not see by what principle any court could compel the monarch to be sworn as a condition for giving evidence any more than a court could compel the monarch to come and give evidence.<sup>673</sup> Great significance was given to whether or not temporal sanctions existed in respect of any oath that the monarch might take. The author has argued elsewhere that the foundations for that rule are flawed.<sup>674</sup> If it is still a convention that the monarch does not appear in court then the relevance of that convention merits reappraisal in a contemporary setting not only so that issues of fairness and proportionality can be assessed but so that there can be a clear understanding of why such a person should be permitted to stand outside the normal requirements of open justice.<sup>675</sup>

### 5.3.1 *R v Mylius (1911)*

Edward Frederick Mylius, the accused in the 1911 case,<sup>676</sup> was a 32-year-old Belgian-born British subject. He was convicted of criminal libel in a one-day trial at the High Court before the Lord Chief Justice, Lord Alverstone, and a special jury. He was sentenced to 12 months' imprisonment. He had asserted in a newspaper article<sup>677</sup> that King George V was a bigamist who had gone through a marriage ceremony with Queen Mary when he was already married. *The*

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<sup>671</sup> 2 Hale PC 282; Chitty, 377.

<sup>672</sup> The tentative "it is said" is reflected in the first (1909) edition of Halbury's Laws of England Vol VI, 410 [623], the edition contemporary with *Mylius*' trial.

<sup>673</sup> George Stuart Robertson *Law and Practice of Civil Proceedings by or against the Crown* Stevens & Son 1908 592.

<sup>674</sup> R Callender Smith *The Missing Witness? George V, Competence, Compellability and the Criminal Libel Trial of Edward Frederick Mylius* *Journal of Legal History* Vol 33 (2) August 2012, 209 – 239.

<sup>675</sup> See also David Pannick QC *Turning Queen's evidence* *Public Law* 2003, 201 – 204.

<sup>676</sup> *The Times* 2 February 1911.

<sup>677</sup> Published in *The Liberator* on 19 November 1910.

*Liberator*, a newspaper promoting republicanism, was printed and published in Paris and distributed there, in the United Kingdom and in the US. The article was direct and uncompromising. It stated that, in 1890, the future king had contracted lawful marriage in Malta with the daughter of a British Admiral, that the marriage had produced three children and that – three years later when Prince George came into the direct line of succession to the throne following the death of his older brother – “he finally abandoned his true wife and entered into a sham and shameful marriage with a daughter of the Duke of Teck.”<sup>678</sup> The King was advised by Winston Churchill, as Home Secretary, backed up by a joint opinion dated 23 November 2010 from the Law Officers.<sup>679</sup> That advice was that, if Mylius was charged with criminal libel, the King could not be required to give evidence.

A feature of the process which then followed was Mylius’ argument that, if the monarch – in his personal capacity – was accusing him of the crime of criminal libel then the monarch should attend in person at the trial in the High Court so that Mylius could have the chance to cross-examine his accuser. Without the King’s presence to stand behind the prosecution and face questioning, Mylius argued, he could not have a fair trial. He did not prevail.<sup>680</sup> It is also abundantly clear that Mylius wanted to be prosecuted and to have his day in court.<sup>681</sup>

The Law Officers’ joint opinion of 23 November 1910 has very recently become available.<sup>682</sup> It formed the basis for the prosecution itself and covered - incidentally - the perceived constitutional position of the monarch as a potential witness at the trial.<sup>683</sup> What it revealed was an almost exclusive focus on the

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<sup>678</sup> Ibid, front page.

<sup>679</sup> Attorney General Sir Rufus Isaacs KC and Solicitor General Sir John Simon KC.

<sup>680</sup> For completeness, it appears – as the relevant marriage records were bought from Malta to London for the trial – that there was no record of Prince George marrying anyone on the island during that period. The woman he was claimed to have married and her family gave evidence at the trial that no such event had ever taken place.

<sup>681</sup> See R Callender Smith *The Missing Witness?* 214 – 215.

<sup>682</sup> Its discovery was confirmed on 8 October 2012 as a result of persistent enquiries directed to the Royal Archives asking them to re-check the Archive index for it and by the author drawing attention to a typescript of what he believed was a copy of the original. This occurred after *The Missing Witness* was published.

<sup>683</sup> George V apparently wanted to give evidence at the trial: see *The Times* 2 February 1911 p 7 col 6 final paragraph – Sir Rufus Isaacs QC: “I am authorised by His Majesty to state

advisability of the criminal libel prosecution having King George V as the complainant.<sup>684</sup> Knowing that the monarch wanted to give evidence so that he could clear his name and be directly vindicated rather than hiding behind the Attorney General's prosecution in his name King George V was not, initially, tendered as a witness for the prosecution. The Attorney General opened the case and submitted the monarch was not competent. Lord Alverstone, the trial judge, agreed. With that avenue closed off – and because the monarch appeared not to be compellable - there was then no further risk of the King's competence as a witness being tested. The actual purpose of the prosecution appears to have been less to punish Mylius than to vindicate the King's honour. Within the law as it then existed that result was not easy to achieve and, procedurally, may have been incorrect.<sup>685</sup> Also, as Sir John Simon, the Solicitor-General, noted in his diary:

We were very lucky to bring the Mylius case to so satisfactory an end. If Mylius, instead of justifying, had pleaded guilty and explained that he was only repeating what thousands of reputable people have said for years without being prosecuted for it, we could never have established the falsity of the lie so effectually.<sup>686</sup>

There are similarities, despite the gap of over a century, with the kind of repetitive, harassing and distressing publications which in contemporary terms appear on the Internet, social media and on websites.<sup>687</sup> The modern-day

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publicly that he was never married except to the Queen and that he never went through any ceremony of marriage except with the Queen....and that his Majesty would have attended to give evidence to this effect had he not received advice from the Law Officers of the Crown that it would be unconstitutional for him to do so.”

<sup>684</sup> Paragraph 5 of that opinion mentions, almost in passing, that: “It is not necessary, in a prosecution for publishing a libel on the King, that His Majesty should give evidence. There is no precedent for the sovereign appearing as a witness in his own court, and, upon the authorities, there is some doubt whether he can do so. Apart altogether from this last consideration, we are distinctly of the opinion that His Majesty should not take so novel a course.”

<sup>685</sup> Mylius pointed out, correctly, that there was a difference between criminal libel and seditious libel. He was charged and convicted of the former while, he argued, he had committed – but never been charged with - the latter.

<sup>686</sup> Oxford, Bodleian Library, MS Simon 2, 3 Feb 1911.

<sup>687</sup> There were two separate counts of criminal libel on the indictment, creating the repetition of the criminal conduct required by the PHA. The second arose from the publication in the 19 December 1910 edition: “The *Daily News of London* tells us that the King plans to visit India with his wife. Would the newspaper kindly tell us which wife?”

Mylius would be a persistent blogger and *The Liberator* would be a web-based, anti-monarchist and pro-republican publication.<sup>688</sup>

Given the speed of events from Mylius' arrest to conviction there is the inescapable question about whether the process was so flawed and lacking in fairness that it could not stand contemporary judicial scrutiny.<sup>689</sup> Conclusions that have been drawn from this case – as fixing a precedent rather than just citing the case as an example that the monarch cannot be compelled to give evidence - are questionable.<sup>690</sup> If the matter now went before the Supreme Court, to test the strength of the precedent or the underlying conventions, it is unlikely that the original conclusions would stand the kind of judicial scrutiny to which the case would now be subjected.

### 5.3.2 *R v Burrell (2002)*

Nearly 90 years passed since Mylius was convicted and this next case. *R v Burrell* demonstrates its effect as an uncomfortable and unreformed precedent. Senior judicial consideration in respect of this may have to occur in the future, particularly since the collapse of the trial of Paul Burrell in October 2002 for theft of items that had belonged to the late Princess Diana.<sup>691</sup> When Sir David

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<sup>688</sup> Raising the question of whether a contemporary Mylius would be more of a *Debnath* than a *Puddick* or *Fredrics* in the criminal sense of the PHA.

<sup>689</sup> The case was almost ignored in the law reports of the time. Conclusions that have been drawn from this case – as fixing a precedent rather than just citing the case as an example that the monarch cannot be compelled to give evidence - are questionable. The convention itself rested on William Blackstone's historical – and (as argued here) out-dated - enunciation some 130 years earlier in his *Commentaries* that no court had authority over the monarch because the jurisdiction "implies superiority of power" and all legal power was derived from the Sovereign.

<sup>690</sup> See Lord Bingham's reference to *R v Mylius* in the Privy Council case of *HRH Prince Jefri Bolkiah v the State of Brunei Darussalam & the Brunei Investment Agency* [2007] UKPC 63.

<sup>691</sup> That trial at the Central Criminal Court began on 14 October 2002 and came to an abrupt end on 1 November 2002 when the Prosecution offered no further evidence and invited Mr Burrell's acquittal. One of the reasons given was that the prosecution case had been opened on the basis – and proceeded on the "false premise" – that Mr Burrell "had never told anyone that he was holding anything for safe-keeping". See generally Edward Lawson QC's *The Report to His Royal Highness the Prince of Wales* 51 – 78: <http://image.guardian.co.uk/sys-files/Guardian/documents/2003/03/13/pow.pdf> .On Friday 25 October 2002 the Duke of Edinburgh mentioned to the Prince of Wales that the Queen had had a private conversation after the death of the Princess of Wales with Mr Burrell in which Mr Burrell had referred to his safekeeping of items.

Calvert-Smith was interviewed about this prosecution at the end of his five-year period as Director of Public Prosecutions (DPP)<sup>692</sup> – before he became a High Court judge – he conceded that the *Burrell* case had led to considerable criticism of the CPS.<sup>693</sup> When the issue, of whether Mr Burrell had discussed directly with the Queen what he had done and why he had done it, became live the CPS put the matter out for leading counsel’s opinion to establish whether the Queen could be called as a witness in her own court. The DPP concluded:

I am reasonably clear Her Majesty would be competent to give evidence should she wish to. The question is, if she did not wish to, could she be compelled to do so? That is an issue to which I cannot give an authoritative answer.

It was a matter that he believed could only be decided by a ruling from the House of Lords.<sup>694</sup> What is clear is that the uncertainty about the compellability of the Queen as a witness in the *Burrell* trial exposed what has been characterised as the “lack of critical comment and the deference of politicians and of lawyers about the Queen’s lack of legal clothes”.<sup>695</sup> There has since been one other unsuccessful attempt, during the inquest into the deaths of Dodi Al Fayed and Princess Diana, to secure the monarch’s input in court proceedings.<sup>696</sup>

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<sup>692</sup> *The Independent*, 3 November 2003.

<sup>693</sup> *Ibid*: From Calvert-Smith’s perspective it took until the middle of the trial for the information to become known and there was no reference to it in Paul Burrell’s defence statement when it was sent to the CPS. By the time Mr Burrell decided to make the disclosure, the trial had reached a critical point. At CPS headquarters the revelation was met with “astonishment” and there was a realisation that there was a real possibility that Mr Burrell might want to call the Queen as a defence witness.

<sup>694</sup> *Ibid*: In terms of the two-day delay between the information becoming known and then becoming public knowledge Calvert-Smith said: “It seemed to Counsel then, and I believe he was absolutely right, that it was necessary to explain to the judge, initially behind-the-scenes, what might be happening. They wanted to know exactly what Her Majesty was saying because it was fourth or fifth-hand when we first heard it. Check out exactly what it was, then have a careful look at the case and then decide whether the case should proceed. I think that was the only way it could have been handled properly.”

<sup>695</sup> David Pannick QC *Turning Queen’s evidence* Public Law 2003, 201 – 204. The aborted trial cost the taxpayer £2m, according to media estimates.

<sup>696</sup> *Mohamed Al Fayed v Assistant Coroner for West London* [2008] EWHC 713 (Admin). This was an unsuccessful judicial review, during the inquest into the deaths of the couple, of Scott Baker LJ’s decision (sitting as an Assistant Coroner) not to allow questions to be directed to the Queen. On 7 March 2008 Scott Baker LJ had stated: “Her Majesty is not, I think, a compellable witness (although I emphasise that this has not been explored in



### 5.3.3 The Practical Problems

The five warnings issued by the Queen about media intrusion during the Royal family's holidays at the private royal estates at Sandringham and Balmoral<sup>697</sup> have all included threats of action under the Act without specifying whether action would be criminal, civil or both. It is unlikely that any court considering ECHR Article 6 principles of fair trial<sup>698</sup> would entertain such complaints from the Sovereign simply by the reading of a witness statement or affidavit signed by her, denying the defendant the opportunity of testing the evidence in a civil or criminal court in cross-examination.<sup>699</sup>

As a result of the Queen's warnings and because of the obvious threats to her safety and the safety of other members of the royal family and their friends - given the persistence and prevalence of such attacks throughout history - Freedom of Information Act 2000 requests were made,<sup>700</sup> for the purposes of this thesis, to the Crown Prosecution Service (CPS), the Attorney General's office and to the police forces in Norfolk, Aberdeen and the Grampians, the Metropolitan Police and the Royal Special Protection Squad. The information requested was to find out whether there were – in place - any policies or procedures in any of these public authorities for dealing with complaints by the

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argument). It is submitted that nevertheless these questions should be put to Her Majesty and she can answer them if she wishes. What should be done thereafter would depend on the answers. I do not think I should go down this route if I do not think it would be expedient to have evidence on these matters.... I have concluded that enquiries of Her Majesty the Queen should not be made as suggested by Mr Al Fayed on the basis that they will not assist the jury to answer the statutory questions."

<http://webarchive.nationalarchives.gov.uk/20080521144222/http://www.scottbaker-inquests.gov.uk>

<sup>697</sup> <http://www.telegraph.co.uk/news/uknews/theroyalfamily/6736477/The-Queen-gets-tough-on-paparazzi-in-royal-privacy-row.html>

<sup>698</sup> As they now must under the HRA.

<sup>699</sup> Although considerations of proportionality, particularly in relation to security, might allow such evidence to be delivered to the court externally by live video link from a safe location. The procedure used to deliver such evidence in court is by way of an application to use Special Measures – particularly by way of video link – under the provisions of section 17 of the Youth Justice and Criminal Evidence Act 1999. See also *Polanski v Condé Nast Publications Limited* [2005] UKHL 10. For a contrary approach to the Article 6 issues generally see Ian Dennis *The right to confront witnesses: meanings, myths and human rights* Crim. L.R. 2010, 4, 255-274.

<sup>700</sup> On 30 December 2010.

monarch or members of the Royal family as victims, witnesses, complainants or defendants.

Without exception the response was "no". These responses – particularly from the Law Officers' Office and the CPS – indicate a procedural vacuum for how, in the event of a witness statement being required rapidly from the monarch or a member of the Royal family, that is to be achieved both practically and effectively. Given the criticism of the police and CPS procedures by Edmund Lawson QC in his review of the collapse of the Paul Burrell trial<sup>701</sup> this suggests that appropriate procedures to cover this area are still not in place and that rapid consideration should be given to addressing this area.<sup>702</sup> As noted earlier, however, issues of fairness and proportionality require – in addition – that the monarch “waive” her non-compellability if she wished to engage in the court process as a potential victim, witness or claimant.

## 5.4 The Key Protective Cases

### 5.4.1 *Thomas v NGN*

The first time the Act, arguments about Articles 8 and 10 and the proportionality balancing exercise were applied and analysed in terms of newspaper publication was in *Thomas v NGN*,<sup>703</sup> a Court of Appeal decision. *The Sun* had generated attributed celebrity notoriety for Ms Esther Thomas, a black civilian clerk working at a City of London police station, when it reported that two police sergeants had been demoted to constables after Ms Thomas reported them for making racist jokes about a Somali asylum seeker.<sup>704</sup> The paper then ran letters

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<sup>701</sup> Edward Lawson QC *The Report to His Royal Highness the Prince of Wales*.

<sup>702</sup> The mobbing of the car containing Prince Charles and Camilla, Duchess of Cornwall, in London on its way to a Royal Variety performance during the student demonstrations on Wednesday 8 December 2010 would also have required careful consideration about how the witness statements were taken from members of the Royal family when criminal proceedings were likely. Scotland Yard announced in May 2012 that no criminal proceedings would be taken in respect of that incident, avoiding the Prince of Wales and his wife being required to give any kind of evidence.

<sup>703</sup> *Thomas v NGN* [2001] EWCA Civ 1233.

<sup>704</sup> *Ibid* [5]: “She found her way 8,000 miles here from Somalia - surely she can find her way f\*\*\*ing back” to which Ms Thomas replied: 'If she was a blonde 6ft Australian you would have treated her differently'. One of the police officers responded: “I'd have taken her out

from readers attacking Ms Thomas' actions and then an article that further identified her. She claimed she received a number of racist hate letters because of the articles and had become terrified and scared to go to work.

Lord Phillips MR agreed with the County Court judge<sup>705</sup> that the meaning of 'harassment' was sufficiently clear that it was not necessary to look at what had been said in Parliament under the principle in *Pepper v Hart*<sup>706</sup> and that the definition clearly went beyond the narrow categories of stalking and neighbour disputes. *The Sun* had argued that its Article 10 freedom of expression rights should be protected.<sup>707</sup> Lord Phillips noted the requirement in Section 12 of the Human Rights Act 1998 that "courts had to take care not to interfere with journalistic freedom unless satisfied that this is necessary". *The Sun* had also argued that the Act could not be applied to press publications because harassment (as defined by s.7) would make any series of publications calculated to cause an individual distress a crime *and* a tort unless proved reasonable.<sup>708</sup>

Lord Phillips concluded that, when *The Sun's* three publications were considered together, he was satisfied that Ms Thomas had an arguable case that *The Sun* had harassed her by publishing racist criticism which was "foreseeably likely to stimulate a racist reaction" on the part of their readers and cause her distress.<sup>709</sup> To the argument that, if the test of whether a series of publications constituted harassment was to turn on whether the conduct of the

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to dinner". Ms Thomas: "You'd like to shoot us all". Police officer: "I'd have you shot if you don't get on with your work".

<sup>705</sup> HHJ R Cox at Lambeth County Court had refused to strike out her claim. *The Guardian* contributed £5,000 to help fund her action which could have resulted in £40,000 in costs had she failed.

<sup>706</sup> *Pepper v Hart* [1993] AC 593.

<sup>707</sup> Citing in particular *Nilsen and Johnsen v Norway* (2000) 30 EHRR 878 [43]: "The test of 'necessity in a democratic society' requires the Court to determine whether the 'interference' corresponded to a 'pressing social need', whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient", and *Observer and Guardian v UK* (1992)14 EHRR 153 [19].

<sup>708</sup> In earlier cases the ECtHR had decided that complaints about media intrusion into the private lives of individuals were inadmissible because the remedies provided by English law were adequate: *Winer v United Kingdom* [1986] 25 EHRR CD 154 and *Earl Spencer and Countess Spencer v United Kingdom* [1998] 25 EHRR CD 105. .

<sup>709</sup> *Thomas v NGN* [2001] EWCA Civ 1233 [49].

publisher was reasonable, then that test lacked the certainty that the Strasbourg court required if it was to find that a restriction on freedom of expression was prescribed by law, he stated:

On my analysis, the test requires the publisher to consider whether a proposed series of articles, which is likely to cause distress to an individual, will constitute an abuse of the freedom of the press which the pressing social needs of a democratic society require should be curbed. This is a familiar test and not one which offends against Strasbourg's requirement of certainty.<sup>710</sup>

Article 10 (1) sets out the right of freedom of expression, stating that it includes the freedom to hold “opinions and to receive and impart information and ideas without interference by public authority....”. Article 10 (2) qualifies the right “since it carries with it duties and responsibilities”. The qualifications include the protection of “public safety” and prevention of “disorder or crime”. Harassment falls clearly into both of those categories. On that basis the Court of Appeal judgement was a proportionate decision taken in line with those Article 10 qualifications, allowing Ms Thomas the opportunity to take the matter to trial.

#### **5.4.2 *Howlett v Holding***

Harassment by publication can sometimes take place in situations that are outside the use of traditional media. *Howlett v Holding* is one such example.<sup>711</sup> Eady J granted an injunction under the Act to the claimant preventing the defendant from causing aircraft to fly past with banners describing her in derogatory terms, dropping abusive leaflets or putting her under surveillance by a private detective agency in an attempt to show she was a benefits cheat. She was, in fact, an attributed celebrity as local councillor who had spoken out against a planning application presented by a company with which the defendant was involved. The campaign of harassment had been going on intermittently for between four and five years.<sup>712</sup> He argued that any injunction

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<sup>710</sup> Ibid [50].

<sup>711</sup> *Howlett v Holding* [2006] EWHC 41 (QB).

<sup>712</sup> Mrs Howlett had successfully brought to libel actions against Mr Holding in respect of allegations of dishonesty made by him about her. In the second libel action Mr Howlett had given evidence that he wanted to make her life "living hell" by way of retribution for

restraining him from flying banners with messages would constitute an infringement of his Article 10 rights to free speech. The claimant's Article 8 rights were engaged in relation to her privacy and in respect of the protection of her physical and psychological integrity. Eady J, keeping his focus on the key issue, observed:

As always, one must pay the closest regard to proportionality. Mrs Howlett is not seeking to restrain Mr Holding from exercising his right of free speech, even to make derogatory allegations about her, for all purposes. If he has genuine concerns, even now, that Mrs Howlett may yet be breaking the law, he can go to the appropriate authorities and report those concerns. Indeed, he has already done so...[but] the anguish that Mrs Howlett has had to suffer at Mr Holding's hands over the last four years is out of all proportion to the value to be attached to the exercise of his right of free speech by the methods he has chosen.<sup>713</sup>

Applying the necessary "intense focus" and addressing "the important issue of proportionality", Eady J concluded that there was

....only one answer. Mrs Howlett is entitled to call upon the protection of the law and to have Mr Holding's acts of aerial harassment restrained by injunction.<sup>714</sup>

He criticised Mr Holding for trying to "goad" Mrs Howlett into launching a third set of libel proceedings, describing what he had done as "using the surveillance as a weapon of attack,"<sup>715</sup> dismissing the claim of the s.1 (3) (c) defence as with "no rational basis".

It is necessary, however, to remember that Parliament's objective was to prevent stalking and other forms of harassment and, accordingly, that arguments of "reasonableness" for the purpose of s.1 (3) (c) need to be scrutinised carefully with that in mind. The terminology needs to be interpreted alongside the concepts of necessity and proportionality, as

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her daring to speak out publicly in her capacity as a local councillor, where she had qualified privilege.

<sup>713</sup> *Howlett v Holding* [12 – 13].

<sup>714</sup> *Ibid* [14].

<sup>715</sup> *Ibid* [18].

contemplated by Article 8(2).....Here I see no reason at all why Mr Holding's behaviour should be classified as reasonable.<sup>716</sup>

Eady J pointed out that the Article 10 right, in terms of the proportionality balancing exercise, did not extend to protecting remarks directly inconsistent with the ECHR's underlying values.<sup>717</sup> He noted that the defendant was a rich man who used his wealth to manipulate or subvert court orders in a cruel and cynical way. In terms of surveillance and having Mrs Howlett followed in the street, causing her anxiety because she never knew when he might strike, and praying in aid *Peck v United Kingdom*,<sup>718</sup> he concluded:

It may now safely be said that it is not possible for those who wish to intrude upon the lives of individuals through surveillance, and associated photography, to rely upon a rigid distinction being drawn in their favour between what takes place in private and activities capable of being witnessed in a public place by other people.<sup>719</sup>

In giving short shrift to the attempt to use exceptions or defences in s.1 (3) of the Act under the guise of "preventing or detecting crime" Eady J retained a narrow focus. In terms of s.1 (3) (c) of the Act, and the Article 8 requirement that any encroachment on a citizen's privacy rights would have to be "in accordance with the law", he observed that it was necessary to consider whether there were any legal constraints restricting surveillance outside the specific context of the Act. He concluded that was not the case.<sup>720</sup> In effect he construed "reasonableness" in terms of proportionality and the public interest.

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<sup>716</sup> Ibid [35].

<sup>717</sup> *Jersild v Denmark* (1994) 19 EHRR [35] and *Lehideux & Isorni v France* (1998) 30 EHRR [53].

<sup>718</sup> *Peck v United Kingdom* (2003) 26 EHRR 41.

<sup>719</sup> *Howlett v Holding* [26].

<sup>720</sup> Part II of the Regulation of Investigatory Powers Act 2000 required that any surveillance, even by the law enforcement agencies, would have to be authorised in writing. Mr Holding did not have that authorisation.

### 5.4.3 Paparazzi

A significant proportion of PHA cases have come from litigation instigated or threatened by celebrities of all categories and are aimed at the activities of paparazzi photographers. Early-adopters<sup>721</sup> were Sienna Miller, Lily Allen and Amy Winehouse. In November 2008 Sienna Miller settled an action with the Big Pictures agency<sup>722</sup> after a “campaign of harassment” including confrontations outside her home, dangerous car chases and pursuit while out walking her dogs. More recent examples, to prevent over-bearing paparazzi activity, include Hugh Grant’s girlfriend (and the mother of his child),<sup>723</sup> Cheryl Cole,<sup>724</sup> Lara Stone and her husband David Walliams,<sup>725</sup> The “boy band” One Direction’s Harry Styles was awarded the injunction, in particular, on safety rather than outright harassment grounds, to prevent close pursuit by an unnamed paparazzo on a motor scooter.<sup>726</sup>

Requests to the media by the royal family not to publish photographs of the monarchy outside their official duties are becoming commonplace with reminders about the PHA. Typical was a warning from Clarence House in October 2013 on behalf of the Duchess of Cambridge that proceedings under the Act would be taken if pictures of the Duchess of Cambridge walking to shop

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<sup>721</sup> As noted by Andrew Scott *Flash Flood or Slow Burn? Celebrities, photographers and the Protection from Harassment Act* (2009) *Media & Arts Law Review* 14(4) 397- 424.

<sup>722</sup> £37,000 plus costs together with a further £35,000 damages and costs from *The Sun/News of the World* and £15,000 from *The Star*. She then recovered an agreed further £100,000 damages and costs for harassment from News International as a lead defendant in the phone-hacking litigation before Vos J in 2012.

<sup>723</sup> *Ting Lan Hong v XYZ* [2011] EWHC 2995 (QB): When Hugh Grant attended Ms Hong’s home he asked the photographers if there was anything he could do or say to make them leave a new and frightened young mother in peace. “They said ‘show us the baby’. He refused. He asked if they thought it was acceptable for grown men to be harassing and frightening a mother and baby for commercial profit. They shrugged and took more pictures.” Tugendhat J [19]. She had earlier received anonymous telephone calls telling her to tell Hugh Grant to “shut the fuck up” when he appeared on *Question Time* to talk about the phone-hacking scandal. Ms Hong is taking misuse of private information action against Associated Newspapers for subsequent events.

<sup>724</sup> *Cheryl Cole v XYZ* (unreported) 15 June 2011: injunction granted by Eady J.

<sup>725</sup> *Stone and Walliams v XYZ* [2012] EWHC 3184 (QB).

<sup>726</sup> *Harry Styles v Paparazzi AAA* <http://inform.wordpress.com/2014/03/11/news-harry-styles-harassment-case-photographers-consent-to-permanent-injunctions/>

The injunction prevents “Paparazzi AAA and others” from pursuing the singer by car or motorbike. It also stops them placing him under surveillance, loitering or waiting within 50 metres of his home, and photographing him in such circumstances.

in Oxford Street were published.<sup>727</sup> That was then followed by an email from Clarence House in November 2013 asking for the removal of photographs of Prince Harry on a trip to the fast food outlet Nandos.<sup>728</sup> These warnings reflect a *Von Hannover 1* approach to such activity, ignoring, perhaps, Strasbourg's increasingly liberal change of emphasis on this issue in *Von Hannover 2* and *Von Hannover 3* and described in Chapter 3.<sup>729</sup>

The artist known as "Banksy" – an achieved celebrity - presents an interesting practical problem in relation to a series of covertly-taken photographs that purport to identify him - and which apparently show him at work creating his signature street art – and the Act.<sup>730</sup> Those who have the pictures accept that they were taken surreptitiously and as part of a course of conduct to expose Banksy's identity. Banksy, himself, has a commercial interest in ensuring that his identity remains his own private "property". In any litigation that arises out of this situation he will wish to maintain his anonymity. He may then be faced with the s.1 (3) defence relying on the photographic surveillance being pursued "for the purpose of preventing or detecting crime," namely criminal damage.<sup>731</sup>

#### **5.4.4 Anonymity and the Act**

In *ZAM v CFW*<sup>732</sup> the case combined injunctive relief and anonymity together to restrain publication (subsequently breached) of defamatory allegations in

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<sup>727</sup> Friday 25 October 2013: *The Sun* received a warning that if it used a picture of the Duchess of Cambridge "out and about" then PHA action would be taken on the basis that she must have been followed by a professional photographer for the picture to be taken. The picture was not used.

<sup>728</sup> <http://www.pressgazette.co.uk/royal-family-urges-press-stop-pursuit-and-harassment-royals-outside-official-duties> . The images, taken inside the restaurant were picked up by the *Mail Online* and the *Daily Mirror*. Both publications subsequently removed the photographs. The Note to Editors said an increasing number of photographs were being taken and result in "pursuit and harassment". The Editor's Code of Practice states: "It is unacceptable to photograph individuals in private places without their consent...Private places are public or private property where there is a reasonable expectation of privacy."

<sup>729</sup> Chapter 3: 5.4.

<sup>730</sup> The author is aware that two different national newspapers have paid £80,000 and £30,000 for pictures that reveal Banksy's identity.

<sup>731</sup> This could also provide the platform for a thorough exploration of Banksy's – and others' personal image rights – in English law.

<sup>732</sup> *ZAM v CFW* [2011] EWHC 476 (QB).



parallel with the PHA, to prevent harassment by publication of such material.<sup>733</sup> Key factors in Tugendhat J's initial decision included threats of blackmail by one of the defendants as well as failure to submit a credible defence, despite the serious nature of the allegations. *ZAM's* wife was a beneficiary under substantial family trusts: *CFW* was her sister (also a beneficiary of the trusts) and her sister's husband (*TFW*). The allegations related to financial impropriety suggesting *ZAM* had misappropriated money from the trusts and demanded the liquidation of assets. Tugendhat J was satisfied that, in addition to the allegations being seriously defamatory, the conduct of the defendants (particularly *TFW*) amounted to a clear case of harassment under the Act. Without an injunction there would continue to be a course of conduct amounting to harassment. He accepted *ZAM's* case that *TFW* both understood and intended that publication of the allegations would cause alarm and distress, key elements of harassment.<sup>734</sup>

This case brought together an unusual combination of facts: the serious nature of the allegations, the harassment element, the lack of justification or any other defence and the clear and aggressive pursuit of publication in breach of the interim injunction.<sup>735</sup> *TFW* failed to appear at trial or produce any evidence to support his allegations, some of which appeared on the Internet. As one commentator noted<sup>736</sup> Tugendhat J stated that he was granting anonymity in the case under the court's jurisdiction "in accordance with s.6 of the Human Rights Act 1998 and CPR 39.2 (4)". He did not state exactly which Convention right the court was protecting. He referred to anonymity orders frequently being

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<sup>733</sup> This is a rare example of an interim injunction in libel proceedings being granted together with anonymity in a libel action.

<sup>734</sup> *ZAM v CFW and TFW* [2013] EWHC 662 (QB) [118]: Although there were eight publications, there was a single award of damages for defamation (totalling £120,000). Since the harassment came from the defamatory publications, it was not appropriate to award of damages under the PHA claim.

<sup>735</sup> *Ibid*: [117]: "The allegations of dishonesty in financial matters go to the heart of his professional career in finance....The sexual allegations go to the heart of his family life, and to the benevolent voluntary activities which also formed an important part of his life....an allegation of being a paedophile is...so foul that even the most categorical vindication does not prevent a person so accused of having his name permanently linked with the allegation."

<sup>736</sup> Jennifer Agate *A collector's item: interim injunctions and anonymity in libel action* Ent LR 2011 22 (6), 181 – 183.

made where blackmail was alleged and cited a number of privacy cases to that effect. Anonymity in the case appeared to have been granted to protect ZAM's reputation under Article 8, apparently actively applying the Supreme Court decision in *Re Guardian News and Media Ltd*<sup>737</sup> that the right to protection of reputation was a right which – as an element of private life – fell within the scope of Article 8. It was the first time that an anonymity order had been granted on that basis. The development of anonymity orders in harassment (and private information) cases is a significant reinforcement which benefits all categories of celebrity and ordinary members of the public equally.<sup>738</sup> Tugendhat J did not, however, explain why he did not institute contempt proceedings against *TFW*.<sup>739</sup>

## 5.5 Permitted Interference: s.1 (3) of the Act

### 5.5.1 *Trimingham v Associated Newspapers*

The permitted statutory intrusions by virtue of s.1 (3) of the Act are unsuccessful when presented in the context of a campaign that one party claims is reasonable but which the court concludes is malign or malicious in the *Howlett v Holding* sense.<sup>740</sup> Given that the focus of the PHA is to prevent unwarranted intrusions then civil proceedings, with the lower burden of proof embodied in the balance of probabilities, might be thought to signal a more effective, straightforward and a less stressful method of protecting celebrity privacy rights. *Trimingham v Associated Newspapers*<sup>741</sup> is, against that observation, an example of the unpredictability of the litigation process even when there is a demonstrable focus on proportionality and the “ultimate balancing test”. Carina

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<sup>737</sup> *Re Guardian News and Media Ltd* [2010] UKSC 1.

<sup>738</sup> Although Imogen Thomas – a model who was identified when Ryan Giggs was able to conduct most of his privacy litigation as CTB – would probably disagree.

<sup>739</sup> Ibid: [106] “[*TFW*] has a history of defiance of the Interim Injunctions, misinforming the public as to what the action is about, and manipulation of the national press....the fact that the Interim Injunctions were inaccurately reported in major national newspapers may be relevant to my findings as to the number of readers the Second Defendant has been able to attract to his website publications, and thus to damages, as explained below.”

<sup>740</sup> Or as in *Hayes v Willoughby* [2013] UKSC 17.

<sup>741</sup> *Trimingham v Associated Newspapers* [2012] EWHC 1296 (QB).

Trimingham – the bi-sexual partner of former MP and Cabinet Minister Chris Huhne - abandoned her appeal against Tugendhat J's eventual decision<sup>742</sup> shortly after Mr Huhne and his former wife were convicted of conspiracy to pervert the course of justice. For reasons discussed below the intrusion permitted by Tugendhat J's decision merited further appellate scrutiny.

When the trial opened before him,<sup>743</sup> it was adjourned after a heavy hint from the Judge to her counsel that the pleadings should be amended to include a claim under the PHA.<sup>744</sup> In the action itself she complained about the publication of details of her private civil partnership ceremony, of her private conversations with friends, and of details of her sexual life. The headlines to two early stories (of a total of 65) set the tone of others: *Chris Huhne's bisexual lover: Life and very different loves of the PR girl in Doc Martens*<sup>745</sup> and *First picture of Chris Huhne's lover and the lesbian civil partner she has left broken hearted*.<sup>746</sup> The stories included claims that she faced the “formidable task of transforming herself into a cabinet minister's consort”, and that with her “boyish cropped, spiky haircut and love of Dr Marten boots and jeans, could be forgiven for feeling rather out of place” and that she “does not fit the traditional feminine mould of ‘political wife’”. There was also a comment piece describing her as a “comedy lesbian from central casting” and “Millie Tant, straight from the pages of *Viz* magazine”.<sup>747</sup>

In his judgment Tugendhat J noted that *Thomas v NGN*<sup>748</sup> went to the Court of Appeal only in respect of the refusal of the County Court judge to strike out Ms

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<sup>742</sup> On 18 February 2013.

<sup>743</sup> On 4 October 2011: “In the course of the hearing Mr Justice Tugendhat said that he thought it would be extremely unsatisfactory for him to try the case without considering whether the pleaded facts also amounted to harassment. On the second day the Claimant applied to amend to include a harassment claim. The Judge allowed the amendment...and adjourned the trial.” <http://inform.wordpress.com/2011/10/05/news-trimingham-privacy-trial-adjourned/>

<sup>744</sup> Rather than using the same details to aggravate the misuse of private information claim for damages.

<sup>745</sup> 21 June 2010.

<sup>746</sup> 22 June 2010.

<sup>747</sup> Richard Littlejohn *Daily Mail* 24 June 2010.

<sup>748</sup> *Thomas v NGN* [2001] EWCA Civ 1233

Thomas' claim, not on the concluded result of the action itself.<sup>749</sup> No-one, subsequently, had claimed successfully under the Act against an English newspaper.<sup>750</sup> Reflecting on what Lord Phillips had said in *Thomas*, Tugendhat J explored the dynamics of s.1 (3) (c) of the Act thus:

....for the court to comply with HRA s.3, it must hold that a course of conduct in the form of journalistic speech is reasonable under PHA s.1 (3) (c) unless, in the particular circumstances of the case, the course of conduct is so unreasonable that it is necessary (in the sense of a pressing social need) and proportionate to prohibit or sanction the speech in pursuit of one of the aims listed in Art 10 (2), including, in particular, for the protection of the rights of others under Art 8. The word "targeted" is not in the statute. I take Lord Phillips to be using it to give guidance as to what is meant in s.7 (3) by the words "conduct in relation to ... a person": those words are to be interpreted restrictively to comply with HRA s.3.<sup>751</sup>

In short, Lord Phillips' test required the publisher to consider whether a series of articles, which were likely to cause distress to an individual, would "constitute an abuse of the freedom of press which the pressing social needs of a democratic society require should be curbed". Applying Lord Steyn's *Re S* stage (iv) terms - the proportionality test or "ultimate balancing test" - the PHA s.1 (3) (c) required the court to apply that test to "the pursuit of the course of conduct".<sup>752</sup>

Tugendhat J then summarised the issues he had to decide in the case. The parties accepted that publishing 65 articles amounted to a course of conduct. If the conduct was not reasonable then the distress suffered by Ms Trimingham amounted to harassment.

So the principal issues in the present case are: (1) was the distress that Ms Trimingham suffered the result of

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<sup>749</sup> *Trimingham v Associated Newspapers* [2012] EWHC 1296 (QB) [50]. The result of *Thomas* was never publicised as the matter settled between the parties.

<sup>750</sup> And, in Northern Ireland, an action against a newspaper had failed: *King v Sunday Newspapers Ltd* [2010] NIQB 107; [2011] NICA 8. See also *Fulton v Sunday Newspapers Ltd* [2014] NIQB 35 (at 5.2 below).

<sup>751</sup> *Trimingham v Associated Newspapers* [2012] EWHC 1296 (QB) [53].

<sup>752</sup> *Ibid* [55].

the course of conduct, in the form of speech, that she complains of? (2) if so, ought the Defendant to have known that that course of conduct amounted to harassment? (3) if so, has the Defendant shown that the pursuit of that course of conduct was reasonable (in the sense defined in *Thomas*)? To both questions (1) and (2) there are subsidiary questions: was Ms Trimingham a purely private figure or not? and, either way, was she in other respects a person with a personality known to the Defendant such that it ought not [sic] to have known that the course of conduct amounted to harassment?<sup>753</sup>

He considered whether excessive repetition – 65 taunting articles referring to her bisexuality and appearance - might create a course of conduct amounting to harassment. Did these cross the line from what was reasonable to what was unreasonable within the meaning of the PHA s.1 (3) (c)?<sup>754</sup>

But repetitious publications of the words complained of in this case do not fit easily into that analysis. In one sense the Defendant may be said to have targeted Ms Trimingham, because it names her. But the Defendant has not targeted her in a way that any other defendant has been alleged to harass a claimant, so far as I am aware (e.g. sending numerous messages, making numerous demands, and following, and threatening her). This is because each time the Defendant has named Ms Trimingham it has done so in a story in which the main character is Mr Huhne. And each publication has been prompted by a particular event in Mr Huhne's public career or life, or some other newsworthy event, such as a party conference.<sup>755</sup>

He decided that the main target of the articles was Mr Huhne. Ms Trimingham was named only because of the “very important secondary role” she played in the events relating to him and, factually, was named in less than half of those articles.<sup>756</sup> He made it clear that he was not deciding that a “secondary character” could never succeed but only that she could not, on the basis of

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<sup>753</sup> Ibid [111].

<sup>754</sup> Ibid [268].

<sup>755</sup> Ibid [269].

<sup>756</sup> Ibid [270].

repetition or taunting arising from repetition about her “being considered in isolation from the repetition and fresh reporting of stories about Mr Huhne”.<sup>757</sup>

I find that the words complained of are “in relation to her”...I also find that because each occasion on which the words complained of have been repeated is an occasion related to a newsworthy event relating to Mr Huhne, the fact of the repetition, even 65 times, does not have the effect that speech which is otherwise ‘reasonable’ (within the meaning of the PHA s.1(3)(c)) crosses the line, so as to amount to harassment.<sup>758</sup>

So, when he balanced the factors required by *Re S* it was not “necessary or proportionate” to make any injunction in the terms sought or to make a finding of harassment under the Act.<sup>759</sup> In deciding that all of her claims failed, he accepted her assertion that that repeated mocking of a person by a national newspaper by reference to their sexual orientation would almost inevitably be so oppressive as to amount to harassment. However, he found that because the words “bisexual” and “lesbian” were factually accurate words<sup>760</sup> which were “not normally understood to be pejorative by a reasonable person”. He did not accept that the references to “spiky hair” and “DM boots” were anything more than factual references to her “appearance”.<sup>761</sup> That distress - as a result of the publication of references to her sexuality and her looks - was no different to the distress caused by the general reporting of her affair with Mr Huhne MP.

In using the word “reasonable” Tugendhat J gave it the special meaning he believed he was required to give it in order to interpret s.1 (3) (c) of the Act compatibly with Article 10 and not whether “what the Defendant has done is reasonable in any other meaning of the word reasonable”. All any court could do was to find whether or not it was “necessary and proportionate to sanction

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<sup>757</sup> Ibid [271].

<sup>758</sup> Ibid [272].

<sup>759</sup> Ibid [273].

<sup>760</sup> Ibid [257].

<sup>761</sup> Ibid [296 – 297].

or prohibit a particular publication on one of the grounds specified in Art 10(2)".<sup>762</sup>

The Court of Appeal<sup>763</sup> – before the appeal was withdrawn – was told that the case would:

have significant ramifications as more and more people nowadays find themselves in the 'public eye'. In his report Lord Justice Leveson urges the new press regulator to 'equip itself to deal with complaints alleging discrimination'. He criticises the media's representation of women and minorities and refers to prejudicial and pejorative references including of sexual orientation.<sup>764</sup> This appeal will analyse this point in depth and be important both in terms of the implications for publishers and could well provide guidance on how a new Code could be drafted.

On any reading of Tugendhat J's judgement there is scope for arguing that he misapplied the test for determining whether references were pejorative. He focussed almost entirely on whether the words "bisexual" and "lesbian" were - of themselves - pejorative, without sufficiently considering the context in which they were used. That separation of comments about Ms Trimingham's sexuality and comments about her appearance seems to miss the fact that those negative references to her appearance – by continually casting her as masculine and unattractive, and having the look of a laughable lesbian cartoon character – created a pejorative stereotyping about her sexuality. Also he may have erred in assessing whether the newspapers' references to her sexuality were irrelevant by applying the wrong test and allowing inappropriate deference to editorial style. References to a person's sexuality – as well as their race, ethnicity, and other personal characteristics – merit special protection and required careful scrutiny, beyond the broad, general approach that he adopted which largely deferred to editorial discretion.<sup>765</sup> On causation, he concluded that references to her sexuality caused her no distress or damage: that is a strange

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<sup>762</sup> Ibid [340].

<sup>763</sup> In granting permission to appeal on 24 September 2012 Lord Justice Laws emphasised that there were "significant issues" as to the Judge's treatment of the harassment claim.

<sup>764</sup> At 3.151 – 3.157 of the *Leveson Report*.

<sup>765</sup> Pejorative and irrelevant references to sexuality are expressly precluded by Clause 12 of the PCC Editors Code. It was a ground of the appeal that the Judge erred by failing to take the PCC Code into account rather than finding – as he did - that at most the Code provided some evidence of what a reasonable journalist ought to know.

finding. He held she was not a private individual because of her PR work for leading politicians and because of her sexual relationship with Mr Huhne. He seems to have glossed over the point that, in terms of the PHA claim, *any* public figure might be equally upset by comments about their sexuality – or indeed their race, or ethnicity – as a private figure might be. Any public figure facing a repetitive press campaign focussing on the fact that they had a big nose and had Jewish ethnicity would be likely to feel harassed over and above issues of discrimination. With the appeal withdrawn, however, none of these issues can be tested. The decision as it stands does, however, provide a detailed exploration of the intrusion permitted by s.1 (3) (c) of the Act in the context of celebrities' Article 8 rights as against newspapers' Article 10 rights.

### **5.5.2 *Fulton v Sunday Newspapers***

Section 1 (3) in the context of the troubles in Northern Ireland was examined in *Fulton v Sunday Newspapers Ltd*.<sup>766</sup> It is a harassment case that goes to the heart of both s.1 (3) (a) and (c). It highlights – in the special circumstances that still obtain in in relation to that Province – both the “investigative” and “reasonableness” elements of journalism and the public interest. It arose from the attributed celebrity notoriety of Mr Colin Fulton and the newspaper’s “relentless publication”, since September 2012, of allegations that he was associated with the UVF either as a member or leader. The Police Service for Northern Ireland (PSNI) had warned Mr Fulton that he had been the target of five death threats from dissident Republicans.

He wanted an injunction restraining the newspaper from harassing him under the provisions of the Protection from Harassment (Northern Ireland) Order 1997<sup>767</sup> and from continuing with publications given the material risk to his life caused by them.<sup>768</sup> Gillen J, in refusing the injunction, made only one mention

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<sup>766</sup> *Fulton v Sunday Newspapers Ltd* [2014] NIQB 35.

<sup>767</sup> Article 3 of the NI Order mirrors the *actus reus* and *mens rea* requirements in the English PHA and, identically, does not apply to a “course of conduct” if the person who pursued it shows: “(a) that it was pursued for the purpose of preventing or detecting crime or....(c) that in the particular circumstances the pursuit of the course of conduct was reasonable.”

<sup>768</sup> In respect of ECHR Article 2.



of proportionality (as will be seen). He focussed on Article 10 and the public interest in the exposure of serious crime and reporting on paramilitaries in the Province.<sup>769</sup> He concluded:

it is in the public interest that investigative journalism should not be impeded where it is publishing legitimate information concerning serious criminal activity. Quite apart from the UVF association...the newspaper has published allegations of deeply troubling criminal activity on the part of this plaintiff associated with the UVF. The court has a duty to protect the doctrine of freedom of expression. This is an objective value to which the courts must remain committed.<sup>770</sup>

Gillen J believed that the value of freedom of speech lay in the “public interest that investigative journalism be free to reveal the full nature of criminal activity” that might be “unfolding in a community bedevilled by paramilitary activities”. Serious allegations have been made about Mr Fulton including thefts from occupied houses, “punishment attacks on teenagers of a particularly pernicious nature”, an attack on three girls, and “participation in illegal drinking clubs in which drugs are sold in addition to serious involvement in the UVF”.<sup>771</sup>

Apart from the issue of freedom of expression and the right to investigate paramilitary and other criminal activities in the community, it seems to me it would be logistically extremely difficult to separate his alleged involvement in these crimes...from his alleged participation in the UVF and his association with leading members. It would be neither proportionate nor practical for such a division to be made in the event.<sup>772</sup>

Gillen J, balancing everything, noted that Mr Fulton had not issued a libel writ because of “financial constraints”.

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<sup>769</sup> It is possible to imagine similar scenarios arising on the UK mainland - in the future - about the activities of high profile, attributed celebrity religious leaders and issues in relation to religious fundamentalism and jihad.

<sup>770</sup> *Fulton v Sunday Newspapers Ltd* [19].

<sup>771</sup> *Ibid* [19].

<sup>772</sup> *Ibid* [19].

## 5.6 Access to the Civil Protection of the Act

The *Howlett*, *Brookes* and *Trimingham* cases point up a fundamental “gateway” issue in relation to the protection of private life rights: the problem of gaining access to the civil processes and procedure to assert rights generally and to seek civil PHA protection. Ms Trimingham’s decision to withdraw her appeal is unlikely to have occurred because of a lack of funding. Mr Huhne is a wealthy man. It may owe more to the attributed celebrity couple wishing to present a lower media profile and to move on with Mr Huhne’s post-imprisonment rehabilitation. Had the Court of Appeal found in her favour it is likely that the matter would have been taken to the Supreme Court and – thereafter – to Strasbourg, keeping the matter (and the descriptions used of Ms Trimingham) alive for the media and in the public eye for months if not years.

Mrs Brookes found solicitors prepared to act for her on a *pro bono* basis and Mrs Howlett was fortunate to find lawyers to act for her on the basis of a Conditional Fee Agreement (CFA). The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)<sup>773</sup> introduced radical changes to CFAs recommended by Lord Justice Jackson<sup>774</sup> in 2010. Following consultation, however, the Government announced in March 2013 that CFAs for privacy and defamation proceedings have been retained for the moment.<sup>775</sup> As was seen in Chapter 3 *Campbell v MGN*<sup>776</sup> carried a CFA “sting” to it for the *Daily Mirror* (the losing party). The “sting” was corrected in MGN’s favour on an Article 10 appeal to Strasbourg.<sup>777</sup> However, that case emphasised that it is not just the modestly-resourced who seek protection for their legal costs. Moreover, the high evidential, public interest and burden of proof hurdles that need to be cleared to get the CPS to prosecute – particularly in the light of the DPP’s 20 July 2013 guidelines in respect of social media prosecutions – explain why the civil

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<sup>773</sup> LASPO s.44 – s.46.

<sup>774</sup> Review of Civil Litigation Costs 2010.

<sup>775</sup> Via the Conditional Fee Agreements Order 2013 in force from 1 April 2013.

<sup>776</sup> *Campbell v MGN* [2004] UKHL 22.

<sup>777</sup> *MGN v United Kingdom* (Case No.39401/04) [2011] ECHR 66: the judgment found that the imposition of success fees of 100 % in media cases was a breach of Article 10. The decision does not suggest that all success fees are inconsistent with Convention rights. A balance had to be struck between access to justice and other relevant rights: where that was struck was always “fact sensitive”.

remedies within the PHA will remain attractive to harassed celebrities of all categories as well as those individuals on the periphery - like personal assistants, colleagues and partners – whose phones have been hacked.

## 5.7 Summary

The Act provides a broad and flexible method for action and enforcement – particularly because “harassment” is not defined and therefore its reach is greater - in both the criminal and the civil courts. It can prohibit surreptitious, unwanted photography,<sup>778</sup> surveillance, telephoning and obtaining access to another person’s home or property.<sup>779</sup> There are other pieces of common law and statutory legislation which can be used separately but none which are quite as broad in the spectrum of activities which can be captured by this Act. Other criminal legislation is made more effective by the existence of the possibility of ROs which owe their existence and breadth to this Act.

The PHA provides a route for younger members of the royal family to complain to the CPS and to seek a criminal prosecution with a view to obtaining an RO whether or not it achieves a conviction. That RO, depending on the span of defendants in the charge, could apply to anyone who “aided, abetted, counselled or procured” the harassment that was the subject of the complaint. Such action would properly become a cause célèbre.

If there is a problem then it is in terms of getting the police and prosecutors to address the criminal conduct or, on the civil side, gaining access to the remedies.<sup>780</sup> That issue is likely to grow in the future. The availability of all the new methods of communication and forums has increased the range of ways in which individuals can be harassed and the volume of requests being made to prosecutors, lawyers generally and the courts for appropriate remedies. Harassment and repeated unlawful surveillance raise issues in terms of misuse

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<sup>778</sup> *Crawford v CPS* [2008] EWHC 148 (Admin): harassing includes surveillance and surreptitious photography when carried out by man on his former wife and her new partner.

<sup>779</sup> Even in situations which do *not* have elements of trespass.

<sup>780</sup> See also: Simon Sellers *Online privacy: do we have it and do we want it? A review of the risks and UK case law* EIPR 2011, 33 (1), 9 – 17.

of personal data which are explored in detail in the next, and final, substantive chapter.

## CHAPTER 6

### Data Protection as a Privacy Remedy

#### 6.1 Introduction

This final, substantive chapter examines the third pillar of statutory privacy legislation, the Data Protection Act 1998 (the Act).<sup>781</sup> It is, after all, the only piece of English legislation which is specifically directed at protecting personal information and an individual's privacy in respect of it. Like the PHA, discussed in the previous chapter, the statute operates through a number of different enablers. As with the PHA, attributed and achieved celebrities were "early adopters" with cases like *Campbell*, *Douglas* and *Murray*. In each of those early cases, while the data protection claim was pleaded in the action, it was relegated to an adjunct, secondary position. Harassment is a topic that makes easy media headlines: data protection sounds like a concept that is more likely to lead to somnolence rather to individuals being put in fear.

The domestic history leading up to the Act did nothing to dispel that view.<sup>782</sup> The sentencing remarks of Saunders J in *R v Coulson & others* show the pernicious effects of that misperception.<sup>783</sup> Breach of confidence and misuse of

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<sup>781</sup> The Act came into force on 1 March 2000 - replacing the moribund Data Protection Act 1984, the Access to Personal Files Act 1987 and the Access to Health Records Act 1990 - thus pre-dating by six months the statutory recognition in the HRA 1998 of Article 8 privacy and Article 10 freedom of speech rights which became effective on 2 October 2000. Comments from politicians and the media about "judge-made" privacy law being created out of the HRA ignored what Parliament itself had created in the DPA. Its genesis was in the European Data Protection Directive 95/46/EC. The 1984 DPA contained some elements of the now-familiar Data Protection principles but it did not recognise an individual's right to privacy.

<sup>782</sup> Ian J Lloyd, *Information Technology Law* (6<sup>th</sup> Edn OUP 2011), 29 – 33, contains a revealing summary of the history of data protection in the UK, its inbuilt administrative deficiencies which have hobbled its regulatory potential and the political lack of will surrounding the area generally since Kenneth Baker MP's 1969 Data Surveillance Bill and Brian Walden MP's 1969 Privacy Bill both failed to gain traction.

<sup>783</sup> <http://www.judiciary.gov.uk/wp-content/uploads/2014/07/sentencing-remarks-mr-j-saunders-r-v-coulson-others.pdf>

private information were the litigation issues which received the lion's share of the judicial and academic attention in those high-profile celebrity cases leaving the data protection breaches in them relegated to a "technical" area of the process which did nothing to bring to data protection the celebrity status it has recently achieved as a result of the *Google Spain* decision.<sup>784</sup> Yet, with the application of the Act's data protection principles and its language directing consideration towards proportionality in respect of the protection of personal data, that same Act could have already produced a *Google Spain* result here on similar facts and a complaint to the Commissioner.<sup>785</sup> Part of what will be examined in this chapter is how the Act has laid so moribund for so long as an active privacy remedy.

Unlike the PHA, the Act did not leave enforcement on the divide between the criminal law via Crown Prosecution Service (CPS) prosecution or by action in the civil courts. Instead it created a Regulator - the Commissioner - who has both Regulatory and Enforcement powers through a variety of civil and criminal procedures at his disposal. It also created a statutory tort available for individuals – as well as all categories of celebrity - who suffer from breaches of the principles in the Act.<sup>786</sup>

It is not an elegant or easily accessible piece of Parliamentary drafting.<sup>787</sup> One Lord Chancellor called it "incomprehensible".<sup>788</sup> It has been considered almost as an ugly relation in the law of privacy and its occasional appearances in law

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<sup>784</sup> Case C-131/12 *Google Spain and Google Inc v AEPD and González*.

<sup>785</sup> Or, on appeal, to the Information Rights Tribunal.

<sup>786</sup> It has a statutory relative, the Freedom of Information Act 2000 (FOIA), whose title disguises the fact that s.40 FOIA protects personal data via the absolute exemption "gateway" which opens directly into the provisions of the DPA.

<sup>787</sup> Historically there has been criticism about whether the UK's implementation of the Act properly reflected the European Data Protection Directive 95/46/EC with threats of infraction proceedings: <http://amberhawk.typepad.com/amberhawk/2013/02/question-answered-why-does-the-european-commission-think-the-uks-data-protection-act-is-a-deficient-implementation-of.html> and also *Ministry of Justice v Information Commissioner & Dr Chris Pounder* [EA/2012/0110]. See most recently *Vidal-Hall v Google Inc* [2014] EWHC 13 (QB) [92 – 95].

<sup>788</sup> Lord Falconer, as Lord Chancellor and Minister of Justice, 18 October 2004 in an interview to Patrick Wintour of the *Guardian*: <http://www.guardian.co.uk/uk/2004/oct/18/freedomofinformation.schools>

reports "tell of maverick claims and paltry damages".<sup>789</sup> One lawyer with experience of the Act having worked at the Commissioner's Office characterised it thus:

An individual who wishes to use the Act to take action against the press will need deep pockets, a robust constitution and preferably a favourable life expectancy.<sup>790</sup>

Whatever the practical limitations or failures that exist within the drafting and operation of the Act, developments both now and in the future are likely to encourage the operation of a regime of personally-enforceable data protection rights rather than what has appeared - through much of the life of the Act - to be a well-intentioned but inert set of data protection principles. An inherent problem within the current regulatory regime is that it has only been able to be as active as the Commissioner in post at any particular time has been able or chosen to be. An individual can act on his own, as will be seen, but the Act creates a statutory right for data subjects to seek help and assistance from the Commissioner in enforcement and litigation,<sup>791</sup> only one person has ever attempted to use this right since the Act came into force.<sup>792</sup>

Actually gauging the extent and operation of the Act and Directive 95/46/EC is not straightforward as three UK decisions<sup>793</sup> and one CJEU case,<sup>794</sup> have demonstrated. However the jurisdictional effect of Tugendhat J's decision in *Vidal-Hall*<sup>795</sup> – discussed later – coupled with the CJEU decision in *Google Spain* may have brought new vigour to it.

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<sup>789</sup> Philip Coppel QC: address to Statute Law Society 19 March 2012: [http://www.statutelawsociety.org/\\_\\_data/assets/pdf\\_file/0019/103870/19.03.12\\_P.Coppel\\_paper.pdf](http://www.statutelawsociety.org/__data/assets/pdf_file/0019/103870/19.03.12_P.Coppel_paper.pdf)

<sup>790</sup> Rosemary Jay *Data Protection Law and Practice* 4th Edn Sweet & Maxwell 2012, 556.

<sup>791</sup> Section 53 of the Act.

<sup>792</sup> See 6.4.3 of this Chapter.

<sup>793</sup> *Durant v FSA* [2003] EWCA Civ 1746, *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47 and – most recently – *Edem v IC and FCA* [2014] EWCA Civ 92.

<sup>794</sup> *Bodil Lindqvist* C-101/01 (6 November 2003): referring to individuals on an internet page and identifying them either by name or by other means constitutes processing of personal data by automatic means within the meaning of EU law.

<sup>795</sup> *Vidal-Hall v Google Inc* [2014] EWHC 13 (QB) [83 – 103].

In terms of proportionality and the practical operation of the regulatory aspects of the Act by the Commissioner, the Leveson Report fired a ranging shot over the media's bows with the comment that:

....the exercise of....these powers has to be kept under review, considered within the overall framework and purposes of the data protection regime as a whole, and both reasonable and proportionate in all the circumstances ...[R]elevant considerations in that context would include.... the extent of objective evidence of poor practice along with the nature and seriousness of that poor practice and levels of public concern. Evidence of widespread ignorance of the requirements of law and good practice (whether on the part of industry or individual) would be particularly relevant, especially if that ignorance were related to the genuine complexity of those requirements. As an expert regulator, the ICO would then be in a unique position to address the problem with explanation, education and support.<sup>796</sup>

The broader context of what Leveson highlighted – as will be seen later – is that the Commissioner may need greater resources. Also, that the current position of s.32 of the Act disproportionately favours the press in the way it finally became legislation. How and when any recalibration takes place remains to be seen.

The next sections of this Chapter examine how the Act has functioned to protect privacy rights – particularly those of celebrities - and how the permitted interferences have or have not outgrown the Act in the case law that has been created. Until recently issues of proportionality often have not been particularly clearly articulated and have remained implicit in a less-than-helpful manner.

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<sup>796</sup> Leveson Vol III Part H [2.66], 1087.



## 6.2 The Protected Rights in the Act

### 6.2.1 The Core Rights

The core rights in relation to personal data protected within the Act are set out in the Schedule containing the Data Protection Principles.<sup>797</sup> "Personal data"<sup>798</sup> means data (including *sensitive* personal data) relating to a living individual<sup>799</sup> who can be identified from those data on its own or from those data when combined with other information in the possession of – or likely to come into the possession of – the data controller. "Data" itself covers information which may be held in five different ways<sup>800</sup> and "data controller"<sup>801</sup> means someone who either alone, jointly or in common with other persons, determines the purpose for which and the manner in which any personal data are – or are to be – processed. While data is defined in this way as "information" it follows that "personal data" includes expressions of opinion recorded about an individual and any indication about the intentions of the data controller or any other person

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<sup>797</sup> The key Data Protection Principle in Schedule 1 is the 1<sup>st</sup> Principle: " Personal Data shall be processed fairly and lawfully and, in particular, shall not be processed unless: (a) at least one of the conditions in Schedule 2 is met, and (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

<sup>798</sup> Data Protection Act 1998 s.1 (1).

<sup>799</sup> Issues about a "living" individual in s.1. (1) of the Act – the "data subject" – are far from straightforward. The Act contains a further addition extending it "to any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual". Ian J Lloyd, *Information Technology Law* 40, notes: "This represents....an unfortunate legacy from the original Act of 1984 which included a widely criticised distinction between statements of opinion – which were classed as personal data and statements of the data controller's intentions toward the data subject – which were not. The argument put forward by the government .... was that statements of intention are personal to the data controller rather than to the subject. This is certainly arguable, but the point applies with equal if not greater validity with regard to statements of opinion. Even the then Data Protection Registrar was moved to comment to the effect that he found the distinction unclear and the provision in the Data Protection Act 1998 should perhaps be seen as a measure to remove what had generally been considered an unsatisfactory distinction, rather than a deliberate effort to depart from the requirements of the Directive."

<sup>800</sup> Ibid s.1 (1) (a) – (e): (1) information which is being processed by means of "equipment operating automatically in response to instructions given for that purpose"; (2) information which is recorded with the intention that it should be processed by such equipment; (3) information which is recorded as part of the relevant filing system or with the intention that it should form part of such a system; (4) information which forms part of an accessible record (such as an individual's health or educational public record) and (5) information which is recorded information held by a public authority and which does not fall within any of the four preceding categories.

<sup>801</sup> Ibid s.1 (1).

in respect of that individual. This gives an individual what has been described elsewhere as “informational self-determinism”.<sup>802</sup> The regime established by the Act creates rights<sup>803</sup> belonging to individuals in respect of information being held about them. This gives the individual data subjects rights of access to, control over and compensation for misuse of information held and used by others about them. These key rights are access to what is held on them (s.7),<sup>804</sup> a requirement – on notice - not to process personal data where it could cause damage to the data subject (s.10), the right to compensation for damage or distress<sup>805</sup> (s.13)<sup>806</sup> and for rectification, blocking, erasure and destruction (s.14).

An individual who suffers *distress* because of any contravention by the data controller of any of the requirements of the Act is entitled to compensation from the data controller for that distress if (a) individual also suffers damage because of the contravention or (b) the contravention relates to the processing of personal data for the "special purposes".<sup>807</sup> The data controller has a defence if he can show that he took such care as, in all the circumstances, was reasonably required to comply with the requirement concerned.<sup>808</sup> Section 14 applies where the data subject satisfies the court that personal data of which

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<sup>802</sup> German Federal Constitutional Court's (*Bundesverfassungsgericht*) 1984 decision declaring the proposed statistical census an unjust invasion of privacy: *Bundesverfassungsgericht* Decisions Vol. 65, 1. See also Chapter 1.1. and Chapter 2.2. and 2.2.2.2 on “informational privacy”.

<sup>803</sup> Which, in the context of recent decisions such as *Re Mobile Phone Voicemail Interception Litigation* [2012] EWHC 397 (Ch), resemble the rights within the intellectual property regime.

<sup>804</sup> *Austen v University of Wolverhampton* [2005] EWHC 1635 (QB).

<sup>805</sup> In *Sean Robert Grinyer v Plymouth Hospital NHS Trust* (unreported 28 October 2011) HHJ Cotter QC, sitting at Plymouth County Court, assessed £12,500 damages (and £4,800 for loss of earnings) for personal injury under s.13 of the Data Protection Act 1998 on a conventional common law basis upholding a claim for aggravated damages but not exemplary damages. The Claimant's then partner had unlawfully accessed his medical records in the course of her employment as a nurse and thereby committed a breach of the Act. This exacerbated a pre-existing paranoid personality disorder and prevented him also from accepting an offer of employment:  
<http://www.unitystreetchambers.com/barrister/johnisherwood.php>

<sup>806</sup> Section 13 (1) and see *Halliday v Creation Consumer Finance* [2013] EWCA Civ 333 for how complex establishing this can become.

<sup>807</sup> In the Act, by virtue of s.3 and discussed later, "special purposes" means any one or more of the following: the purposes of journalism, artistic purposes and literary purposes.

<sup>808</sup> Section 13 (3).

he is the subject are inaccurate. The data controller can be ordered to rectify, block, erase, or destroy those data and any other personal data in respect of which he is the data controller and which contain an expression of opinion which appears to the court to be based on inaccurate data.<sup>809</sup>

So, in an English *Google Spain* scenario, repetitive linking by a UK-based search engine of a data subject who was not a celebrity of any category or any kind of public figure to a report of a long-satisfied County Court judgement or to criminal proceedings that actually led to an acquittal could be breaches under the Act. This is not a right to be forgotten, as the *Google Spain* judgement has been characterised. It is a right to have information that was correct at the time - but which has been satisfied and superseded through the passage of the years – treated correctly and proportionately according to the law.<sup>810</sup>

A recently-lodged High Court claim by Mr Benny Steinmetz - an attributed/achieved celebrity international entrepreneur and billionaire - in relation to the above provides an example of how the protected rights described above can be used practically. It also reflects the extent of the tensions between the protected rights and the permitted intrusions in respect of them. *Steinmetz and others v Global Witness Limited*<sup>811</sup> involves a claim under the Act brought by Mr Steinmetz<sup>812</sup> the Chairman of a mining conglomerate.<sup>813</sup> The claim is against the Nobel-prize winning NGO, Global Witness (GW).<sup>814</sup> Subject access requests were made under s.7 of the Act in respect of personal data held by GW about four claimants. Complaints were then made to the Commissioner

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<sup>809</sup> Section 14 (1).

<sup>810</sup> Case C-131/12 *Google Spain and Google Inc v AEPD and González* [81]. The case will be considered in more detail later in this Chapter.

<sup>811</sup> The details of the High Court claim are available on <http://www.bsgrresources.com/bsgr-guinea/bsgr-guinea-analysis-reports/claim-filed-against-global-witness/>

<sup>812</sup> Worth £1.7 billion in 2010: <http://israel21c.org/culture/israels-10-richest-men-and-women/>

<sup>813</sup> BSGR's interests include 50% of the Simandou iron ore reserve in Guinea.

<sup>814</sup> Global Witness – with offices in the UK and US - investigates and reports internationally on natural-resource related conflict and corruption. Since November 2012, it has alleged that BSGR's share in the Simandou reserve, one of the largest and most valuable in the world, was obtained by corruption. Those allegations are currently being investigated by the Government of Guinea and by a US Federal Grand Jury.

about GW's non-compliance with the requests.<sup>815</sup> The claim, in effect, uses the Act to mirror a libel claim<sup>816</sup> by inviting the High Court to make findings on the truth of the corruption allegations reported by GW.<sup>817</sup>

For its part, GW maintains that the claim has been brought for collateral and illegitimate purposes<sup>818</sup> – that it is an abuse of process - and is an unwarranted attack on its Article 10 freedom of expression right.<sup>819</sup> It seeks to use the s.32 media exemption in relation to processing for the purposes of journalism. It relies on the High Court's s.3 HRA 1998 duty to interpret s. 32 DPA in a manner which is compatible with Article 10.<sup>820</sup>

This claim – and the defence to it - confronts the issue of where the balance is to be struck<sup>821</sup> under the Act between the privacy rights of a billionaire entrepreneur, with the resources to litigate the matter fully, and the Article 10 rights of GW as an NGO to inform and bring matters to the attention of the public.<sup>822</sup> If GW is held to be a news organisation – as some of the recent

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<sup>815</sup> In the proceedings the claimants are seeking a disclosure order under s.7 (9) in relation to personal data, an order under s.10 that GW ceases to process any of the Claimants' personal data on the basis that it was obtained without authorisation as well as seeking identification of GW's sources, a s.14 Order against GW requiring it to rectify, block, erase or destroy inaccurate data and s.13 damages for distress.

<sup>816</sup> See, in particular, *The Economist's* characterisation of the case in the sub-heading *Libel laws have become laxer. Try invoking data protection instead* <http://www.economist.com/news/britain/21599791-libel-laws-have-become-laxer-try-invoking-data-protection-instead-data-lock>

<sup>817</sup> For a detailed exposition of the Act's potential as a reputational shield see David Erdos *Filling Defamation's "Gaps": Data Protection and the Right to Reputation* Oxford Legal Studies Research Paper 69/2013.

<sup>818</sup> GW seeks to stay the proceedings by using s.32 (4) of the Act, requiring the Commissioner to decide on the application of s.32 to the disputed data.

<sup>819</sup> <http://www.globalwitness.org/library/global-witness-fights-misuse-data-laws-threatens-journalistic-freedom>

<sup>820</sup> A live issue that remains undamaged by the Supreme Court FOIA decision in *Kennedy v Charity Commission* [2014] UKSC 20.

<sup>821</sup> The "proportionality" issues in relation to Article 10 Freedom of Speech and ECtHR jurisprudence were recently robustly examined (and rejected) by Laws LJ in *Miranda v SSHD* [2014] EWHC 255 (Admin). "In a press freedom case, the fourth requirement in the catalogue of proportionality involves as I have said the striking of a balance between two aspects of the public interest: press freedom itself on one hand, and on the other whatever is sought to justify the interference: here national security. On the facts of this case, the balance is plainly in favour of the latter." [73]. Also, generally [39 – 47], [72 – 75].

<sup>822</sup> ECtHR 27 May 2004, Case No. 57829/00, *Vides Aizsardzības Klubs v. Latvia* and ECtHR 12 June 2012, Case. Nos. 26005/08 and 26160/08, *Tatár and Fáber v. Hungary*.

ECtHR decisions suggest it might so be characterised – then by analogy the s.32 exemption may apply to protect it.<sup>823</sup> On 21 January 2014 the Commissioner issued a draft consultation paper *Data Protection and Journalism: a guide for the media*.<sup>824</sup> The outcome of the *Steinmetz* litigation is likely to have a significant influence on the position ultimately adopted by him in relation to s.32.

The dynamics<sup>825</sup> of the opening stages of the case are evident from Henderson J’s Chancery Division judgement in March 2014 on the preliminary issue of whether the two applications should be heard together by the same Judge or whether GW’s claim for a stay on s.32 grounds should be heard first.<sup>826</sup> The Judge decided on the latter course because Parliament had “pretty clearly taken the line” that s.32 issues should first be determined by the Commissioner.<sup>827</sup> He also conceded that data protection law was “slightly arcane and complicated”.<sup>828</sup>

### **6.2.2 Section 13 Damages: uncertainty gives way to clarity?**

On the issue of damages and operation of s.13 – and the results of claims under the Act - the situation had, until recently, been clouded with doubt. This uncertainty hobbled the utility of the Act in early celebrity litigation. Gray J in *Lord Ashcroft v AG and Department for International Development*<sup>829</sup> interpreted the Act as containing a free-standing duty on data controllers to comply with the principles, breaches of which would engage s.13. But, on the

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<sup>823</sup> ECtHR 14 April 2009, Case No. 37374/05, *Társaság A Szabadságjogokért v. Hungary* and ECtHR 25 June 2013, Case No. 48135/06, *Youth Initiative for Human Rights v. Serbia*.

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[http://ico.org.uk/news/latest\\_news/2014/~media/documents/library/Data\\_Protection/Research\\_and\\_reports/data-protection-and-journalism-a-guide-for-the-media-draft.pdf](http://ico.org.uk/news/latest_news/2014/~media/documents/library/Data_Protection/Research_and_reports/data-protection-and-journalism-a-guide-for-the-media-draft.pdf). The guide states that it “simply clarifies our view of the existing law as set out in the DPA,” to help the media fully to understand their obligations and to promote good practice. The guide was not mandatory.

<sup>825</sup> See 6.5.2 later in this Chapter.

<sup>826</sup> *Steinmetz & others v Global Witness* [2014] EWHC 1186 (Ch).

<sup>827</sup> *Ibid* [21].

<sup>828</sup> *Ibid* [29].

<sup>829</sup> *Lord Ashcroft v AG and Department for International Development* [2002] EWHC 1122 (QB).

facts of the case before him<sup>830</sup> - which related to events spanning the two Data Protection Acts – he found that the 1984 Act conferred a private law right to damages only by its s.23 in respect of the alleged disclosure of documents. Any other breaches of the 1984 Act – or its principles – were a matter for the Commissioner rather than a claim for damages through the courts.

In *Douglas*<sup>831</sup> Lindsay J held that, although the Claimants had established claims to compensation under s.13 of the Act, that did not give a separate route to recovery for the damage or distress beyond a nominal award of £50. That was on the basis that he could not see how the damage and distress were caused “by reason of any contravention...of [the] Act”.<sup>832</sup> The same conclusion was reached by Patton J at first instance in *Murray v Express Newspapers and Big Pictures*.<sup>833</sup> He decided that damage meant ordinary pecuniary loss and rejected the contention that damages could be awarded under the Act by reference to the market value of the data that had been misused. By the time the case went to the Court of Appeal, where its result was overturned and a new trial ordered,<sup>834</sup> Express Newspapers had settled the action by the payment of £500.<sup>835</sup> The picture agency subsequently settled rather than appealing the matter to the House of Lords and – again – an opportunity to

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<sup>830</sup> In 1999 and 2000 articles had been published revealing confidential and sensitive personal information about the Claimant in documents leaked from the Foreign Office and the second Defendant. This case related to an application to re-amend his particulars of claim in his action for damages for breach of confidence and privacy in order to add breaches of the 1984 and 1998 Data Protection Acts.

<sup>831</sup> *Douglas* [2003] EWHC 786 Ch.

<sup>832</sup> In both *Douglas* and *Campbell* the nominal award was £50.

<sup>833</sup> *Murray v Express Newspapers and Big Pictures* [2007] EWHC 1908 (Ch).

<sup>834</sup> *Murray v Big Pictures* [2008] EWCA 446.

<sup>835</sup> On the data protection point, C sought compensation for an amount equivalent to the cost of him consenting to the taking of his picture, an image/personality rights analogy that now has force in the light of the October 2011 CJEU decision in *Martinez v MGN* (C-509/09 and C-161/10). The Court of Appeal said, in relation to the claim under the Act: “If the trial judge were to hold that article 8 is engaged and that the article 8/10 balance should be struck in David’s favour, it would follow that Big Pictures’ admitted processing of David’s personal data was unlawful. It would also follow that the processing was unfair and that none of the conditions of Schedule 2 to the DPA was met.” And also: “The DPA claim raised a number of issues of some importance, including the meaning of damage in section 13(1) of the DPA. It seems to us to be at least arguable that the judge has construed “damage” too narrowly, having regard to the fact that the purpose of the Act was to enact the provisions of the relevant Directive.”

explore issues of quantum that might assist with setting an informed tariff for damages was lost.

It has been suggested that s.13 creates a new statutory tort of "careless falsehood",<sup>836</sup> something that would amount to "false light" misrepresentation of private information.<sup>837</sup> The ingredients for the tort are, firstly, falsity and then the fact that the data controller had not taken reasonable care to comply with the Act. On that basis it would not be a tort of strict liability. If the error in the publication took place because there had been no checking of the accuracy of the information<sup>838</sup> it would make this difficult to defend. This is an area that touches on inaccurate speculation about the sensitive personal health data of members of the royal family and other celebrities. In contrast to claims of defamation and malicious falsehood the Claimant would not need to establish a defamatory meaning or innuendo in what had been broadcast or published. All that would be necessary would be to demonstrate inaccuracy.<sup>839</sup> Although s.32 would still apply there would be no defence equivalent to qualified privilege and, in relation to a claim in malicious falsehood, malice would not need to be pleaded or established. The Claimant would simply have to establish that there had been a failure to take reasonable care to comply with the Act's requirements.

### **6.2.2.1 Floodgates closed? *Quinton v Pierce***

Eady J may have anticipated - and tried to close - the floodgates the *Steinmetz* litigation currently seeks to open. In *Quinton v Peirce & another*<sup>840</sup> he held that it was neither necessary nor proportionate to interpret the scope of the Act so as to provide a parallel set of remedies for the publication of information which

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<sup>836</sup> Tugendhat and Christie [6.89 - 6.92].

<sup>837</sup> See *Steinmetz and others v Global Witness Limited* (2014) and the discussion in this chapter.

<sup>838</sup> Requiring perhaps an approach similar to that of "responsible journalism" in *Reynolds v Times Newspapers* [2001] 2 AC 127, reflected in the statutory defence in s.4 of the Defamation Act 2013.

<sup>839</sup> With the obvious disadvantage of public disclosure of the accurate sensitive personal data.

<sup>840</sup> *Quinton v Peirce & another* [2009] EWHC 912: this was a dispute between two former MPs from rival parties – also district councillors in Oxfordshire – and material in an election leaflet said to contain untrue factual statements.

was neither defamatory nor malicious.<sup>841</sup> He held that the remedy could only be granted where the facts said to be inaccurate only had one possible interpretation.

Although in principle s.13 damages under the Act would appear to be straightforward – without some of the quirks of the rules in slander, libel and malicious falsehood in respect of aspects of general and special damages – the lack of any change in the case law on this point to demonstrate the effectiveness and simplicity in this area seemed to be intractable.<sup>842</sup> Although compensation for actual losses are recoverable and compensation for distress is specifically recoverable in relation to complaints about the special purposes it is not possible to point to any cases which deal with the spectrum of sums available. The Act had been overshadowed by the damage that could be recovered for a breach of confidence or breach of private life rights. Until very recently it was difficult to see how damages recoverable by virtue of it might correspond to the levels of damage available in other privacy actions.

#### **6.2.2.2 Floodgates opened? *Desmond v Foreman***

However in *Desmond v Foreman*<sup>843</sup> - a case that also had within it a defamation claim – Tugendhat J dismissed the application for summary judgment by the Defendants, finding that the Claimant's case under Article 8 and the DPA had a real prospect of success in relation to some of the communications complained of. It had been open to the Claimant to complain to the Commissioner. Tugendhat J, however, thought that:

proceedings under the DPA may provide the most appropriate form of investigation.... It is for consideration whether claims under the HRA or in defamation would

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<sup>841</sup> Ibid [87].

<sup>842</sup> See *Halliday v Creative Consumer Focus* [2013] EWCA 333 where £1 nominal damages and £750 for distress was awarded *only* because the Defendant had conceded the "damage" point.

<sup>843</sup> *Desmond v Foreman* [2012] EWHC 1900 (QB): The Claimant had been a cover teacher who was suspended and ultimately dismissed following allegations that he had conducted himself in an inappropriate sexual manner towards a sixth-form student. The communications implied that he was actually guilty of and had actually committed various serious offences (including rape, of which he had been accused in 2001 but exonerated through court proceedings). He claimed breaches of DPA Principles 1, 2, 3, 4 and 6.



add any benefit to the Claimant over and above a claim under the DPA. And as noted above, a claim under the DPA appears to raise no issues of limitation.<sup>844</sup>

He directed the DPA claim to proceed first and separately from the other two claims.<sup>845</sup> Unless the parties settle this matter the case may provide a valuable insight into issues of the relevant quantum when – in particular – it is set ahead of consideration of Article 8 and defamation issues within it.

### **6.2.2.3 Floodgates removed? *Vidal-Hall v Google Inc.***

Tugendhat J returned to this theme – unlocking the potential of the protected rights within the Act – recently and most notably in *Vidal-Hall v Google Inc.*<sup>846</sup> The Claimants had used *Apple* devices to access the internet and various Google services. They added DPA breach and damages claims late in the proceedings, against Google Inc., which also involved issues of service out of the jurisdiction, breach of confidence and misuse of private information. In relation to the DPA claims, Tugendhat J noted there were two objections:

first that it is too late, and second that the damage recoverable under the DPA does not include damages for distress unless there is also financial damage.<sup>847</sup>

He disposed of the first pragmatically, relying on 2011 Supreme Court authority affirming that the Civil Procedure Rules had created the “overriding objective” enabling courts to deal with cases justly, to save expense and ensure that cases were dealt with expeditiously.<sup>848</sup> On the second he considered<sup>849</sup> the effect of *Johnson v MDU* and *Murray v Big Pictures*<sup>850</sup> together with the Opinion of the Article 29 Working Party 1/2008.<sup>851</sup> He declined to follow *Johnson* on the

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<sup>844</sup> Ibid [81].

<sup>845</sup> Ibid [82].

<sup>846</sup> *Vidal-Hall v Google Inc* [2014] EWHC 13 (QB).

<sup>847</sup> Ibid [79].

<sup>848</sup> *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31 [74 – 75].

<sup>849</sup> *Vidal-Hall v Google Inc* [90 – 104].

<sup>850</sup> *Johnson v MDU* [2007] EWCA Civ 262 and *Murray v Big Pictures* [2007] EWHC 1980 (Ch) and [2008] EWCA Civ 446

<sup>851</sup> WP148, 7: “The extensive collection and storage of search histories of individuals in a directly or indirectly identifiable form invokes the protection under Article 8 of the European Charter of Fundamental Rights. An individual's search history contains a footprint of that person's interests, relations, and intentions. These data can be

basis that no Article 8 right had been engaged in that case and that it was not an authority for the proposition that s.13 DPA claims were bound to fail “absent any claim for pecuniary damage”.<sup>852</sup> He concluded:

Since the meaning of damage under DPA s.13 is a question of law, the general rule might suggest that I should decide it, since damage...is a jurisdictional requirement.... However, unlike some jurisdictional issues of law.... the meaning of damage under s.13 is a question which might arise for decision at trial, if the permission to serve out is not set aside.<sup>853</sup>

This is a controversial question of law in a developing area, and it is desirable that the facts should be found.... I shall therefore not decide it. However, in case it is of any assistance in the future, my preliminary view of the question is that [the Claimants’] submissions are to be preferred, and so that damage in s.13 does include non-pecuniary damage.<sup>854</sup>

Tugendhat J adopted the Claimants’ leading counsel’s submission that “moral damage” was a recognised EU concept indicating the right to compensation for breach of individual rights “where the rights are non-pecuniary or non-property based”.<sup>855</sup> This was because, on 24 June 2010, a European Commission press release announced that it had issued a Reasoned Opinion to the UK (the second stage under EU infringement proceedings) requesting it to strengthen data protection powers.<sup>856</sup>

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subsequently used both for commercial purposes and as a result of requests and fishing operations and/or data mining by law enforcement authorities or national security services.”

<sup>852</sup> *Vidal-Hall v Google Inc* [91].

<sup>853</sup> *Ibid* [100].

<sup>854</sup> *Ibid* [101 – 103].

<sup>855</sup> *Ibid* [95].

<sup>856</sup> *Ibid* [94]: “The right to compensation for moral damage when personal information is used inappropriately is also restricted. These powers and rights are protected under the EU Data Protection Directive and must also apply in the UK. As expressed in today’s reasoned opinion, the Commission wants the UK to remedy these and other shortcomings.”

This judgement is at least as important for Tugendhat J's decision about the jurisdiction of the High Court to hear the case.<sup>857</sup> All the claimants resided in England. This was also one of the jurisdictions where Google provided search engine facilities. Committing a tort in England which caused damage here allowed service of the claim on Google outside the jurisdiction.<sup>858</sup>

Damage is alleged to have arisen from what the Claimants, and potentially third parties, have, or might have, seen on the screens of each Claimant. That is....publication....So publication to the Claimants plainly was effected in this jurisdiction.<sup>859</sup>

In terms of the English courts' approach to s.13 damages under the Act it is too early to say that this is the end of the previously-evidenced restrictive approach.<sup>860</sup> Given the care demonstrated to arrive at reasoned conclusions and a proportionate result, in the first stage of what is likely to be one of the most significant cases in this area by a specialist judge well-acquainted with the issues, this decision is of particular interest and importance to celebrities of all categories.

### **6.2.3 The protected right and sensitive personal data: ignored in *Evans*?**

Sensitive personal data, by virtue of s.2 of the Act, is personal data containing information as to (a) the racial or ethnic origin of the data subject, (b) his political opinions, (c) his religious beliefs or other beliefs of a similar nature, (d) whether he is a member of a trade union, (e) his physical or mental health or condition,

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<sup>857</sup> On 31 July 2014 Bean J followed Tugendhat J in granting permission for Google to be served out of the jurisdiction. This related to ex-Morgan Stanley banker Daniel Hegglin's action to have Google remove links to "vile and abusive" material about him. There is a *Google Spain* aspect to this case which arises not in the Right to Be Forgotten sense but rather in the jurisdictional decision. Bean J held that the effect of *Google Spain* brought the data processing activities of Google Inc, within the territorial scope of the EU Data Protection Directive and, therefore, actions here in England. In *Vidal- Hall* jurisdiction had been conceded: <http://www.ft.com/cms/s/0/6d20f298-1726-11e4-b0d7-00144feabdc0.html?siteedition=uk#axzz39MjWYUxZ>

<sup>858</sup> *Ibid* [72 – 75].

<sup>859</sup> *Ibid* [77].

<sup>860</sup> In a decision in the Upper Tier Tribunal in *IC v Niebel* (GIA/177/2014) the UTT Judge declined [52 – 53] to follow what was described as Tugendhat J's "preliminary view" about damages. However in *AB v Ministry of Justice* [2014] EWHC 1847 (QB) an award of £1 nominal damages was awarded to then allow £2,250 compensation for distress.

(f) his sexual life, (g) the commission or alleged commission by him of any offence, or (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.<sup>861</sup> This means that personal data issues that fall for resolution under the Act should consider the definition above. This is so even when the initial request for information occurs under the Freedom of Information Act 2000 (FOIA) because of the s.40 “gateway” provision in FOIA.<sup>862</sup> A notable oversight in this area recently occurred in the ascribed celebrity case of *Evans v IC and others*.<sup>863</sup>

The lack of consideration of and protection for Prince Charles’ sensitive personal data is a curious omission.<sup>864</sup> Further, the omission was not spotted when the Attorney General’s s.53 FOIA veto in respect of the Upper Tribunal’s decision was appealed to the Administrative Court which sat with Lord Judge LCJ and two colleagues.<sup>865</sup> *Evans* was the culminating event in what is now an eight-year attempt by the *Guardian* to ensure transparency as regards Prince Charles’ communications with the Government which either sought to promote a charity or to promote a particular view on policy (‘advocacy correspondence’). In seeking to block the disclosure, the Government largely relied on the exemptions in FOIA for information provided in confidence (section 41) and communications with the royal family (section 37). In relation to any environmental information present, the Government cited the exception in the EIR for disclosures having an adverse effect on the person who supplied the information (regulation 12 (5) (f)). At the time of the original requests the various exemptions were subject to a public interest test. In respect of all these exemptions and exceptions the Government argued vigorously that the

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<sup>861</sup> This does not include sensitive personal data put into the public domain by celebrities.

<sup>862</sup> The DPA/FOIA interplay at this intersection – in terms of sensitive personal data – was considered in *Christopher Colenso-Dunne v IC (EA/2012/0039)* in the context of whether the names of journalists on the *Motorman* database suggested they had been committing crimes.

<sup>863</sup> *Evans v IC and others* [2012] UKUT 313 (AAC).

<sup>864</sup> I am indebted to Dr David Erdos – now at the Centre for Intellectual Property and Information Law at the University of Cambridge - for the opportunity to comment on and contribute to (on condition of anonymity) an early draft of his article *Privacy and the Prince – a Government of Laws not Men?* LQR 2013, 129 (Apr), 172 – 176.

<sup>865</sup> *R on the Application of Rob Evans v AG and IC* [2013] EWHC 1960 (Admin).

correspondence was part of the constitutional convention that the right of the heir to the throne had, in preparation for kingship, a right to be educated in the ways and means of government and that the correspondence was therefore especially confidential. The Commissioner broadly accepted the Government's analysis. The Tribunal rejected that.

At no stage does any thought appear to have been given to the 'sensitive' personal data provisions of the DPA. Much of the relevant correspondence related to the Prince's advocacy of his opinions on matters of public policy. The Tribunal clearly and correctly held that at least these interchanges must be considered "political".<sup>866</sup> Indeed, it was largely as a result of this political aspect that the Tribunal found the public interest for disclosure to be so strong. As it stated:

Those who seek to influence government policy must understand that the public has a legitimate interest in knowing what they have been doing and what government has been doing in response, and thus being in a position to hold government to account.<sup>867</sup>

At the same time both the Commissioner and the Departments stated that disclosure of such information could result in the Prince appearing politically biased and that, therefore, there was a public interest against disclosure.<sup>868</sup> Nevertheless, despite the common agreement that information in the correspondence was both by its nature 'political' and that it derived from Prince Charles, none of the parties drew the conclusion that it included information as to the 'political opinion' of a living individual. In line with the Data Protection

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<sup>866</sup> There was a limited reference to the DPA but only insofar as this involved treating the information as 'ordinary' as opposed to 'sensitive' personal data: Annex 3 [275-281].

<sup>867</sup> *Evans v IC and others* [2012] UKUT 313 (AAC) [160].

<sup>868</sup> *Ibid* [34]. The latter part of this argument was not accepted by the Tribunal. The Attorney General, using his s.53 FOIA veto, stated that a special reason in favour of non-disclosure was that the letters "reflect The Prince of Wales' most deeply held personal views and beliefs", "are in many cases particularly frank" and "contain remarks about public affairs which...would potentially have undermined [his] position of political neutrality": [12] Attorney General *Exercise of Executive Override Under Section 53 of the Freedom of Information Act 2000 in respect of a judgment of the Upper Tribunal dated 18 September 2012 Statement of Reasons* <https://www.gov.uk/government/publications/evans-v-1-information-commissioner-2-seven-government-departments-2012-ukut-313-aac>

Directive 95/46/EC, such information is classed as ‘sensitive’ under s.2 DPA. As a result, irrespective of the public interest arguments, it may only be disclosed if a special condition included within or under Schedule 3 of the DPA is met.<sup>869</sup>

Given the reluctance of the Government to see this information released, this oversight – and the Commissioner’s apparent blind spot in respect of a data protection regime he is responsible for upholding - is puzzling. The Commissioner has not only stated that such innocuous information as the political affiliation of an MP must be considered sensitive<sup>870</sup> but he has also expressed the view that, in light of the reference in section 40 of FOIA (and the EIR) to a “member of the public”, only the non-purpose-specific legitimating conditions included within Schedule 3 may be used in such a context. As the Commissioner states, it follows that:

Condition 1 (explicit consent) or condition 5 (information already made public by the individual) will be the only possible schedule 3 conditions...because the other conditions concern disclosure for a stated purpose, and so cannot be relevant to the applicant and purpose blind nature of disclosure under the FOIA.<sup>871</sup>

Although Prince Charles was not a party in the case, the Commissioner clearly stated that the Prince did not give consent,<sup>872</sup> let alone explicit consent. It is clear on the evidence that “Prince Charles writes on subjects that he would not speak publicly about”.<sup>873</sup> The Commissioner’s strict approach has been challenged by certain Information Rights Tribunal judgments. These have applied (within the FOIA context) the conditions set out under Schedule 3 which provide for disclosure for the purposes of journalism (and also literature and art) and have also mooted applying the research purposes provision as well.

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<sup>869</sup> The Tribunal and the parties were therefore fundamentally mistaken in finding “common ground that in the present case entitlement to disclosure broadly depends on the answer to a core question: will disclosure...be in the public interest?” *Evans* at [1].

<sup>870</sup> Information Commissioner's Office: *The Exemption for Personal Information* ICO 2008, 8.

<sup>871</sup> *Ibid* 8 – 9.

<sup>872</sup> *Evans* Annex 3 [17].

<sup>873</sup> *Evans* [161].

However, even these decisions have emphasised that the hurdle to surpass in such cases is much more onerous than the legitimating condition, largely based on a simply ‘public interest’ test, which must be generally satisfied when disclosing personal information.<sup>874</sup> In *Evans* it is difficult to see how either journalism or the research conditions would be met. Thus, the journalism condition requires that disclosure be not just in the “public interest” but in the “substantial public interest”<sup>875</sup> and also requires the disclosure to be in connection with (i) the commission by any person of any unlawful act, or (ii) dishonestly, malpractice, or other seriously improper conduct by, or the unfitness or incompetence of, any person, or (iii) mismanagement in the administration of, or failures in services provided by, any body or association.<sup>876</sup> There was no argument that the Prince’s correspondence was “unconstitutional”.<sup>877</sup> As a result any claim made under (i), (ii) or (iii) would have been unlikely to succeed. In terms of the “research” condition it is also unlikely that the activities of the *Guardian* could be construed as being for “research purposes”. Also that condition requires that the disclosure not: (i) “support measures or decisions with respect to any particular data subject otherwise than with the explicit consent of that data subject” nor that it: (ii) “cause, nor is likely to cause, substantial damage or substantial distress to the data subject or any other person”.<sup>878</sup> The context for the *Guardian’s* fight for disclosure was linked to a campaign to curtail Prince Charles’ role in the formulation of public policy. On this basis the operation of the clear provisions of the DPA 1998 through the FOIA s.40 gateway should have required that at least substantial parts of this correspondence be withheld from disclosure.

The case goes before the Supreme Court in November 2014 on the issue of whether the Attorney General used his FOIA veto lawfully. It remains to be seen whether this omission will be spotted there or whether an “Emperor’s Clothes” impasse has now been created where no-one involved with the case as it was

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<sup>874</sup> [6] Schedule 2, DPA 1998.

<sup>875</sup> Met in the “Nick Griffin” case of *Cobain v Information Commissioner (2011) (EA/2011/0112 and 0113)* but not met in *Smith v. Commissioner (EA/2011/0006)*.

<sup>876</sup> [3] Data Protection (Processing of Sensitive Personal Data) Order 2000.

<sup>877</sup> *Evans* [91].

<sup>878</sup> [9] Data Protection (Processing of Sensitive Personal Data) Order 2000.

originally argued can admit to such sensitive personal data blindness in respect of such a high-profile celebrity and such a disproportionate result.

Prince Charles – with his ascribed celebrity status - might have expected the issues relating to his correspondence with Departments of State to have engaged the DPA regime and for that to have been identified at an early stage by the Commissioner. He was not represented during that appeal hearing. His attendance and participation could have been secured by the Tribunal, at the case management stage, by joining him as a party.<sup>879</sup> His private office was consulted and declined voluntary joinder. Clearly the Tribunal did not want to take that matter further, an accommodation which respected that response. Had he been represented, however, it would have been open to his own Attorney General to highlight issues relating to the letters – or at least some of them – containing sensitive personal data relating to the Prince and being, as such, shielded and protected from public inspection by the data protection regime.

The royal family – from the experience highlighted above – appear to have anticipated that preservation of their privacy and their personal data may more effectively be achieved by other means. The kind of legislative change secured on behalf of the monarch, Prince Charles and his two sons by the change to the original s.37 FOIA in the Constitutional Reform and Government Act 2010<sup>880</sup>, is a route open only to such ascribed celebrities.

## **6.3 The Protected Right in the EU Charter of Fundamental Rights**

### **6.3.1 Introduction**

Article 8 of the EU's Charter of Fundamental Freedoms (the Charter) is embodied in the Treaty of Lisbon and has been effective in the EU (and the UK)

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<sup>879</sup> Under the provisions of Rule 9 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009: consent of the party to be joined is not required but the party can choose to take no part in the proceedings after joinder.

<sup>880</sup> To make information requests about them an absolute exemption rather than a qualified one.



for the last four years.<sup>881</sup> It contains a clear, independent and free-standing right in relation to the protection of personal data in its Article 8.<sup>882</sup> Rights and freedoms in the Charter can be limited but only subject to the principle of proportionality.<sup>883</sup>

Directive 95/46/EC – by Article 1 - requires Member States to protect the fundamental rights and freedoms of natural persons and, in particular, their right to privacy with respect to the processing of personal data. Article 13 (1) (g) of the Directive permits exemptions to restrict the scope of the data protection provisions when they constituted a necessary measure to safeguard the protection of the rights and freedoms of others.<sup>884</sup>

When the case law in respect of Charter Article 8 remained relatively undeveloped the author feared there was a danger that the strength of this stand-alone provision would be diluted by being seen only as an amplification of Charter Article 7/Convention Article 8.<sup>885</sup>

In particular:

It took a significantly long time for the ECJ to articulate any reference to Charter Article 8 and the fact that it established any specific right to the protection of personal data....It did so only with issues around the Data Protection Directive's objective that Member States should protect the fundamental rights and freedoms of natural persons and in particular their right to privacy

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<sup>881</sup> In force from 1 December 2009.

<sup>882</sup> (1) Everyone has the right to the protection of personal data concerning him or her. (2) Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. (3) Compliance with these rules shall be subject to control by an independent authority.

<sup>883</sup> Article 52 (1).

<sup>884</sup> In the Act the Government chose to use this to exempt the data protection provisions in circumstances required by law or made in connection with legal proceedings (s.35).

<sup>885</sup> R Callender Smith *Discovery and compulsion: how regulatory and litigation issues relating to intellectual property rights are challenging the fundamental right to the protection of personal data* Queen Mary Journal of Intellectual Property Vol 3 No 1 2013, 11 – 16. In particular:

with respect to the processing of personal data. It also considered reconciling those rights with the fundamental right to freedom of expression. It did not specify exactly which fundamental rights had to be reconciled.<sup>886</sup>

In the light of *Google Spain* it is clear that such concerns were inaccurately focussed and only half-correct: the failure to specify exactly which fundamental rights had to be reconciled. It is not the dilution of the Charter Article 8 right that now causes the problem but the apparent supremacy given to it – in the context of the judgement – because nowhere is the Charter Article 11 freedom of speech right mentioned or “reconciled”.

### 6.3.2 *Google Spain*

Particularly when matters involved attributed and attained celebrities but particularly the former – and internet search links - the actual result in *Google Spain* (rather than the reasoning) should have come as no great surprise. *Google France* had repeatedly claimed it was difficult to remove egregious material from its systems yet it been ordered to block links to images from the former *News of the World* video of the “orgy” involving Max Mosley.<sup>887</sup> It contended that the search engine was merely a platform delivering links to independent content.<sup>888</sup> The court decided Google must find a way to remove links to the nine images of Mr Mosley with the prostitutes.<sup>889</sup> Google said it would require building a new software filter to catch new versions of the posted

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<sup>886</sup> Ibid 15- 16.

<sup>887</sup> Google had a decision from Paris’s Tribunal de Grande Instance, arguing that it was being required to set up a “censorship machine” that could damage internet freedom.

<sup>888</sup> On filtering and blocking see also Sophie Stalla-Bourdillon *Online monitoring, filtering, blocking. What is the difference? Where to draw the line?* Computer Law & Security Review 29 (2013), 702 -712.

<sup>889</sup> It was also ordered to pay Mr Mosley €1 (84p) in damages and €5,000 in other legal fees: <http://www.telegraph.co.uk/technology/google/10431605/Google-ordered-by-French-court-to-drop-sex-images-of-ex-F1-chief-Max-Mosley.html> Automatically recognising these nine images and stopping them appearing on a Google images search was within the expertise of an “averagely experienced programmer” according to expert witness Professor Viktor Mayer-Schönberger of the Oxford Internet Institute. See also Mr Mosley’s lawyer’s blog post on this topic: <http://inforrm.wordpress.com/2013/11/13/google-go-down-in-paris-how-did-it-come-to-this-dominic-crossley/>

images continuously and remove them.<sup>890</sup> Mr Mosley pointed out that Google could remove them automatically as it did for content such as child pornography.<sup>891</sup> Pre-*Google Spain* this confirmed that the persistence of individual celebrities with substantial financial and legal resources – with the stamina for the litigation required in different jurisdictions – could successfully test and challenge the law in relation to the misuse of their personal information in the context not just of the domestic press and media but also on the internet.<sup>892</sup> It is, after all, on the internet where the damaging linkage occurs.

*Google Spain* created global attributed celebrity status for Mario Costeja González, providing this most up-to-date data protection example of the *Streisand* effect. As a result of the decision celebrities of all categories may seek shelter in the incorrectly categorised “right to be forgotten” elements of the decision.<sup>893</sup> But – as has already been pointed out – the role an individual has played in public life will be one of the factors in determining whether:

the interference with his fundamental rights is justified by the preponderant interest of the general public in having [via a search link] access to the information in question.

<sup>894</sup>

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<sup>890</sup> An interesting argument in the light of publicised developments in the UK on 18 November 2013 by Google and Microsoft of software they have developed that filter out child abuse searches: <http://www.ft.com/cms/s/0/2c37bd70-5020-11e3-9f0d-00144feabdc0.html#axzz211nFrPCL>

<sup>891</sup> Mr Mosley has sued Google in Germany and elsewhere, seeking to get the company to use automatic filters that eliminate any thumbnail images of the sex video, as well as links in search results.

<sup>892</sup> On 29 July 2014 Mr Mosley announced his High Court claim against Google Inc and Google UK in respect of continuing misuse of private information and DPA breaches: <http://www.pressgazette.co.uk/max-mosley-sue-google-continuing-publish-sex-party-images>

<sup>893</sup> Google’s Chief Legal Officer, David Drummond, announced the creation of an advisory “council of experts” to make recommendations about how it should deal with requests for the removal of links from search results and explained its post-judgement approach on 10 July 2014 in *The Guardian*. The criteria included whether information related to a politician, celebrity or other public figure; if it was from a reputable news source, and how recent it was; whether it involved political speech; questions of professional conduct which might be relevant to consumers; the involvement of criminal convictions which were not yet spent; and if the information was being published by a government. <http://www.theguardian.com/commentisfree/2014/jul/10/right-to-be-forgotten-european-ruling-google-debate> .

<sup>894</sup> C – 131/12 *Google Spain* [97].

Curiously the concept of “playing some part in public life” is not further articulated in the decision. Neither were any Charter Article 11 freedom of speech considerations. This leaves unnecessary uncertainty together with the danger that what equates to the “public interest” bar remains vague and has been set too low. The court found *Google Spain* was established in Spain as a controller (not processor) and that the activities of *Google Search* (also a controller) were “inextricably linked” to those of *Google Spain*.<sup>895</sup>

Specifically:

....it cannot be accepted that the processing of personal data carried out for the purpose of the operation of the search engine should escape the obligations and guarantees laid down by Directive 95/46, which would compromise the Directive’s effectiveness and complete protection of the fundamental rights and freedoms of natural persons which the Directive seeks to ensure....<sup>896</sup>

The individuals who are likely to benefit from this decision are aspiring attributed celebrities who can – with forethought – have information which is old and no longer accurate in the *Google Spain* sense removed prior to their first appearances or before their profile shows that they are playing some part in public life.

Google has apparently received over 70,000 requests to remove links since the Luxembourg judgement in May. The Commissioner’s first response was:

We recognise that there will be difficult judgments to make on whether links should be removed. It is also important to remember that the exemption for journalism, art and literature under section 32 of the Data Protection Act can be applied by media organisations, bloggers and other publishers of information, depending on the circumstances.<sup>897</sup>

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<sup>895</sup> Ibid [45 – 60]: arguably it overstated or misrepresented the law.

<sup>896</sup> Ibid [58].

<sup>897</sup> <http://iconewsblog.wordpress.com/2014/05/20/four-things-weve-learned-from-the-eu-google-judgment/> and <http://iconewsblog.wordpress.com/2014/05/20/four-things-weve-learned-from-the-eu-google-judgment/>

Then, on 4 July 2014 and striking a different tone on a slightly different topic, the Commissioner's Office wrote to Google:

....to confirm our findings relating to the update of the company's privacy policy....we confirm that its updated privacy policy raises serious questions about its compliance with the UK Data Protection Act. In particular, we believe that the updated policy does not provide sufficient information to enable UK users of Google's services to understand how their data will be used across all of the company's products.

Google must now amend their privacy policy to make it more informative for individual service users. Failure to take the necessary action to improve the policies compliance with the Data Protection Act by 20 September will leave the company open to the possibility of formal enforcement action.

This change of tone is significant both in the context of the existing Act and also for the Commissioner's future attitude to Charter Article 8 protection of the personal data right. In addition, and despite it being a key aspect of the Commissioner's general duty to uphold and enforce the Data Protection principles, it is perhaps surprising that it has taken so long for him – and maybe because of remarks elsewhere<sup>898</sup> – to move to articulate the importance of basic HRA 1998 and ECHR Article 8 privacy rights.

## 6.4 The Regulator

Originally named the Data Protection Registrar he became the Data Protection Commissioner<sup>899</sup> before finally arriving at his present title of Information Commissioner<sup>900</sup> to reflect his role under the Freedom of Information Act 2000 (FOIA). He has duties to educate and inform the public about data protection as well as specific regulatory powers.<sup>901</sup> In his regulatory role he can serve enforcement, information, and monetary penalty notices, and bring prosecutions. He has an important role in European cooperation and the

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<sup>898</sup> See Tugendhat J and *SolicitorsfromHell*.

<sup>899</sup> 1 March 2001.

<sup>900</sup> 30 January 2002.

<sup>901</sup> His powers and role are set out in Part VI of the Act.

associated obligations under related conventions and is also responsible for encouraging good practice and codes of practice. He is required to lay an annual report before Parliament dealing with the exercise of his functions under the Act.<sup>902</sup>

Here four specific areas of his work are examined – in the context of the celebrity privacy issues and proportionality in this thesis – which have been subjected to greater public scrutiny. These are the issues arising from *Operation Motorman 1 and 2 (Motorman)*, the Subject Access provisions within s.53 of the Act, his role in civil court proceedings and his power to issue monetary penalty notices (MPNs) and to prosecute.

#### **6.4.1 *Motorman***

The history of *Motorman*<sup>903</sup> is set out over 12 pages in the Leveson Report.<sup>904</sup> It involved the Commissioner's officials, from 2002 onwards, investigating the activities of a private detective called Steve Whittamore. They uncovered a mass of documentation detailing an extensive trade in personal information. When analysed it showed a clear audit trail between the requests, supply and payment for personal information about celebrities of all categories and others. Mr Whittamore's customers included a significant number of journalists employed by a range of newspaper and magazine titles.<sup>905</sup>

The implications of this material were so significant that the Commissioner presented two reports to Parliament summarising the investigations' findings:

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<sup>902</sup> In 2006 he used his power to lay other reports before Parliament when he raised the problems about the unlawful trade in personal data in *What Price Privacy?* and *What Price Privacy Now?* arising from *Operation Motorman 1 and 2*: see 6.4.1.

<sup>903</sup> Ironically it was named after the large operation carried out by the British Army in Northern Ireland on 31 July 1972. That aimed to retake the "no-go areas" controlled by Irish republican paramilitaries that had been established in Belfast, Derry and other large towns.

<sup>904</sup> Leveson Vol I Ch 3, 257 – 269.

<sup>905</sup> The database that was created - which includes the names of all the celebrity "targets" and the journalists making the requests - referred to in 3.3, 259 of that Chapter was the subject of a successful FOIA appeal decision against the Commissioner published on 29 November 2013: *Christopher Colenso-Dunne v IC (EA/2012/0039)*. The disclosure ordered, however, is embargoed until the conclusion of trials still to take place at the Central Criminal Court.

*What Price Privacy?* and *What Price Privacy Now?* The reports also called for stricter penalties for those engaged in unlawful activities, in particular for breach of s.55 of the Act. Such changes are still awaited.

No journalists were ever interviewed by the Commissioner in relation to *Motorman*.<sup>906</sup> The Commissioner intended to prosecute Mr Whittamore and five others under s.55 of the Act. However the CPS first prosecuted them – and others – with corruption offences.<sup>907</sup> Given the conditional discharges received by the accused the Commissioner discontinued his prosecutions on public interest grounds. Leveson LJ commented, because the maximum sentence for a breach of s.55 was a financial penalty, that it was not an unrealistic decision.

The negative impression created by *Motorman* about the Commissioner's rigor and vigour in this area in matters relating to enforcement activity connected to journalists – despite the fact that his room for action was hampered by CPS activity over which he had no control – was inevitably reinforced by DI Owen's evidence during the Leveson Inquiry.<sup>908</sup>

That *Motorman* was the tip of an iceberg of data protection failures impacting on celebrities and others is borne out by recently-released July 2014 statistics.

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<sup>906</sup> In his evidence about *Motorman* to the Leveson Inquiry on 17 November 2011, former DI Alexander Owens – a Senior Investigating Officer from 1999 – 2005 at the ICO – said the serial breaches of the Act came from access to personal data held only by the DVLA via the Police National Computer (PNC). He felt Richard Thomas, the Commissioner, was unwilling to take on the press involved and that “was a wrong decision... certainly not based on any advice given by Counsel or on any lack of evidence, as ICO would have everyone believe.” See also Leveson Vol III Part E Chapter 3 257 – 268 and Vol III Part H Chapter 2 1003 – 1025, [1.1 – 1.9].

<sup>907</sup> The indictment at Blackfriars Crown Court was amended to include s.55 offences. Mr Whittamore and another investigator pleaded guilty and – for reasons explained in the sentencing remarks by HHJ Samuels - received conditional discharges.

<sup>908</sup> The *Consenso-Dunne* Information Rights appeal decided that the names of many (but not all) of the journalists on the database who were Mr Whittamore's clients could be released. The Tribunal highlighted a major error that had occurred in the (then) Commissioner's handling of that information request. Mr Colenso-Dunne had been told on 26 September 2011 that the information on the database had not been recorded. The Leveson Inquiry three months later heard detailed evidence in December 2011 from the Commissioner and DI Owens that the database did and always had existed. The Tribunal's critical view of this is in a preliminary ruling in the *Colenso-Dunne* appeal (on 12 November 2012) from [24 – 31]. Particularly [30]: “We only became aware of the ICO's error after the Appellant drew our attention to the evidence presented to the Leveson Inquiry regarding the Spreadsheets.”

These show that more than 100 detectives are investigating allegations of hacking, bribery and other crime by British newspaper journalists and 46 police officers are investigating phone hacking. A further 53 police are investigating payments by newspapers to police and other public officials. Since *Motorman* there have been 210 arrests and interviews under caution, including 96 of journalists, 26 of police officers and 13 of private investigators. These have produced 71 charges, 19 guilty pleas, 7 acquittals and 15 journalists and public officials being sentenced for offences ranging from phone hacking to misconduct in a public office. The total cost of these investigations so far is £32.7m, a large bill for misconduct at one end of the spectrum and ineffective regulatory action at the other.<sup>909</sup>

#### **6.4.2 The Subject Access Provisions: s.53 of the Act**

As the result of a series of FOIA requests made for this thesis, it became apparent that there had only ever been one request for the Commissioner's assistance under this section in the entire life of the Act - in 2003 - which was refused (with reasons).<sup>910</sup> The s.53 route is open to all but could be particularly useful for aspiring attributed celebrities with limited budgets. There had been a singular lack of engagement with the public - or publicity about – about the route to ask him<sup>911</sup> for assistance.<sup>912</sup> There is a public interest filter in respect of the Commissioner's involvement<sup>913</sup> and – if the Commissioner does not want to be involved – he is required to let the requestor know that and, if he thinks fit, the

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<sup>909</sup> <http://inform.wordpress.com/2014/07/12/revealed-10-police-inquiries-into-illegal-data-techniques-martin-hickman/>

<sup>910</sup> By the author *IRQ0458792* on 31 July 2012 and *IRQ0462072* on 5 September 2012, with a third request, by Ms Kuan Hon (a PhD colleague) *IRQ0467845* on 10 October 2012.

<sup>911</sup> Section 53 (1) of the Data Protection Act 1998

<sup>912</sup> Ibid: "An individual who is an actual or prospective party to any proceedings under section 7 (9), 10 (4), 12 (8) or 14 or by virtue of section 13 which relates to personal data processed for the special purposes may apply to the Commissioner for assistance in relation to those proceedings."

<sup>913</sup> Ibid s.53 (2).



reasons for his inaction.<sup>914</sup> The giving of reasons is not mandatory but failure to do so could form the basis of an application for judicial review.<sup>915</sup>

As a result of the Information Requests, it became apparent that the Commissioner considered whether that single case would clarify important points of law or principle, the number of people potentially affected, the nature of the detriment to people potentially affected and whether the issues had a wider impact on the general public before concluding that he would not provide assistance because it did not involve a matter of substantial public importance.<sup>916</sup> The Information Requests, however, resulted in the disclosure of a 2004 policy document.<sup>917</sup> This document – which has no statutory force and was drafted within the Commissioner’s office – may explain the reason for the lack of activity. The factors that he may consider when deciding whether or not, and to what extent, to provide assistance are common sense.<sup>918</sup> But, in any case that exceeds:

£25,000 (or in which the costs of proceeding to a  
contested trial or final hearing would exceed £75,000)

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<sup>914</sup> Ibid s.53 (3).

<sup>915</sup> Schedule 10 of the Act sets out further provisions relating to the Commissioner’s assistance under s.53. The reason such provisions exist within the Act seems to be to ensure that individuals faced by the procedural claims under s.32 (4), given the complexity of this area, have an “equality of arms” in terms of their Article 6 ECHR rights as no legal aid has ever been available for litigation under the Act.

<sup>916</sup> ICO to Ms Kuan Hon: 6th November 2012.

<sup>917</sup> This makes it clear that the Commissioner will only intervene in a “matter of substantial public importance.” This is defined as “a matter of real and significant public importance with repercussions which go beyond the impact on the parties/litigants themselves and which affects the wider public, or raise an important question of principle. The considerations....include: whether the case will clarify an important point of law or principle; the number of people potentially affected; the nature of the detriment to any class of people potentially affected; whether the issues raised by the case have a wider impact on the general public.”

<sup>918</sup> They include: the likely cost of assistance, the financial means of the applicant, whether there are alternative resources or funding available to the applicant, whether there is a more appropriate alternative course of action available to the Commissioner (the use of his enforcement powers), the likelihood of the claim succeeding, whether the case falls within an area selected by the Commissioner for special attention, the likelihood of a settlement being reached prior to commencement of proceedings, complexity of the case in law and/or fact, the availability to the Commissioner of sufficient resources and/or funding, the detriment that has been/is being caused to the applicant, the conduct of the applicant in pursuing the claim, the conduct of the data controller in defending the claim, whether the data controller is representative of a certain sector and – finally - the size and resources of the data controller.

the Commissioner may refuse, defer or cease the provision of assistance at any time if the proposals put forward by or on behalf of the applicant for progressing the case, including proposals as to cost, do not appear to the Commissioner to be satisfactory.

It is stated clearly in the policy that the Commissioner would need to be satisfied that it was reasonable to provide assistance in light of the *resources* available to him to discharge his statutory functions and the likely future demands on those resources. This policy has, in effect, allowed the Commissioner to delimit his “assistance” to such a degree that he appears to have written himself out of acting at all. This makes s. 53 a moribund and almost unused power within the Act. It may not be Charter Article 8 compliant.

In a move that further distances the Commissioner from complaints or concerns he receives under the Act he announced a Consultation that closed at the end of January 2014<sup>919</sup> in respect of a “new approach to data protection concerns”.<sup>920</sup> His office received 40,000 written enquiries or complaints, and 214,000 phone calls in 2012/13 from members of the public. In only 35% of these instances, had data protection legislation actually been breached. He intends to encourage individuals to address their concerns to the organisation complained about so that his office can focus on “those who get things wrong repeatedly” and take action against those who commit serious contraventions of the legislation.

We may make an assessment under s.42 of the DPA where we think this adds value or where the customer has asked us to do so. We may simply offer advice to both parties and ask the organisation to take ownership of their customer or client's concern. We will decide how we can best tackle each concern on a case by case basis.

However s.42 states that “any person who is, or believes himself to be, directly affected by any processing of personal data” may make a request for an assessment “as to whether it is likely or unlikely that the processing has been

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<sup>919</sup> [http://ico.org.uk/about\\_us/consultations/closed\\_consultations](http://ico.org.uk/about_us/consultations/closed_consultations)

<sup>920</sup> The changes took effect from 1 April 2014.

or is being carried out in compliance with the provisions” of the Act. On receiving such a request the Commissioner “shall make an assessment”.<sup>921</sup> That duty is an absolute one and whether it has been carried out must also be communicated to the person who made the request.<sup>922</sup> Avoiding that statutory duty as well as his obligations under the Directive and EU Charter of Fundamental Rights responsibilities could lead to a judicial review in this area.

#### **6.4.3 *Law Society and others v Kordowski*<sup>923</sup>**

The Commissioner’s lack of action was exposed to the full glare of judicial attention – together with comments on the Commissioner’s inaction in respect of his powers under the Act - in *Law Society and others v Kordowski*.<sup>924</sup> The Law Society, and those firms it represented, successfully claimed that being listed and named on a website purporting to list “solicitors from hell” was defamatory, harassment, and breached the DPA. Tugendhat J noted that the DPA contained detailed provisions<sup>925</sup> about how the Commissioner should promote the observance of the requirements of the Act by data controllers. The provisions were in addition to the rights conferred on individuals by the Act.<sup>926</sup> The Chief Executive of the Law Society had written to the Commissioner to complain about the website. On 6 January 2011 the Commissioner replied in a three-page letter explaining why he felt unable to intervene. The Commissioner was not represented and did not attend the hearing. Tugendhat J said that he appreciated the burden that the law may have placed on the Commissioner and that it might be more appropriate for complainants to pursue their own remedies through the courts. Equally, the Commissioner could properly decline to act.

But where there is no room for argument that processing is unlawful (as is the case with the Defendant, given the numerous judgments against the Defendant referred to in this judgment), it seems to me to be more difficult to

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<sup>921</sup> s.42 (1).

<sup>922</sup> s.42 (4). This section transposes Article 28 (4) of the Directive.

<sup>923</sup> *Law Society and others v Kordowski* [2011] EWHC 3182 (QB)

<sup>924</sup> *Ibid* [76 – 101].

<sup>925</sup> In Part V of the Act, under the title ‘Enforcement’, and Part VI under the headings ‘Functions of Commissioner’.

<sup>926</sup> *Law Society and others v Kordowski* [93].

say that the matter is not one which could be dealt with under Part V.

Now this has been articulated, the use or lack of use of s.53 of the Act raises significant issues for the Commissioner. There are clearly resource issues, more pressing now given current and on-going financial stringency. However the data protection activity and responsibilities of the Commissioner's office is the source of a significant income-generating portion of his budget.<sup>927</sup> In his July 2014 report to Parliament the Commissioner identified the main risks for his future work as Government budget constraints, implementing the EU's data protection Regulation, unspecified "reputational risks" to his office and a rising workload.<sup>928</sup> There was no reference to s.53 of the Act.

#### **6.4.4 Enforcement**

The Commissioner's enforcement powers include prosecutions and the ability to issue Civil Monetary Penalty Notices (MPNs).<sup>929</sup> Unlawfully obtaining or accessing personal data is a criminal offence under section 55 of the Data Protection Act 1998.<sup>930</sup> The offence is currently only punishable by a fine of up to £5,000 in a Magistrates Court or an unlimited fine in a Crown Court. As discussed in 6.4.1 above, successive Commissioners have called for more effective deterrent sentences, including imprisonment, to be available to the courts to stop the unlawful use of personal information. Under section 77 of the Criminal Justice and Immigration Act 2008, the Justice Secretary has the power – so far unused - to introduce new regulations that would add custodial sentences to s.55. Calls to activate the powers have been repeated – without

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<sup>927</sup> The 2013/14 accounts show that the Data Protection income stream was £16,528,000 (2012/2013: £16,055,000):  
[http://ico.org.uk/about\\_us/performance/~/\\_media/documents/library/Corporate/Research\\_and\\_reports/annual-report-2013-14.pdf](http://ico.org.uk/about_us/performance/~/_media/documents/library/Corporate/Research_and_reports/annual-report-2013-14.pdf)

<sup>928</sup> Ibid: Governance Statement 54 – 58.

<sup>929</sup> 1,970 MPNs were issued in 2013/2014 (3,130 2012/2013) bringing in £820,000 (£2,572,000 2012/2013).

<sup>930</sup> The Commissioner adopted the Code for Crown Prosecutors and is currently reporting to the Home Affairs Committee on a joint investigation being conducted with the National Crime Agency into breaches of s.55 of the Act by private investigators (Operation Spruce):  
<http://data.parliament.uk/writtenevidence/WrittenEvidence.svc/EvidencePdf/5914>

success - by the House of Commons Justice Committee.<sup>931</sup> What the Commissioner has done instead, absent of powers of imprisonment, is to seek compensation orders to ensure that the profits from misappropriation and misuse of personal data are traced and clawed back, over and above any fine imposed by the court.<sup>932</sup>

As a result of the Parliamentary challenge mounted in the “MPs’ Expenses” case<sup>933</sup> the relevant information for disclosure required a degree of redaction to exclude the personal and sensitive personal data of some of those associated with the MPs. The information needed to be scanned first in an un-redacted form and then redacted. The company subcontracted to do this for the House of Commons – by an oversight - was not required to sign a confidentiality agreement. An individual connected with that company made copies of the CDs containing the un-redacted personal information and offered those to various media publications first on a "pay per view" basis and then to the *Daily and Sunday Telegraph* for exclusive use. The Commissioner considered whether the circulation of the CDs and use of sensitive personal information on them by the media contravened s.55 of the Act. That section provides that:

a person must not knowingly or recklessly, without the consent of the data controller, obtain or disclose personal data or the information contained in personal data... [unless] in the particular circumstances the obtaining, disclosing or procuring was justified as being in the public interest.<sup>934</sup>

The (then) Commissioner decided that these egregious media disclosures would be met with a public interest defence described above both from the CD

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<sup>931</sup> Justice Committee proceedings 21 March 2013:

<http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/962/96205.htm>

<sup>932</sup> For the illegal acquisition of 500,000 T-Mobile telephone records, and their subsequent sale, two men were ordered to pay a total of £73,700 compensation on conviction at Chester Crown Court in 2011 with imprisonment in default.

[http://ico.org.uk/enforcement/~media/documents/pressreleases/2011/t-mobile\\_news\\_release\\_20110610.ashx](http://ico.org.uk/enforcement/~media/documents/pressreleases/2011/t-mobile_news_release_20110610.ashx)

<sup>933</sup> *Corporate Officer of the House of Commons v Information Commissioner, Brooke, Leapman and Ungood-Thomas* [2008] EWHC 1084 (Admin).

<sup>934</sup> s.55 (2) (d).

supplier and the media and that it was not in the public interest for him to consider taking action under the Act.<sup>935</sup>

Under sections 55A and 55B of the Act<sup>936</sup> the Commissioner may, where there has there been a serious contravention of section 4(4) of the Act, serve a monetary penalty notice on a data controller requiring payment of a monetary penalty not exceeding £500,000.<sup>937</sup> There is statutory guidance about this topic on the Commissioner's website.<sup>938</sup> Those who have had MPNs levied on them and who are currently recorded on the Commissioner's website include 20 local authorities, three police authorities, 11 health and social care bodies, five companies, five financial services companies and two Government departments.<sup>939</sup> While the current focus of MPNs is on inadequate security in relation to personal data and the legislation and not on media activity, that remains as an area of potential development for the future.

## 6.5 Permitted Interference

Six chapters<sup>940</sup> of Volume III of the Leveson Report deal with the media and the Act. Some of those observations and suggestions will be examined in greater detail later and separately. As a general comment, however, while the Press itself may temporise over regulatory structures and paradigms there is arguably a much greater challenge to the way in which it may be permitted to operate in terms of the collection, retention and publication of personal data about

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<sup>935</sup> Richard Thomas confirmed this reasoning in relation to s.55 to the author shortly after the event.

<sup>936</sup> Introduced from the Criminal Justice and Immigration Act 2008 and effective from 6 April 2010.

<sup>937</sup> The top limit for MPNs – when initially consulted on by the Ministry of Justice – would have been £2 million. The eventual limit of £500,000 came about when it was realised that Government departments were likely to be significant offenders.

<sup>938</sup> <http://ico.org.uk/enforcement/fines> . It should be read in conjunction with the Data Protection (Monetary Penalties and Notices) Regulations 2010 and the Data Protection (Monetary Penalties) Order 2010.

<sup>939</sup> In November 2013 the Ministry of Justice received an MPN of £140,000 for releasing personal data of prisoners in a Category B prison and in January 2014 an MPN of £185,000 was served on the Department of Justice in Northern Ireland for allowing a filing cabinet containing details and files relating to a terrorist incident to be sold at auction.

<sup>940</sup> The entirety of Part H covering six chapters and 114 pages (997 – 1111).

celebrities and others in the future.<sup>941</sup> This results from evidence received, comments made and recommendations formulated by Leveson about altering the perceived inequalities in the proportionality of the Article 8 and Article 10 balancing exercise which results from the application of s.32 of the Act. As was pointed out, the development of this aspect of the Act's case law had been to "push personal privacy law in media cases out of the data protection regime and into the more open seas of the Human Rights Act."<sup>942</sup> That had happened because of the "slowness of the legal profession to assimilate data protection law" and, tellingly in the case of the judiciary, judges' greater familiarity with and preference for the "latitude afforded by the human rights regime over the specificity of data protection".<sup>943</sup> That development was undesirable, Leveson suggested, because the data protection regime was "much more predictable, detailed and sophisticated in the way it protects and balances rights"<sup>944</sup> and "significantly reduced the risks, uncertainties and expense of litigation concomitant on more open-textured law dependent on a court's discretion".<sup>945</sup>

Where the law has provided specific answers, the fine-nibbed pen should be grasped and not the broad brush. The balancing of competing rights in a free democracy is a highly sophisticated exercise; appropriate tools have been provided for the job and should be used.<sup>946</sup>

For reasons of relevance and lack of space it is not proposed to examine the exemptions within the Act that relate to national security, the prevention and detection of crime, regulatory functions, taxation, health, social work, employment and such areas as business management planning and corporate finance.

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<sup>941</sup> Although, on 16 July 2014, the Commissioner told lawyers and the media that the s.32 exemption would remain despite the proposed EU Data Protection Regulation. He stated that, if and when the Regulation was finally approved, EU member states would still be left to decide what their own rules should be. This approach appears to ignore the distinction between EU Regulations and EU Directives.  
<http://www.medialawyer.press.net/article.jsp?id=9998971>

<sup>942</sup> Leveson Vol III Part H 2.12, 1070.

<sup>943</sup> Ibid. This observation, in polite terms, suggests that the judiciary itself is not sufficiently comfortable with the provisions of the Act.

<sup>944</sup> Ibid.

<sup>945</sup> Ibid.

<sup>946</sup> Ibid, 1071.

### 6.5.1 Section 32: “Journalistic, literary or artistic material”

By s.32 (1) of the Act personal data which are processed only for the “special purposes” are exempt if (a) the processing is undertaken with a view to the publication of any journalistic, literary or artistic material, (b) the data controller reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and (c) the data controller reasonably believes that, in all the circumstances, compliance with that provision is incompatible with the special purposes.<sup>947</sup> Section 32 (3) states that, in considering whether the belief of a data controller was or is a reasonable one, “regard may be had to his compliance with any code of practice”.<sup>948</sup> Where, at the relevant time<sup>949</sup> the data controller claims, or it appears to the court, that any personal data to which the proceedings relate are being processed *only* for the special purposes, and with a view to the publication<sup>950</sup> of any journalistic, literary or artistic material which, at the time twenty-four hours immediately before the relevant time, had not previously been published by the data controller, then the court “shall stay the proceedings until either of the conditions in subsection (5) is met”.<sup>951</sup> This exemption currently recognises the importance of Article 10 ECHR - freedom of speech – in the Act, reflecting Article 9 of 95/46/EC. It acknowledges that journalists and the media must be allowed to process data about individuals without having their activities, including newsgathering, investigations and publication, stifled by the Act’s requirements. However the Act does not define what the public interest means. What it does say is that, in considering whether a data controller’s

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<sup>947</sup> By s.32 (2) this relates to (a) the data protection principles except the seventh data protection principle; (b) section 7; (c) section 10; (d) section 12, and (e) section 14(1) to (3).

<sup>948</sup> Such as the Press Complaints Commissions’ Code, or one designated by the Secretary of State: see See Data Protection (Designated Codes of Practice) (No. 2) Order 2000/1864.

<sup>949</sup> Under section 7(9), 10(4), 12(8) or 14 or by virtue of section 13 of the Act.

<sup>950</sup> s.32 (6) “publish”, in relation to journalistic, literary or artistic material, means make available to the public or any section of the public.

<sup>951</sup> s.32 (5): the conditions are (a) that a determination of the Commissioner under section 45 with respect to the data in question takes effect, or (b) in a case where the proceedings were stayed on the making of a claim, that the claim is withdrawn.



belief was “reasonable”, then there may be reference to any relevant code that falls within the Statutory Instrument.

Two of the leading cases that explored how the courts have interpreted section 32 have already been identified: *Campbell* and *Douglas v Hello*. In terms of arguments within these two cases on issues relating to the Act, it is the reasoning they provide about when s.32 works to prevent a successful claim of s.13 damage and distress that is of interest. Under s.2 of the Act “sensitive personal data”<sup>952</sup> may include – depending on the context - photographs taken of an individual.<sup>953</sup> Such data cannot be processed unless one of the conditions in Schedule 3 of the Act is met. Section 3 of the Act contains an important definition of “special purposes”: as stated earlier this means for journalism or art or for literary purposes.<sup>954</sup> Combined with s.4 (4), s.27 (1) and s.32 the effect is that – in certain circumstances – the processing of data for the special purposes is exempt from all but one of the data protection principles, concerning data security.

In *Campbell* the first instance judge, Morland J, followed a detailed route for his decision. Firstly he considered whether the personal data was “sensitive personal data” within Section 2. He found that it was. Then, he considered whether the defendant was exempted from liability under Section 32. His reasoning on this point (struck down by the Court of Appeal), made on the basis of looking at Directive 95/46, practitioner texts and *travaux préparatoires*,<sup>955</sup> was that s.32 covered *only* pre-publication processing. Given that the s.32 exemption did not apply, had there been a contravention of the first data protection principle under s.4(4)? He found there had been such a

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<sup>952</sup> Including racial or ethnic origins of the data subject, political opinions, religious beliefs or other beliefs of a similar nature, trade union membership, physical or mental health, sexual life and offences allegedly or actually committed together with their disposal or sentence by a court. Tax and other fiscal matters are excluded.

<sup>953</sup> Particularly a photograph – irrespective of ethnicity – that showed Ms Campbell leaving an NA meeting, a matter touching generally on her physical and mental health.

<sup>954</sup> That s.3 of the Act - “(a) for the purposes of journalism; (b) artistic purposes; and (c) literary purposes” is a particularly broad and media-protective definition was reinforced domestically by the Supreme Court in *Sugar v BBC* [2012] UKSC 4 and in EU jurisprudence by Case C-73/07 *Tietosujvaltuutettu v Satakunnan Markkinopörssi*.

<sup>955</sup> See Tugenhaf and Christie *The Law of Privacy and the Media* 2<sup>nd</sup> Edn 2011 [6.104].

contravention and concluded that Piers Morgan, the defendant editor, had failed to establish the s.13(3) defence.<sup>956</sup> In terms of compensation Ms Campbell was awarded £2,500 for both breach of confidence and the data protection breach - the latter subsumed and dependent on the breach of confidence claim in the House of Lords - and then a further £1,000 aggravated damages for a second publication of slightly different details. In *Douglas Lindsay J* found that there were no grounds that *Hello* could have reasonably believed that publication of a private wedding event was in the public interest.<sup>957</sup> In respect of the DPA damages, £50 was awarded.

The Court of Appeal in *Campbell* construed s.32 broadly - and as sequential steps - with the defendant being required to (and succeeding in) meeting all the requirements of subsections (1) (a), (b) and (c).<sup>958</sup> The information formed “a legitimate, if not essential part of the journalistic package designed to demonstrate that Ms Campbell had been deceiving the public”. The public interest reasons identified were her possession of Class A drugs, that she was a role model for young people, that she had held herself out as someone who never used drugs – drug use being prevalent in the fashion industry – and that she had lied about her drug use so permitting the media to put the record straight. This reasoning was not tested further because the claim under the Act was “silent” in the House of Lords. The final decision was arguably distorted because the issues about the protection of privacy in personal information became absorbed into and parasitic on the outcome of the breach of confidence exercise balancing Articles 8 and Article 10. They deserved to be treated as separate entities. The Court of Appeal’s reasoning – itself – is questionable. It had found that the Directive and the Act were aimed at the processing and

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<sup>956</sup> “In my judgment the Defendant has utterly failed to establish a section 13 (3) defence. Indeed in his evidence Mr Piers Morgan made it clear that in his opinion the Claimant had lost all rights to privacy.” Morland J [121].

<sup>957</sup> *Douglas v Hello!* [2003] EWHC 786 Ch [230 – 239]. Even if the exemption had been available, Lindsay J found that *Hello* had broken the PCC Code.

<sup>958</sup> When the case went to the House of Lords, Counsel for the parties agreed that the data protection issue should stand or fall on the result of the rest of the case. As a result there was no further exploration in the House of Lords of the DPA.

retention of data "over a sensible period"<sup>959</sup> although this phrase is not referred to anywhere. Rather, the fifth data protection principle provides – in proportionality terms - that personal data are not to be kept for longer than is necessary for the purpose for which they are being processed. The remedies available for breaches of the data protection principles were stated to be "not appropriate for the data processing which will normally be an incident of journalism".<sup>960</sup> Yet all the remedies with which the Court of Appeal was concerned – like rectification and erasure – were discretionary ones.<sup>961</sup> Also, that it was impractical for the Press:

to comply with many of the data processing principles and the conditions in Schedules 2 and 3, including the requirement that the data subject has given his consent to the processing.<sup>962</sup>

In principle there is nothing manifestly impractical in the Press complying with the data processing principles. In particular, the data subject's consent - which Part II of Sch I may require for the processing to be lawful - is tempered by what is practicable. That the requirement to satisfy a condition in Schedule 3 would "effectively preclude publication of any sensitive personal data" since otherwise there "would be a string of claims for distress under s.13" for which "there would be no answer...even if the publication in question had manifestly been in the public interest"<sup>963</sup> is the kind of "floodgates" judicial reasoning<sup>964</sup> that has hampered the development of the Act generally. To suggest that the requirement to satisfy a condition in Schedule 3 is an unwarranted restriction on the press creates a climate where unrestricted press publication of the most private of personal information - "sensitive personal data" - without redress

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<sup>959</sup> *Campbell v MGN Ltd* [2002] EWCA Civ 1373 [121].

<sup>960</sup> *Ibid* [122].

<sup>961</sup> *P v Wozencroft (Expert Evidence: Data Protection)* [2002] EWHC 1724.

<sup>962</sup> *Campbell* [122].

<sup>963</sup> *Ibid* [122 – 124].

<sup>964</sup> Described at 6.2.3.1 – 6.2.3.2,

ignored the very thing the Directive strives to protect. It transpired that much of the phone-hacked data was this kind of sensitive personal information.<sup>965</sup>

Section 32 of the Act will always be fact-sensitive. Surreptitiously-taken photographs of celebrities are always going to attract particular scrutiny.<sup>966</sup> Any personal information that is obtained through a subterfuge or by deception may not have been processed “fairly”<sup>967</sup> in terms of the first data protection principle.<sup>968</sup> This was a point pressed by Robert Jay QC in questions to Richard Thomas and Christopher Graham (past and current Commissioners) in respect of illegally obtained ex-directory celebrity telephone numbers.<sup>969</sup> He wanted to know why, in the light of information about this kind of activity from *Operation Motorman*, the Commissioners had not served s.43 Information Notices on newspaper titles under the Act and in pursuance of their duty under s.51 to promote good practice. The answers were, from Mr Thomas: “I can’t think of any occasions I was personally involved in where this power was used” and from Mr Graham:

...if the point is ...that Section 32 covers the writing of this piece, but it doesn't cover the obtaining of the evidence, I find that, well, a challenging distinction about which I would need to think further.

When the additional hurdle of lawful processing is factored in then the apparent burden on the media appears onerous. Practically this is not the case because of the structure of the way this section operates.

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<sup>965</sup> The circumstances in which such material could legitimately be used is set out in The Data Protection (Processing of Sensitive Personal Data) Order 2000 (SI 2000/417).

<sup>966</sup> On this point, the arguably unperceivable differences – save the conflicting results - between *von Hannover 1* (2005) 40 EHRR 1 and *von Hannover 2* 40660/08 [2012] ECHR 228 turn on whether the photographs were taken surreptitiously: R Callender Smith *From von Hannover (1) to von Hannover (2) and Axel Springer AG: do competing ECHR proportionality factors ever add up to certainty?* Queen Mary Journal of Intellectual Property Vol.2 No.4 2013 388–392.

<sup>967</sup> Note the conflict that now exists on this between *Von Hannover I* and *Von Hannover II* noted above and the issues raised by phone hacking pre- and post-HRA 1998.

<sup>968</sup> A recent example is the “blagging” call made by two Australian radio’s *2DayFM* presenters on 5 December 2012 to the King Edward VII hospital in London where the Duchess of Cambridge was a patient.

<sup>969</sup> Respectively Day 14, 9 December 2011, evidence transcript p 18 line 24 and p 19 line 1 and Day 32, 26 January 2012, p 31 lines 3 – 7.

### 6.5.2 The Dynamics of s.32

If the tests in s.32 (1) are met, and the newspaper – as data controller - reasonably believes that compliance with the relevant data protection provision means that either publication of the material which it would be in the public interest to publish would not be possible or that he would be unable to do so effectively or fully, then he is not bound by the particular data protection provision (except principle 7, the security principle). This allows the editor to disregard the prohibition on processing sensitive personal data, the requirement for legitimacy of processing and the prohibition on overseas transfer if there is a reasonable belief that the s.32 (1) tests are made out. The balancing test – assessing whether the publication is in the public interest and whether the relevant data protection provision would be incompatible with publication – is likely to be difficult where the editor seeks to avoid compliance with these fundamental provisions but the effect of s. 32 (4) puts off the examination of all of this until after publication of material.

This inbuilt restriction on prior restraint continues to apply to any processing which is undertaken “with a view to publication” and lasts for as long as there is an intention to publish. This allows the media to resist proceedings brought by an individual to enforce rights under sections 7, 10, 12 or 14 (1) – (3). The media can insist that the individual’s proceedings are halted until the Commissioner has made a determination that the processing is no longer carried out for the special purposes or is not carried out only for the special purposes. The practical effect of this is to allow the media to have proceedings stayed until after publication of the relevant material.

This introduces a novel situation, which does not appear to be reflected in any other area of English law, where specific factual issues are transferred from the jurisdiction of the court to a regulatory official – the Commissioner – for an external determination on whether the exemption was correctly applied. The Commissioner’s determination<sup>970</sup> is limited to whether the personal data were or were not being processed only for the special purposes. If he decides that

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<sup>970</sup> Under s.45 of the Act.

the special purposes test is not met then he can lift the stay on the court proceedings. At that stage the media can appeal to the Information Rights Tribunal against that determination. As one commentator has noted:

It is not apparent why Parliament decided that the determination has to be made by the Commissioner. It would be far simpler for the courts to make appropriate determinations as to whether the processing was being carried out for the special purposes. The court seized of the matter would be able to hear witnesses on the claim and cross-examination on the issue. The Commissioner is not in a position to do this.<sup>971</sup>

Even if, on complaint by a celebrity data subject, the Commissioner considered issuing a s.44 notice<sup>972</sup> on the media to enable him to make an advance determination under s.45 he would need to have reasonable grounds for suspecting the media of malpractice in respect of that specific individual. In effect, the Commissioner faces a difficult evidential burden before he can even seek information from the media. The media, however, can assert the exemption in court proceedings as of right without exposing their processes and procedures to the scrutiny of the court before claiming the statutory stay. The proportionality of the effect of this is particularly strained – even in defence of the media’s Article 10 rights - because the right of the media to appeal the Commissioner’s s.45 determination to the Information Rights Tribunal (with further appeals possible against the Tribunal’s decision) adds in additional time that could be measured in years rather than weeks or months.

### **6.5.3 The Origins of s.32**

Philip Coppel QC wrote a 17-page opinion for the Leveson Inquiry<sup>973</sup> that was highly critical of the way in which s.32 had evolved. His approach highlighted the concerns of Lord Lester of Herne Hill, in the House of Lords debate on the Bill, warning that it failed to implement Directive 95/46, that it was not Article 8

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<sup>971</sup> Rosemary Jay *Data Protection Law and Practice* 4th Edn Sweet & Maxwell 2012, 580.

<sup>972</sup> A special information notice under s.44 can only be served where one of two conditions applies. Either the Information Commissioner has received a request under s.42 or a stay has been claimed under s.32.

<sup>973</sup> Dated 28 Jun 2012.

compliant and “authorised interference by the press with the right to privacy in breach of Article 8 of the ECHR.”<sup>974</sup>

Agreeing with Lord Lester, the Opinion concluded that the practical effect of the *Campbell* litigation had been that breach of privacy claims were now principally brought under the HRA, rather than under the Act because:

Data protection law is technical and unfamiliar to most judges....applications for summary judgment on such claims are, for the moment at least, unlikely to find favour.<sup>975</sup>

The Leveson Report summarised Mr Coppell’s evidence about s.32 as:

....where journalism is concerned undoubtedly, once you’re in section 32 territory, then the protection which is given to an individual’s privacy almost entirely falls away. All you have to do is touch section 32 in some way, shape or form and the contest which the Act is supposed to embody between the right of expression, freedom of [expression], and an individual’s personal privacy has all been tilted one way. In other words, the journalist is made arbiter of the balance, and the balance in turn falls to be made on the basis of matters exclusively within the knowledge of the journalist, including matters inaccessible because of the extensive protection provided for journalists’ sources. He goes on to argue that s32 “does not recognise any right to privacy. It’s there, its sole objective is to cut away at the right of privacy, and at the end of it, certainly after the decisions of the court, there is nothing left of that right.”<sup>976</sup>

The Report concluded that specific revisions to s.32 should be made and that the existing limitations on the subject access right designed to safeguard third party information should be resolved by a provision to the effect that the right of subject access was not intended to displace the general law on the inaccessibility of journalists’ sources.<sup>977</sup> This portion of the Report – while suggesting the kind of privacy accommodations that needed to be crafted in law and in Codes of Practice to rebalance the Article 8 and Article 10 equation

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<sup>974</sup> [61] of the Opinion.

<sup>975</sup> Quoted at [68] from *Imerman v Tchenguiz & ors* [2009] EWHC 2024 (QB).

<sup>976</sup> Leveson Report Vol 3 Part H [2.7 – 2.8] at 1070.

<sup>977</sup> *Ibid* [2.59 – 2.60] at 1082.

– creates currently unmet challenges for any government seeking to take the suggestions forward in legislation. Equally the media may face a similar problem in articulating why the recalibration exercise to create proportionality in this forum, given the spotlight turned on it by Leveson, should not take place. That is all for the future (if it happens at all) and no Government-sponsored draft legislation in this area is currently on the horizon.

The Commissioner<sup>978</sup> issued a consultation document<sup>979</sup> with a view to issuing a Code of Practice in respect of s.32.<sup>980</sup> Section 32(3) states that when considering whether:

the belief of a data controller that publication would be in the public interest was or is a reasonable one, regard may be had to his compliance with any code of practice.

If such a Code of Practice had emerged, and had been designated by the Secretary of State,<sup>981</sup> then serious non-compliance could have resulted in enforcement action from the Commissioner more rapidly than any new press regulator could have achieved. However the tone of the Commissioner's response<sup>982</sup> to the Leveson Report made it clear that his office was not keen to mix its current responsibilities – and those that might eventually emerge from the EU's draft Data Protection Regulation – with those of a back-stop press regulator. In the event the s.32 consultation was closed in August 2013, there

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<sup>978</sup> *The Information Commissioner's Response to the Leveson Report on the Culture, Practices and Ethics of the Press* 7 January 2013: "...there is no escaping the fact that Leveson is critical of the work of the ICO in so far as it involves regulation of the press. This criticism is focused on the response of the ICO to the illegality in the acquisition and use of personal information that was exposed by Operation Motorman, but it also relates to how the ICO has subsequently sought to engage operationally with the press." The current Commissioner is a former BBC radio and TV journalist.

<sup>979</sup> The consultation closed on 15 March 2013.

<sup>980</sup> Under the provisions of s.51 of the Act.

<sup>981</sup> As is the current PCC Code of Practice: SI 2000 No. 1864.

<sup>982</sup> 7 January 2013:

[http://ico.org.uk/news/~media/documents/consultation\\_responses/ico\\_response\\_to\\_leveson\\_report\\_012013.ashx](http://ico.org.uk/news/~media/documents/consultation_responses/ico_response_to_leveson_report_012013.ashx)



having been only 16 responses,<sup>983</sup> and the Commissioner decided simply to issue the draft general guidance to the media on data protection.<sup>984</sup>

The s.32 argument has not featured as a counter-argument by the media in injunctive proceedings relating to misuse of private information cases more generally. Within the regime established by the Act it provides a *Bonnard v Perryman*-type block, permitting the use of sensitive personal data providing it is being processed for publication and the editor – rather than a court - believes its conditions are met. By analogy, however, it removes completely any substance to Max Mosley’s prior notification arguments that were taken to Strasbourg and reinforces the media’s position in terms of its Article 10 rights. In the *Edward RockNRoll* situation described in Chapter 3<sup>985</sup> – had it been argued – it might have resulted in Briggs J having had to consider the effect of it in the general balancing exercise, requiring him to articulate why he was ignoring its provisions on the basis that he was not looking at a claim under the Act. Practitioners regard it only as having validity within the confines of the Act and not as an exemption that can be used - by analogy - to add to the Article 10 side of the balancing scales so that it could be aggregated to resist injunctions based on Article 8 privacy claims brought under alleged breaches of other privacy regimes. It is as if those who fully understand the current s.32 as a media defence do not want to have its inherent lack of proportionality exposed to any further practical judicial examination.

## 6.6 Summary

The data protection regime in the UK is still in a state of flux and development. Looked at positively it is a slowly maturing set of principles and civil remedies which should aid celebrities and others to protect their privacy and reputations as well as the integrity and security of personal data and sensitive personal

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[http://ico.org.uk/news/blog/2013/~media/documents/library/Data\\_Protection/Research\\_and\\_reports/framework-consultation-summary-of-responses.pdf](http://ico.org.uk/news/blog/2013/~/media/documents/library/Data_Protection/Research_and_reports/framework-consultation-summary-of-responses.pdf)

<sup>984</sup> Discussed at 6.2.1 earlier in this Chapter.

<sup>985</sup> Which related to sensitive personal data contained in a *Facebook* picture that had been seen by 1,500 people.

data held and being processed about them. The reality is that current practice does not match this potential.

The roots of the Leveson Inquiry – the determined and industrial-scale of the illegal and unlawful attempts on behalf of certain media to hack into and monitor the movements of and personal data about the royal family, members of the royal household and a raft of other celebrities – lie in an ineffective and limited investigation by the Commissioner in *Operation Motorman*.

The data protection regime has not served celebrities well so far, particularly in terms of phone hacking. Successive Commissioners' views about whether illegally obtained ex-directory phone numbers were within or outside current s.32 protection demonstrates a confusion which is unsettling.<sup>986</sup> The regime clearly failed to accommodate celebrity needs and expectations in terms of their privacy. It has not been much more effective in the context of litigation and judicial interpretation.

While much of the media focus has concentrated on what will happen as a result of the recommendations in the Leveson Report about reformed press regulation there had been less media coverage about what that Report stated about the lack of vigour and vigilance in terms of the protection of personal data by the Commissioner at the time. It is, perhaps, not in the media's interest to highlight such weaknesses yet such weaknesses also seem to have escaped the adverse focus of the celebrities' pressure group *Hacked Off*.

At a domestic level the recently-raised litigation and jurisdictional issues in the *Vidal-Hall v Google Inc* and *Steinmetz v Global Witness* cases should help provide additional clarity to untested areas involving proportionality generally and specifically to celebrity data protection rights. *Google Spain* is as significant for its jurisdictional aspects as the practical effects of the result itself.

The UK's data protection regime is struggling to become mature and effective. As it tries to do this there is, on the horizon, the prospect of substantial changes as a result of the EU's proposed Data Protection Regulation. That lack of

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<sup>986</sup> In answer to Robert Jay QC's questions detailed at Chapter 6.5.1. Footnote 964.

stability – in anticipating its final content and the eventual regime it may create – adds additional uncertainty and lack focus within the current regime. As a regime to protect celebrity privacy by litigation in tandem with the enforcement of regulation it has all the elements to become an effective remedy for the future.

# CHAPTER 7

## Conclusions

### 7.1 Privacy remedies before 2000

Before 22 October 2000 – the date the HRA came into force – four of the five privacy regimes examined in this thesis existed. Two had been actively used for the protection of the privacy of celebrities: breach of confidence and copyright. The Data Protection Act 1998 had been in force since August 1998, replacing the 1984 Act. Neither of those Acts was tested in the celebrity sense until Lord Ashcroft’s unsuccessful post-HRA case, which began on 22 June 2001.<sup>987</sup> Protection from harassment was perceived only as a curb against domestic violence and as an anti-stalking measure. Misuse of private information – the new tort catalysed from the mixture of the HRA and breach of confidence – was an action for the future. Cases like *Kaye* and *Earl Spencer* had showed the restricted, tired and technical limits of the law when celebrities tried to rely on breach of confidence pre-HRA despite English judicial pronouncements about that cause of action being flexible enough to accommodate issues for the future. There is no evidence – when all the cases are examined - of any judicial timidity or fearfulness of media criticism in maintaining the “breach of confidence can accommodate all celebrity (and other) privacy issues in this area” approach.

Considering the celebrity privacy cases up to this period there are the inevitable litigation themes and topics that have continued to the present. “Kiss and tell” stories (particularly *Argyll*, *Woodward*, *Stephens* and *Barrymore*), pictures – real and digital – from *Prince Albert* to *Hyde Park Properties* and the telephone

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<sup>987</sup> With Michael Tugendhat QC representing him.

tapping in *Francome* were staples of the litigation battleground then as now but not in the volume that came before the courts post-2000.

When this thesis was started one hypothesis tested was whether there was any evidence of the ability of specific ascribed celebrities - such as the monarch and members of the royal family - to drive and shape the English laws of privacy over the 175 years from *Prince Albert*. That case, together with *R v Mylius* and – on any view - a reasonable copyright complaint about the Queen’s speech in 1992 being improperly appropriated and pre-published, could not bear the burden of supporting that initial proposition in the years up to 2000. If anything, the fact that the privacy aspects of *Prince Albert* lay dormant for so long showed a general reluctance on the part of the royal family to use the law to assert its privacy rights. *Probyn v Logan* – using copyright law and DORA to stifle “Daisy” Warwick’s “kiss and tell” personal fund-raising venture – was as politically pragmatic as was the criminal libel prosecution of Edward Mylius. They were cases of their time with little to add more generally to the future of celebrity privacy law. Too many other attributed and achieved celebrity cases were part of the mixture in the general development of this area of the law.

What is notable from that period is that, despite England’s former Attorney General<sup>988</sup> leading the drafting team for the ECHR in 1948 and with the UK as one of its first signatories of the Convention in 1953, that fact did nothing to advance the status of privacy rights *per se* in English law. It took the HRA to require English courts to recognize, apply and articulate Article 8 and Article 10 rights in English law. There seemed to be an entrenched aversion, in English law, to recognize any concept of privacy law unless it had been previously delineated or it was specifically created by Parliament.

It is reasonable to consider whether the concept of the kind of privacy all categories of celebrity could expect to be able to protect was limited in the years leading up to 2000. Whether, in effect, the “equitable” approach embedded within breach of confidence actions and copyright actions, created regimes for celebrity categories that were more or less amenable to protection or intrusion.

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<sup>988</sup> David Maxwell-Fyffe QC later, as Lord Chancellor, Lord Kilmuir.

If, as Wack's has argued, the nucleus of the right to privacy is the "safeguarding of private facts"<sup>989</sup> or as Moreham contends it is the state of desired 'inaccess' or as 'freedom from unwanted access'<sup>990</sup> then it is really only the outlier case of *Kaye* and that show the ragged edges of interference that is unlikely to be permitted when measured against the post-HRA proportionality balancing exercise.<sup>991</sup> *Argyll, Woodward, Lennon, Stephens* and *Barrymore* are likely to have resulted in the same outcomes now as then. What has changed is the additional protection that would now be accorded to private information. Each of these celebrity cases now would have included a claim in respect of Article 8 misuse of private information to be countered by a media defence that would assert Article 10 freedom of speech issues.

In copyright *Pro Sieben*, in 1998, saw a strong and more positive expression of the balancing of interests that would have sat comfortably two years later within an HRA claim and defence. However the *Hyde Park Properties* result in 1999 is likely to have favoured *The Sun's* Article 10 right to inform the public if the case had been heard the following year.

## **7.2 Privacy remedies from 2000 – 2014**

The successive chapters of the thesis have identified the key celebrity cases and explored the privacy issues contained within them. For consideration now are what developments, themes and trends can be discerned from this body of new case and statute law to support the contention of this thesis that it has been the litigation efforts of all three categories of celebrity that have been driving the development of the laws of privacy particularly strongly during this near-15 year period. There are two discernable period of development: the first 5 years from 2000 – 2004 and then from 2005 up to the present. This second period almost mirrors the explosion in UK Internet usage noted at the beginning of the thesis.<sup>992</sup>

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<sup>989</sup> See Chapter 1.2.2.4.

<sup>990</sup> See Chapter 1.2.2.3.

<sup>991</sup> See Chapter 2.4.3.

<sup>992</sup> Chapter 1.1. Footnote 3.

### 7.2.1 The early years of the HRA: 2000 – 2004

The key celebrity breach of confidence cases during this period took a while to establish consistent themes and to mark the boundaries for the de-coupling of this action in the creation of the new tort of misuse of private information. Chronologically *Douglas* was the first celebrity case. Proceedings began four weeks after the HRA came into force.<sup>993</sup> *Campbell* came three months into the life of the HRA.<sup>994</sup> Significantly both contained DPA claims allied to breach of confidence.<sup>995</sup> *Campbell v Frisbee*, *Theakston* and *A v B & C* and *Archer* represent the other celebrity breach of confidence cases during this period. There is one ECtHR example: *Von Hannover 1*.<sup>996</sup>

This is no tidal wave of litigation. Its tidal reach, however, washed through to the Court of Appeal in all but two of the cases and to the House of Lords in *Douglas* and *Campbell*. This concerted appellate persistence is evidence of the wealth and dedication of these attributed or achieved celebrity litigants to assert and establish the parameters of their privacy rights, something that had not been as evident in the pre-HRA litigation save, perhaps, with *Kaye*. Such celebrities had a point to make: Article 8 private life rights were enforceable not just vertically against the State but, much more importantly, horizontally against the media (even, in the *Douglas* case, a media competitor).

In the other privacy regimes *Thomas* established that harassment was a viable cause of action, in principle, to remedy the kind of attributed celebrity notoriety created for Ms Thomas by *The Sun's* series of publications about her. This case and – in the area of copyright – *Ashdown* saw active Article 8 and Article 10 balancing exercises undertaken.

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<sup>993</sup> 20 November 2000.

<sup>994</sup> 1 February 2001.

<sup>995</sup> *Ashcroft* is excluded because the DPA and breach of confidence elements failed almost immediately and the litigation settled on the second day of the trial.

<sup>996</sup> The financial resources and stamina required for such celebrity litigation are evident in the chronology of this case which relates to pictures of ascribed celebrity pictures of Princess Caroline of Monaco. It began in Germany in 1993, was lodged as an ECtHR appeal in June 2000 and decided by the Grand Chamber in June 2004, 11 years later.

The structure for the consideration and role of proportionality and the balancing exercise between Articles 8 and 10 emerged at the end of 2004 in a case involving the attributed celebrity notoriety of a mother accused of murdering her 9-year-old son by salt poisoning. The issue in *Re S* was whether her surviving 7-year-old son, who had been taken into care, could be identified in newspaper reports. Lord Steyn and his colleagues in the House of Lords had the advantage that *Campbell* was already decided and citable. The 7-year-old's Article 8 rights were engaged but, as he was not a witness, they were incidental and carried less weight. Article 10 was engaged and the freedom of the press was of central importance in a democratic society. Criminal trials were public events and full and unrestrained reporting of them promoted the values of the rule of law. The truly proportionate result could not be deduced correctly without separate and independent consideration of each of the rights which, in this case, meant full and unrestricted reporting of the case when the "ultimate balancing test" was then applied. Where the values under the two articles conflicted, an "intense focus" on the comparative importance of the specific rights being claimed in the individual case was necessary. The legacy of *Re S* was the two practical mechanisms: the "intense focus" and the "ultimate balancing test". This careful formulation and articulation of them by Lord Steyn, on the back of the *Campbell* decision, set the parameters for the developments that then took place in the plethora of celebrity privacy actions which followed in the period leading up to the present.

### **7.2.2 Celebrity privacy law matures: 2005 – 2014**

There are a number of discrete themes that developed during this period which, although identified in the individual chapters, have a cumulative effect when placed in the context of celebrity privacy litigation generally. The general caveat is that, regardless of the category of celebrity, unless it can be shown that a reasonable expectation of privacy exists, the litigation is unlikely to succeed, resulting only in even greater *Streisand*-like exposure. Cases ranging from *Clarkson*, *Ferdinand*, *McClaren*, *Spelman*, *Terry* to *Trimingham* are a reminder of the latter point.



### 7.2.2.1 *Anonymity and Injunctions*

A key feature that emerged in *Re S* but which found much fuller expression in the next ten years of celebrity privacy law relates to the use of injunctions and issues of anonymity. Procedurally this development put those representing celebrities of all categories in a position post-HRA of having to satisfy special and more onerous rules under s.12 HRA when Article 10 rights may have been affected.<sup>997</sup> These were enunciated by Lord Nicholls in *Cream Holdings*. Practically, as noted, these are very close to the high balance of probabilities standard that is required at full trial.<sup>998</sup> The tactical utility of the injunction, however, is that it can be granted with a short return date to allow fuller consideration to be given to the issue about whether to maintain it or discharge it. This allows both sides to perfect their arguments with further, relevant evidence. The Court of Appeal in *Browne* developed the formula: the Article 8 and Article 10 analysis follows the separate “intense focus” in terms of engagement and weighing up of the internal factors before then being measured in the light of s.12 HRA. Figuratively it puts the celebrity litigant’s foot on the side of the door of the court that is most likely to shut out immediate publication of the material complained of or at least allow for the maintenance of anonymity until full trial of the action. If there is anonymity until full trial of the action then, if the celebrity is successful, only costs rather than damages are incurred. This is a more protective and effective way of approaching the potential damage created by the publication of private information than the defamation regime. It is also why, post-2004, many of the attributed and achieved celebrities bringing privacy actions disappeared behind initial letters of the alphabet. The 2012 Practice Direction put an end to celebrities obtaining injunctions with their identities anonymised and then leaving the injunctions in place without taking the matters forward to trial when, at that stage, there was little chance of success. This flushed out the *Clarksons* and *Hutchesons* of the world. Significantly no ascribed celebrity members of the royal family have, so far, sought or adopted this course to secure anonymity.

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<sup>997</sup> Than those that used to exist pre-HRA under *American Cyanamid*.

<sup>998</sup> See Chapter 2.5.1. Footnote 941.

Max Mosley's campaign, and his unsuccessful attempt to persuade the ECtHR that the English media should inform intended targets ahead of publication about the private information on which they intended to rely, actually changed the general practice in this area. It now reflects a *Reynolds*'-type approach, borrowed from defamation, to demonstrate "responsible journalism". This is an example of the sheer power of persistence and substantial financial resources this individual celebrity employed to shape privacy law at the procedural, injunctive end. That it works, without undue stifling, can be seen in the two *Spelman* hearings where initial injunctive anonymity gave way to identification on later, fuller, examination of the issues as well as in *Edward RockNRoll* where – although the embarrassing picture was not published – the issues of proportionality were fully and publicly explored. Additionally it is evidence of the confidence of the media in the judicial formulation and practical application of the "intense focus" and the "ultimate balancing test" in terms of Article 8 and 10 rights.

#### **7.2.2.2 Data Protection**

The existence of the DPA – combined with the Commissioner as a regulator and enforcer - should have strengthened celebrities' rights to protect their privacy. The gap between the potential and the actual in this area is profound. In celebrity privacy actions of all categories DPA damages have been uniformly insubstantial and nominal with token amounts added on the back of breach of confidence or misuse of private information claims. It remains to be seen whether the *Steinmetz* litigation – unencumbered by other claims – creates greater clarity in this area. Leveson confirmed what is self-evident: lawyers and the judiciary prefer the "latitude afforded by the human rights regime over the specificity of data protection". Echoing confirmation of that comes in Henderson J's comment in *Steinmetz* – with the opportunity of passing everything over to the Commissioner on the point before him - that the Act was "slightly arcane and complicated". With some notable exceptions, including Tugendhat J at the judicial level and Anthony White QC as a practitioner, the default position has been to tread the apparently intellectually gentler path of the HRA without resorting to – or at least championing – DPA issues. The effect has been that

understanding of the DPA even within this specialist celebrity litigation area has been stifled and stunted.

The ineffectiveness of the Commissioner as a regulator and enforcer – viewed specifically through the lens of celebrity privacy – is demonstrated by the failures of *Motorman* and a lack of general engagement in terms of the kind of subject access provisions that might allow aspiring attributed celebrities to have him test issues on their behalf. Demonstrating more active regulatory oversight by the Commissioner, rather than ineffective enforcement at the edges, might produce a change in that general perception. *Google Spain* has only very recently changed public and media perceptions about the practicalities and utility of the protection of personal data, not necessarily in the most informed fashion. The result in that case, however deficient the CJEU's detailed reasoning, could always have been a possibility had it occurred in England. That there had been no earlier suggestion of it here speaks volumes in its silence.

Where successive Commissioners have shouted most reasonably, loudly and persistently however is to be given a proper set of appropriate prosecution penalties to reflect the gravity of s.55 offences by adding custody to the price of acting unlawfully and not simply allowing fines and compensation to be the cost of doing illegal business. Here it seems that no political party wants to be seen to be the one that enables section 77 of the Criminal Justice and Immigration Act 2008, allowing for custodial penalties to be imposed for breach of section 55.<sup>999</sup> This is particularly the case with under a year until the next General Election. However there appears to be nothing to stop the Commissioner from using MPNs to curb the media's corporate misuse of data, in situations where that can be proved. The potential for corporate conspiracy indictments from the CPS in terms of News International's previous activity remains a possibility.

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<sup>999</sup> See Chapter 6.4.4. Footnote 931 and particularly [43 and 44] of the Parliamentary Report which enumerates the Government's reasons for inaction. They appear evasive rather than persuasive.

Perhaps the least proportionate element in the protection of celebrities' personal data from media intrusion comes from the structure and operation of s.32. Arguably the media has excessive Article 10 protection as a result of it. Leveson suggested that its revision could be achieved proportionately by stating that the right of subject access was not intended to displace the general law on the protection of journalists' sources. Section 32 is unlikely to be the subject of any adjustment at the moment for pragmatic, political reasons. Indeed, in the Commissioner's most recent speech at a forum entitled *Rewriting History - is the new era of data protection compatible with journalism?* he lauded the indestructability of s.32.<sup>1000</sup>

### **7.2.2.3 Images and Harassment**

Still and video pictures and images have presented, and will continue to present, the greatest interference to all categories of celebrity privacy. Words can tell a tale but pictures can convince the public that a statement is true. *Campbell* provided the media with a salutary reminder that the risks associated with actual publication of celebrity pictures can be mitigated by simple possession of them. If the celebrity denies the activity then the individual runs the risk of a follow-up story illustrating the truth behind the lie. That is the proportionate approach. Pictures on the internet, from digital media publications to links and postings by individuals, are powerful, potent and almost impossible to control in their circulation. Overseas publication of private information which is then reflected on the internet is not susceptible to injunctive activity in England. Celebrities of all categories should consider the privacy laws that may apply to destinations and jurisdictions to which they may travel and work. Similarly the media now must consider how private information obtained about celebrities and their children abroad, apparently lawfully, may give rise to successful actions in English law. The *Weller* case encapsulates those two strands: the repetitive taking of the photographs was not harassment in California yet the decision goes considerably further than *Von Hannover 1* by the finding of the infringement of the private information rights of the children. While the call for the criminalisation of pictures containing images of children –

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<sup>1000</sup> See Chapter 6.5. Footnote 941.

celebrity or otherwise - is unlikely to gain immediate traction, in one sense it does not need to. Pictures secured that way in England would permit both criminal and civil complaints – with the potential for ROs - under the provisions of the PHA, something the ascribed celebrities of the royal family have threatened but have yet to take action on.

#### **7.2.2.4 Jurisdiction**

The signal shift that has occurred during the four years in the completion of this thesis has been in the willingness of the judiciary to assert domestic or European jurisdiction over data protection, personal information and image rights matters that feed directly into the protection of all categories of celebrities' privacy rights. Some of this, like Tugendhat J's decision in *Vidal-Hall*, may be confirmed or confounded on appeal. If nothing else it opens out the jurisprudence of this area in a positive and dynamic way and begins to test, as does *Google Spain*, the previous jurisdictional impunity of multinational internet search and service providers. There will always be "work rounds" that allow private information about celebrities to be found by persistent enquirers on the internet.<sup>1001</sup> However uncomfortable that decision has been for Google in Europe it has also emphasised – in all EU states including England - the importance and significance of the Charter Article 8 right in the protection of personal data even if its exploration of Charter Article 11 freedom of speech issues was deficient to the point of invisibility. *Martinez*, with considerably greater depth to the judicial reasoning, is a CJEU jurisdictional decision that has yet to see its full potential realised by English celebrities seeking to protect their images from interference in other jurisdictions in the EU.

#### **7.2.2.5 Proportionality**

The concept of proportionality has established a primacy over this area in a relatively short space of judicial time in England, engaging the Supreme Court's attention twice recently in *Bank Mellat* and *Kennedy*. As was noted above, *Re S* provided the touchstone to allow the judicial development of proportionality in celebrity privacy cases and the results – from English case law – seem

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<sup>1001</sup> For instance by searching for the information on Google.com rather than Google.co.uk.

properly to hold the ring between the celebrities' rights to protection of privacy and the media's right to interfere with that when it is just and proportionate so to do.

It is not, however, like a piece of computer software that produces the same judicial and practical result each time. Each set of facts can be weighed slightly differently by individual judges and – as *AAA* shows - appellate courts are reluctant to set aside first instance judgements that follow the “intense focus” within each of the competing elements before arriving at the “ultimate balancing test”.

As a closing thought on proportionality, it is telling that the word itself appears only once in the *Google Spain* decision. That is not in the decision itself but in the preamble of issues to be considered by the court. It is at [63] where the court noted that Google submitted that:

by virtue of the principle of proportionality, any request seeking the removal of information must be addressed to the publisher of the website concerned because it is he who takes the responsibility for making the information public, who is in a position to appraise the lawfulness of that publication and who has available to him the most effective and least restrictive means of making the information inaccessible.

### **7.3 Where may we be in 2020?**

It may be that in five years, by 2020, the proposed EU Data Protection Regulation is in force and active in however many of the States then make up the European Union and the CJEU in Luxembourg will have explained *Google Spain* in subsequent decisions by reference to that Regulation. The ECtHR in Strasbourg may – or may not – have a persuasive if not binding part to play in the development of privacy and freedom of speech issues determined under whatever version of the HRA then exists in England. Negotiations for the EU to accede the Convention have been under way for nearly four years.<sup>1002</sup> Entry

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<sup>1002</sup> The Draft Accession Treaty comprises 12 Articles and an explanatory report of 20 pages. The Commission referred the matter to the CJEU in September last year (Opinion 2/13) to find out whether it falls foul of EU Treaties.

into force of the final text requires ratification by the EU and all 47 members of the Council of Europe. That could take years to achieve.

One constant is unlikely to have diminished: media interest in celebrities of all categories. Information of all kinds that intrudes on celebrities' privacy is likely to have increased through new technologies yet to be discovered. Methods of media publication are likely to have become even more predominantly digital, egregious, and internet-based. The importance of this area of law cannot be over-emphasised, dismissed, diluted, or degraded because it is in the proportionate protection of celebrity privacy rights - and the equality of the media's freedom of speech - that we find the elements that ultimately protect the privacy and freedoms accorded to each of us as individuals.

Having begun with an insight from William Shakespeare about the categorisation of celebrities this thesis closes with another Shakespearean observation. In the light of the photographs from Prince Harry's naked pool-playing partying in the US, it comes from Henry V in the scene immediately after the King's call to arms "*Cry 'God for Harry! England and Saint George!'*".

Boy to Pistol: "*Would I were in an alehouse in London! I would give all my fame for a pot of ale and safety.*"<sup>1003</sup>

That would, of course, be a safe and secluded alehouse where the clientele had no mobile phones, the landlord banned the media, the paparazzi were not allowed to congregate outside and all CCTV cameras in the premises were switched off.

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<sup>1003</sup> Henry V 3.2.14.

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