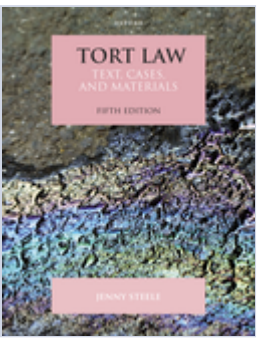

Tort Law: Text, Cases, and Materials (5th edn)
Jenny Steele

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15. Privacy

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Abstract

All books in this flagship series contain carefully selected substantial extracts from key cases, legislation, and academic debate, providing able students with a stand-alone resource. This chapter focuses on the emergence of a new action to protect privacy under the Human Rights Act 1998, with particular reference to unjustified publication of private information. It begins by considering whether privacy is a protected interest at common law and whether privacy must be recognized and given protection through the law of tort. It then examines the tools which have been used in the partial absorption of privacy as a protected interest in common law, citing the provisions of the Human Rights Act 1998 and Article 8 of the European Convention on Human Rights. The controversies surrounding disclosure of private information and the power of injunctions are also considered, along with the issue of intrusion as an invasion of privacy.

Keywords: privacy, Human Rights Act 1998, publication, private information, common law, tort, European Convention on Human Rights, injunctions, intrusion

Central Issues

i) This chapter describes the emergence of a new action in tort to protect against misuse of private information, and its current development. This is a highly distinctive area of the law of tort, and the history of its development is crucial to understanding the content and nature of the tort. The tools for achieving the development were provided by the Human Rights Act 1998, and this is important to the way in which the law has been formed, as elements of

Convention jurisprudence have been deeply absorbed into English law. The new tort has been fashioned from the equitable action for breach of confidence, and its character reflects both this, and the Convention jurisprudence.

ii) The starting point has been and still is that English law recognizes no general tort of invasion of privacy. Since the Human Rights Act 1998, courts have consistently said that they recognize privacy as an 'underlying value' of English law. Even so, recognition of an underlying value is different from recognition of a legal principle which can be applied in concrete situations (Lord Hoffmann, *Wainwright v Home Office* [2004] 2 AC 406, at [31]).

iii) From the equitable action for **breach of confidence**, an action in tort for *unjustified publication of private information* has emerged. Interim injunctions to restrain publication are available in many cases, in marked contrast with the position in defamation (Chapter 14), and courts also recognize that 'disgorgement damages' (where defendants are required to repay profits made from the wrong) are often appropriate. The key questions to be answered when considering whether to restrain publication are (a) whether the claimant **has a reasonable expectation of privacy** in the information or images which the defendant has proposes to publish; and (b) **whether the interest in keeping the information or images private outweighs the interest in revealing the information or images**. Thus, 'balancing' of interests is a key component in any decision.

iv) Evidence of gross violations of personal privacy on the part of the press, and the continuing difficulties of restraining on-line publications, have created a new impetus to attempt to achieve a responsible press. The urgency of some degree of protection has also been underlined by media coverage of criminal investigations where there is insufficient evidence
p. 845 to lead to a charge, raising very clearly the question of when there is a 'reasonable expectation of privacy' not just for celebrities, but for others too. These factors provide a counterpoint to the developments towards enhanced freedom of expression that are evident in defamation reform, and raises the question of how far it is possible to control the press without compromising its independence, and how far there is a right for the public to receive information which compromises the privacy of others. Yet despite these developments, the UK Government's recent Consultation on the Human Rights Act (2021, Chapter 4.2) appears to take the position that it is freedom of expression, and journalism, which are at threat from the current law. While it remains to be seen what will follow, any move to prioritise freedom of expression over privacy would mark a considerable change to the way the law in this chapter operates.

1 A New Protected Interest at Common Law?

When we considered defamation, in Chapter 14, we noted that the actions in libel and slander have protected reputation for centuries, and we moved to the well-recognized potential for conflict between protection of reputation and the interest in freedom of expression. Protection of 'privacy', to the extent that tort law

attempts it, will also lead to questions of conflict with freedom of expression. But there has been a prior difficulty to resolve. This difficulty is that privacy was not traditionally recognized as a protected interest in its own right in English tort law. It remains the case that privacy is protected only in a specific way, through the tort of misuse of private information.

Privacy, in this respect, has appeared to be different from reputation. Now, however, as we saw in Chapter 14, English courts have increasingly described the protection of reputation as falling within the Article 8 'Privacy' right, and the categorization of reputation in at least some instances in terms of Article 8 is beginning to seem important in the present 'rebalancing' of the law. In both areas of law, the move to a balance based on equality between the rights is a significant development. The expanding protection of privacy in its own right has been notable; but where reputation is concerned, the trend has been to restrict its protection in order to safeguard speech. It is possible that over time, the two will come to resemble each other more closely. There are differences, however, in the way that the 'balance' between rights is achieved in these actions. The law of defamation arguably seeks a 'pattern' of rights and protections—for example, through defences such as truth and 'honest opinion' – which will be pieced together through claim, defence, and remedy to achieve a fair balance between reputation, and expression. The law of privacy takes a far more direct approach to balancing interests, asking in each case whether there was a reasonable expectation of privacy, and if so, whether the interest in expression outweighs this reasonable expectation. Equally, there is far more readiness to allow pre-publication injunctions in the privacy action, than in defamation. The reasons for this distinctively direct approach, with its open appeal to the conflicting rights in question, are explained by the history of the action, which is considered in Section 4 of this Chapter, and its roots in Convention jurisprudence, as set out in Section 3. As we have seen in Chapter 1.4, the role of Convention jurisprudence in the law of tort has been the subject of some political criticism, and the Government's 2021 Consultation on the Human Rights Act appears
p. 846 to suggest that the balance may need to be reoriented towards ↵ freedom of expression. At the same time, there was no overt criticism of the case law gathered in this chapter, though different aspects of the law relating to art.8 were mentioned.

The very different structure of the actions in defamation and privacy has been recognized to have practical consequences. In *Sicri v Associated Newspapers*,[1] the claimant successfully argued that the defendant had misused private information when publishing details of his arrest in connection with the Manchester Arena bombing. He was not charged and there is no evidence of any involvement in crime on his part; but there was no addition to the report to reflect this. While publicising the arrest can be expected to have caused significant reputational harm, this had not been evidenced and would not be reflected in the damages awarded. Beyond this, it was suggested by Warby J that reputational damage should *not* be claimed in an action framed in privacy, because of the structural and procedural differences between the actions. Despite the closeness in the protected interests, the jurisprudential difference between the actions would make this a recipe for confusion. Perhaps, it is considered unsafe to merge the two very different approaches to balancing rival interests.

2 ‘Privacy’: One Right or Four Protected Interests?

The idea of a privacy action did not appear from nowhere with the new status of Convention rights in English common law. The idea that a general ‘right to privacy’ can be identified ‘immanent in’[2] existing common law, and (furthermore) that this right ought to be recognized specifically through creation of a dedicated privacy *tort*, dates to a seminal law review article published in 1890 in the United States by Warren and Brandeis, ‘The Right to Privacy’ (1890) 4 Harv L Rev 193. Warren and Brandeis surveyed a range of actions available in English law, and argued that underlying these was a right to ‘privacy’. Social conditions required that privacy be recognized and given protection through the law of tort. The authors’ chief *concern* (no different from the concern in much recent case law such as *Von Hannover v Germany* [2004] ECHR 294, below), was with the conduct of the press, and this provided the personal motivation for their article.[3] Their *method* was to suggest that privacy interests should and could be protected in the same way as the familiar interests in physical integrity and personal property. The ‘privacy right’ is derived from an analogy with *trespass* torts.

S. D. Warren and L. D. Brandeis, 'The Right to Privacy' (1890) 4 Harv L Rev 193, 193–6

> That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact
> p. 847 ↵ nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis* .... Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term 'property' has grown to comprise every form of possession—intangible, as well as tangible.
>
> ... This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.
>
> Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right 'to be let alone'. [Cooley on Torts, 2d ed., p. 29] Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.' ... the question of whether our law will recognize and protect the right to privacy in this and in other respects must soon come before our courts for consideration.
>
> Of the desirability—indeed of the necessity—of some such protection, there can be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency.... The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury....

From this extract we can see the method at work in the essay (as well as its polemical style). Remedies for invasion of a right to privacy should emerge as an extension from, and be closely modelled upon, the protection of property (tangible and intangible), of confidence, and of reputation. The reason why it should so emerge is that it is now needed.

In the United States, the arguments of Warren and Brandeis were spectacularly successful (although there is some question whether the exceptions to the right to privacy have swallowed up the rule, at least where *publication* of private information is concerned).[4] After an initial rejection in the New York case of *Roberson v*

p. 848 *Rochester Folding Box Co* 171 NY ↵ 538, 64 NE 442 (1902), Warren and Brandeis' thesis was accepted by the Supreme Court of Georgia in *Pavesich v New England Life Insurance Co* 122 Ga 190, 50 SE 68 (1905) (where the defendant had used the name and image of the plaintiff to advertise their products), and an enforceable right to privacy was recognized. This acceptance rapidly spread to other state jurisdictions. In an equally influential later article, William Prosser explained that in accepting the existence of a right of privacy, the courts had been little concerned to explore what privacy actually *was*.

William Prosser, 'Privacy' (1960) 48 Cal L Rev 383, at 386–9

> In nearly every jurisdiction[5] the first decisions were understandably preoccupied with the question whether the right of privacy existed at all, and gave little or no consideration to what it would amount to if it did. It is only in recent years, and largely through the legal writers, that there has been any attempt to inquire what interests are we protecting, and against what conduct. Today, with something over three hundred cases in the books, the holes in the jigsaw puzzle have been largely filled in, and some rather definite conclusions are possible.
>
> What has emerged from the decisions is no simple matter. It is not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, 'to be let alone.' Without any attempt to exact definition, these four torts may be described as follows:
>
> 1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
> 2. Public disclosure of embarrassing private facts about the plaintiff.
> 3. Publicity which places the plaintiff in a false light in the public eye.
> 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.
>
> It should be obvious at once that these four types of invasion may be subject, in some respects at least, to different rules; and that when what is said as to any one of them is carried over to another, it may not be at all applicable, and confusion may follow.

Whereas Warren and Brandeis had sought to show that there was a distinctive privacy right underlying a range of case law (which was capable of protection at common law), Prosser set out to divide that case law into a number of categories which, he said, protected slightly *different* interests, even if these protected interests could still (in his view) properly be regarded as aspects of a broader notion of privacy. He did not seek to show *why* these privacy interests are worth protecting, or what the broader idea of privacy (if any) might consist in. He was concerned, however, about the propensity for the action(s) in privacy to avoid and override important restrictions—such as the defence of truth in defamation actions—which had evolved in the established torts. Such was the influence of Prosser's arguments that they provided the model for revising the outline of privacy torts in the Second US Restatement (Torts).

In England, Prosser's arguments have been taken to demonstrate that there is no identifiable core to the right of 'privacy' which would make it capable of protection as a general interest. An important example is Lord Hoffmann's view in *Wainwright v Home Office* [2004] 2 AC 406:

p. 849

> 18 The need in the United States to break down the concept of invasion of privacy into a number of loosely-linked torts must cast doubt upon the value of any high-level generalisation which can perform a useful function in enabling one to deduce the rule to be applied in a concrete case. English law has so far been unwilling, perhaps unable, to formulate such a high level principle.... In The Poverty of Principle (1980) 96 LQR 73, Raymond Wacks turned the tables on the arguments of Warren and Brandeis, suggesting that in some instances the attempt to define a range of existing actions as really to do with privacy not only has been overdone, but also has led to real confusion. He pointed out that in certain decisions of the US Supreme Court,[6] privacy had become synonymous with autonomy itself,[7] a much larger and more fundamental value which surely could not be sensibly used as a protected right or interest for the purposes of tort law, without further definition. The common law simply did not *need* the general idea of privacy.

English courts have stated that they will not create new torts in order to give direct effect to Convention rights. Even so, existing causes of action have absorbed a new right or interest (in privacy) which is *not* an offshoot of existing ideas of property. English common law is not doing precisely what Warren and Brandeis suggested over 100 years ago, deriving a new idea of property *from existing common law cases* in the light of changing needs. Instead, it is giving effect to a Convention right. The absorption of Article 8 (and Article 10) into this area of law is now clearly established. But in doing this, it was dealing with a 'felt need' within the law of tort. The development of a tort relating to private information is distinctive, but was not a surprise occurrence. Indeed it was an event which many predicted would be enabled by the enactment of the HRA, as it gave the courts an opportunity to resolve a long-standing issue about absent remedies.[8]

3 Article 8 ECHR and the Human Rights Act 1998

This section considers the tools which have been used in the emergence of a tort of misuse of private information, and absorption of privacy rights to common law.

3.1 Article 8, European Convention on Human Rights

> **Article 8 Right to respect for private and family life**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

p. 850

The most authoritative interpretation of the obligations imposed by Article 8 in relation to publication is provided by the following case, which has influenced the reasoning in domestic cases very directly.[9] Though in some respects this case sets a very demanding standard, in other respects (particularly as regards the content of Article 8), the guidance it offers is limited.

Von Hannover v Germany [2004] ECHR 294

In this case, the European Court of Human Rights confirmed that Article 8 imposes *positive* obligations upon States to ensure that rights to privacy are respected. Prior to this decision, there was no definitive statement to this effect,[10] although to a large extent English courts anticipated it through their interpretation of the Human Rights Act 1998 (HRA) (later in this chapter).

German law has accorded considerable protection to privacy interests. It has done so through interpretation of Article 1 (relating to the dignity of the human being) and Article 2 (relating to free development of personality) of the Basic Law (*Grundgestetz*). In this case, however, the applicant challenged the restrictions on protection of privacy which operate in German law in respect of 'figures of contemporary society'. It is clear that these restrictions aimed to protect the competing public interests in expression and information. That being so, the applicant was challenging the way that German law struck the balance between protection of individual privacy and protection of a public interest in information where the everyday (unexceptional) behaviour of public figures is concerned. While the Court in this instance held that the balance had not been correctly struck, in a more recent decision concerning further complaints by the same applicant, it has accepted the approach now taken by the German courts.

The Applicant's Case

The applicant, Princess Caroline of Monaco, wished to prevent publication of certain photographs. The photographs showed her pursuing a range of 'ordinary' activities. All were taken in places where, to one extent or another, the public had access. The photographs were interpreted by the German courts as being in no sense derogatory (although one showed her tripping and falling at the beach). However, they were taken without permission and on 'unofficial' occasions when she had no wish to be photographed. The German

courts ruled that most of the photographs could be published. Princess Caroline was a 'figure of contemporary society *par excellence*' (even though she had no official state functions), and in German law she therefore had to tolerate publication of photographs in which she appeared *in a public place* even if they showed scenes from her daily life. Her interests were outweighed by the need to inform. It was thought, however, that one of the photographs should not be published as it violated her rights under the Basic Law (as explained above). It
p. 851 showed her at ↵ the far end of a restaurant garden, and this counted as a 'secluded place' whereas the interior of a restaurant did not. In the garden, she could have assumed that she was 'not exposed to public view'.

Princess Caroline applied to the European Court of Human Rights, arguing that her rights under Article 8 had been violated. The Court found in her favour.

The general principles governing the protection of private life and the freedom of expression

56 In the present case the applicant did not complain of an action of the State, but rather of the lack of adequate State protection of her private life and her image.

57 The court reiterates that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves …

58 That protection of private life has to be balanced against the freedom of expression guaranteed by Article 10 of the Convention. In that context the Court reiterates that the freedom of expression constitutes one of the essential foundations of a democratic society … In that connection the press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the rights and reputations of others, its duty is nevertheless to impart—in a manner consistent with its obligations and responsibilities—information and ideas on all matters of public interest…. Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation …

59 Although freedom of expression also extends to the publication of photos, this is an area in which the protection of the rights and reputation of others takes on particular importance. The present case does not concern the dissemination of ideas, but of images containing very personal or even intimate information about an individual. Furthermore, photos appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution.

60 In the cases in which the Court has had to balance the protection of private life against the freedom of expression it has always stressed the contribution made by photos or articles in the press to a debate of general interest… The Court thus found, in one case, that the use of certain terms in respect of an individual's private life was not justified by considerations of public concern and that those terms did not [bear] on a matter of general importance … and went on to hold that there had not been a violation of Article 10. In another case, however, the Court attached particular importance to the fact that the subject in question was a news item of major public concern and that the published photographs did not disclose any details of [the] private life of the person in question [*Krone-Verlag*] and held that there had been a violation of Article 10….

Application of these general principles by the Court

…

p. 852

63 The Court considers that a fundamental distinction needs to be drawn between reporting facts—even controversial ones—capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of watchdog in a democracy by contributing to 'imparting information and ideas on matters of public interest' [*Observer and Guardian v UK*] it does not do so in the latter case.

69 The Court considers that everyone, even if they are known to the general public, must be able to enjoy a legitimate expectation of protection of and respect for their private life …

Conclusion

76 As the Court has stated above, it considers that the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest. It is clear in the instant case that they made no such contribution since the applicant exercises no official function and the photos and articles related specifically to details of her private life.

77 Furthermore, the Court considers that the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public.

Even if such a public interest exists, as does a commercial interest of the magazine in publishing these photos and these articles, in the instant case those interests must, in the Court's view, yield to the applicant's right to the effective protection of her private life.

78 Lastly, in the Court's opinion the criteria established by the domestic courts were not sufficient to ensure the effective protection of the applicant's private life and she should, in the circumstances of the case, have had a 'legitimate expectation' of protection of her private life.

Conclusions from *Von Hannover*

The largest contribution of *Von Hannover* to general Convention jurisprudence was its clear recognition of positive obligations on the State to secure privacy in dealings between private parties, and particularly in actions against the press. Domestic legal systems must be able to handle the balancing issue that is explained in *Von Hannover*, where Article 8 rights conflict with Article 10 rights, in such a case.

Some important guidance on this balancing exercise is offered by the Court. In particular, the Court reiterates that the key purpose of the Article 10 right is instrumental: freedom of expression is vital to the flourishing of a democratic society and is a key component in the sort of society that will uphold the other rights and freedoms in the Convention (at [58]). This is compatible with the explanation of Article 10 that we said, in Chapter 14, was adopted in the recent English case law on defamation. In privacy cases, the right of the public

to be informed is in potential conflict with the right of an individual to enjoy their privacy. In the *Von Hannover* case, the Court made clear that unless there is a distinct public interest reason for revealing private information (and it seems *particularly* photographs), it will be inappropriate to *allow publication*. Much positive action to secure privacy *will be in restraint of freedom of expression*, and the state is generally obliged *not* to act in such a way as to restrict expression. However, there is no substantial difference in the weight that is
p. 853 accorded to the ↵ two rights in privacy, and in freedom of expression. *States cannot evade the need to balance the rights by according priority to freedom of expression; nor by doing nothing*.

The European Court also emphasized an important difference between **the public interest** (in being informed) which often underlies the Article 10 right, and a **public preference** for certain types of reporting, which makes a particular sort of publication commercially successful: this distinction can clearly be seen in the Supreme Court's decision in *PJS v News Group Newspapers* [2016] AC 1081, and numerous other decisions of the UK courts. The Court clearly did not endorse the views of the German Federal Constitutional Court that 'entertainment in the press is neither negligible nor entirely worthless and therefore falls within the scope of application of fundamental rights'. A report must be demonstrated to serve a particular purpose, if it is to outweigh an individual's right to privacy. Provided the publication itself is 'low-grade', then it seems that even a relatively anodyne publication (with minor impact on privacy) should be restrained. An alternative reading of the *Von Hannover* case is possible, which would place more emphasis on 'harassment' of the Princess through a course of conduct which deprived her of her private life. But this is hard to sustain given the nature of the conclusions reached and especially the identification of the *contribution made by the photos to public debate* as the 'decisive factor'.

Certain other findings of the European Court are also of importance. In particular, the Court emphasized that even a 'public figure' still has an expectation of privacy. This is so not only where the claimant is best described as a 'celebrity' but even when they have some constitutional significance. Privacy is also not to be defined in exclusively spatial terms, limiting protection to areas where the public has no access. The individual claimant does not need to be in a secluded *place*, in order to benefit from the protection of Article 8. Both of these principles are consistent with English law as it has recently developed.[11]

The Court states that its conclusions on release of information are strengthened by consideration of the *manner in which the photographs were acquired*—that is to say, through covert means, without permission, and as part of a campaign amounting to 'harassment'.[12] More recent decisions of the Court have clarified that publication of photographs may be regarded as violations of Article 8 even in the absence of intrusion or harassment in the sense of a media campaign;[13] and in *McKennitt v Ash* [2006] EWCA Civ 1714; [2008] QB 73, the Court of Appeal considered and rejected an argument that intrusion and harassment were crucial to the holding in *Von Hannover*. In English law then, the *Von Hannover* approach guides courts in balancing the rights of parties even in cases which are far from intrusion or harassment.

Von Hannover v Germany [2012] EMLR 16

This decision also concerned a photograph of Princess Caroline and her husband, in a public place. The
p. 854 German courts had changed their approach in response to the earlier *Von* ↵ *Hannover* decision, abandoning the category of public figures who would enjoy only limited privacy protection and introducing a concept of 'graduated' protection. Each photo should be assessed and the court should decide whether there

was a sufficient interest in publishing it, very much in line with the European Court's approach in the earlier *Von Hannover* decision. Indeed, the overriding test applied was whether the publication contributed meaningfully to public debate. While a number of photographs were subject to injunctions in the national courts to prohibit publication, a final photograph was regarded differently: the German Federal Court decided that publication should be permitted. This was because the photograph was looked at together with an accompanying story touching on the ill health of Prince Rainier III of Monaco (the first applicant's father) during the time of the skiing holiday depicted. This, the Federal Court of Justice determined, was 'an event of contemporary society' that the press was entitled to report; and the photograph—of the applicants in a public street in St Moritz during their holiday—was sufficiently linked to the story. Taking both together, the publication was permitted.

The decision of the Grand Chamber in this case appeared more deferential to the national court than its earlier *Von Hannover* decision; but this doubtless reflects the changes made to balancing rights in the national courts. Provided the balancing exercise between Articles 8 and 10 is carried out in conformity with the criteria in the Court's case law, the Grand Chamber considered that there would need to be strong reasons for the Court to substitute its own view: there is a 'margin of appreciation' in respect of the actual balance struck. Since there was no basis on which to criticize the criteria applied, no violation of Article 8 was established.

Two questions may be asked. First, how strong were the reasons for including a photograph to accompany the story? It seems that there was a sufficient 'link' between the picture and the contribution made by the story to satisfy the German court: the two looked at together had a sufficient 'public interest' quality. It would have reached a different position had the article been 'merely a pretext' for publishing a photograph of a prominent person. In the English case of *Campbell v MGN*, it might appear that a rather stricter approach was taken to publication of a photograph to accompany a legitimate story: some other photograph of the claimant could have been used to 'brighten up' the story, rather than one taken without permission in the street. But the photograph in *Campbell* was more intrusive and taken on an occasion that the claimant would have reasonably wished to keep private. All of the facts are relevant when balancing Article 8 and 10 rights and interests.

A second question surrounds the circumstances in which the photograph was taken, and the relevance of these circumstances, and this reflects our discussion of the first *Von Hannover* decision (above). The applicants in this and the earlier case described a general atmosphere of harassment which deprived them of a private life. In this instance, the photograph had indeed been taken without knowledge or permission. Both the national court and the Grand Chamber appear to have accepted that the circumstances in which a photograph is taken will be a factor to weigh in the balance. Here, however, the applicants had brought no evidence to suggest that the means used were illegal or surreptitious, and there were no grounds on which to explore the issue further. Complaints about publication and about intrusion shade into one another, and not only where photographs are concerned, as is well illustrated by the question posed by the appeal in *PJS v News Group Newspapers* [2016] AC 1081: is it legitimate to control print publication in national newspapers, when the relevant information is already available via social media and elsewhere on the internet? In holding that it was, the Supreme Court emphasized the greater intrusion into privacy associated with unrestrained print publication:

p. 855 **Lord Neuberger, *PJS v News Group Newspapers Ltd* [2016] AC 1081**

> 61 The significance of intrusion, as opposed to confidentiality, ...was well explained in the judgment of Eady J in *CTB*'s case [2011] EWHC 1326, where he refused an application by a newspaper to vary an interlocutory injunction because of what he referred to as widespread coverage on the Internet. At para 24 he said that:
>
> ... it is fairly obvious that wall-to-wall excoriation in national newspapers ... is likely to be significantly more intrusive and distressing for those concerned than the availability of information on the Internet or in foreign journals to those, however many, who take the trouble to look it up.
>
> As he went on to say in para 24, in a case such as this, for so long as the court is in a position to prevent some of that intrusion and distress, depending upon the individual circumstances, it may be appropriate to maintain that degree of protection.

3.2 The Human Rights Act 1998

Before the decision of the European Court of Human Rights in the first *Von Hannover* decision, English courts had already concluded that they were required to balance the rights in Articles 8 and 10 as a matter of English law, as a consequence of the Human Rights Act 1998 (HRA). This section considers the relevant provisions of the HRA. In the next section, we turn to the case law.

Section 6

Section 6 of the HRA is extracted in Chapter 1.

We have touched on the general implications of this provision in Chapters 1, 10, and 13. The general issue in respect of privacy actions is whether the Convention rights will have any effect **in actions between private parties**. Sections 7 and 8 (also extracted in Chapter 1) ensure that the Convention rights can be the basis of an action in their own right in 'vertical' cases, which is to say where the individual or other private party brings an action against a public authority. Any impact on actions between private parties is described as **horizontal effect**.

Actions relating to privacy have made a particular contribution to the understanding of horizontal effect. The HRA does not enable courts to create entirely new causes of action between private parties. The following comments from *Campbell v MGN* are reasonably conclusive on this point.[14]

Campbell v MGN
[2004] 2 AC 457

Lord Hoffmann

p. 856

49 … Even now the equivalent of Article 8 has been enacted as part of English law, it is not directly concerned with the protection of privacy against private persons or corporations. It is, by virtue of section 6 of the 1998 Act, a guarantee of privacy only against public authorities. Although the Convention, as an international instrument, may impose upon the United Kingdom an obligation to take some steps (whether by statute or otherwise) to protect rights of privacy against invasion by private individuals, it does not follow that such an obligation would have any counterpart in domestic law.

Baroness Hale

132 … The 1998 Act does not create any new cause of action between private persons. But if there is a cause of action applicable, the court as a public authority must act compatibly with both parties' Convention rights….

Section 6 does not entitle courts to *create new torts*; but on the other hand, existing causes of action should be interpreted with regard to the Convention rights. That then is the formal position. In reality, recent changes have gone further than this. This was achieved principally through interpretation of section 12, rather than section 6, though the duty in section 6 is also frequently mentioned.

Section 12

Section 12 is concerned with the Convention right to freedom of expression. But it is through consideration of this section that equal weight has been given to other Convention rights, including privacy. The impact of section 12 in this area of private law has been much greater than a surface reading would lead us to expect.

Section 12 of the HRA is extracted in Chapter 1.

The section requires that particular regard be had to the Article 10 right *in any case* where a remedy is being considered which may interfere with the Article 10 right. In *Douglas v Hello!*, it was pointed out that because regard must be had to freedom of expression in *any* such case (and not just in cases brought against public authorities), Article 10 must *necessarily* have some horizontal effect. Perhaps surprisingly, this section was also the vehicle through which Article 8 rights were given horizontal effect in that particular case. Having regard to the Article 10 right must involve having regard to the *restrictions* on the right outlined in Article 10(2), since these are an inherent part of the definition of the Convention right to freedom of expression. We extracted Article 10 in Chapter 13 (Defamation). Here is a reminder of the way the restrictions to the right operate.

> **Article 10.2**
>
> The exercise of [freedom of expression], since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, *for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence*, or for maintaining the authority and impartiality of the judiciary.
>
> [Emphasis added]

p. 857 ↵ In this way, section 12 gives limited horizontal effect not only to Article 10 rights, but also to all those other rights by which they are expressly qualified: *Douglas v Hello!* [2001] QB 967.

Equality between the Rights

On the face of it, section 12(4) gives priority to freedom of expression, since a court must have 'particular regard' to it. Since the section is primarily concerned with remedies, it might be assumed that it works against the availability of injunctions. An injunction was initially sought in *Douglas v Hello!* and importantly, this interpretation (giving priority to freedom of expression) was rejected. The restrictions in Article 10(2) are an inherent part of the definition of the Convention right to freedom of expression. Hence, the right and its restrictions should be given the same 'particular' consideration. This element of the Court of Appeal's approach—**equality between rights**—is consistent with the *Von Hannover* decision as outlined above,[15] and was strongly re-emphasized by the Supreme Court in *PJS v News Group Newspapers* [2016] AC 1081. Equality between rights is in marked contrast with US law, which gives priority to freedom of expression, a contrast noted by Sedley LJ in *Douglas v Hello!* [2001] QB 967:

> 135 … The European Court of Human Rights has always recognised the high importance of free media of communication in a democracy, but its jurisprudence does not—and could not consistently with the Convention itself—give article 10(1) the presumptive priority which is given, for example, to the First Amendment in the jurisprudence of the United States' courts. Everything will ultimately depend on the proper balance between privacy and publicity in the situation facing the court.

It is exactly this presumptive priority which the Government's Consultation on the Human Rights Act appears to contemplate (see the extract in Chapter 1.4). This, however, would be contrary to the historic position in English common law, and not only to the Convention position.

Section 12(4)(b) also requires a court when considering freedom of expression to have regard to 'any relevant privacy code'. This requirement was referred to, for example, in *Sicri v Associated Newspapers* [2020] EWHC 3541 (QB). The parties agreed that there should be reference to the Editors' Code of Practice enforced by the Independent Press Standards Organisation. This required proof that the public interest had actually been considered and put the onus on editors to show why they reasonably believed publication would be in the public interest. None of this had been demonstrated.

Whatever judicial creativity can be observed in the earlier cases explored in the next section of this chapter, a recent Joint Committee of the House of Commons and House of Lords rejected criticisms from 'elements of the media' that the law in this area is 'judge-made' (hence, open to attack as undemocratic). Yet exactly this sentiment can be discerned in the Government's 2021 Consultation on the Human Rights Act, extracted in Chapter 1.4.

p. 858 **Joint Committee on Privacy and Injunctions, Session 2010–2012, Report (HL 273, HC 1443, 27 March 2012)**

> 40. The laws around privacy already have statutory foundation. They have developed following the passing of the Human Rights Act 1998, which Parliament enacted in full knowledge that the common law would gradually develop a right to privacy in UK law. During the passage of the Human Rights Bill through the House of Lords the then chairman of the Press Complaints Commission, the Rt Hon Lord Wakeham, moved an amendment which aimed 'to stop the development of a common law of privacy'. The amendment was withdrawn. Replying to the debate on it the Lord Chancellor, the Rt Hon Lord Irvine of Lairg, said—
>
> "I repeat my view that any privacy law developed by the judges will be a better law after incorporation of the convention because the judges will have to balance and have regard to articles 10 and 8, giving article 10 its due high value. What I have said is in accord with European jurisprudence."

4 Development of the New Tort

4.1 From Confidence to Privacy

Following the HRA, spectacular developments in protection of privacy took place through development of the action for breach of confidence. Historically, this action has not been categorized as a tort. Rather, obligations of confidence have been recognized in equity, binding the recipient of information as a matter of conscience:

Brooke LJ, *Douglas v Hello!* [2001] QB 967

> 65 … If information is accepted on the basis that it will be kept secret, the recipient's conscience is bound by that confidence, and it will be unconscionable for him to break his duty of confidence by publishing the information to others …

In order to understand the emergence of the new tort, some selected aspects of the large case law on breach of confidence are covered here. These are the aspects which are needed if we are to reach an understanding of the process by which privacy is emerging as a protected interest.

The Previously Existing Law: What is 'Breach of Confidence'?

It is true to say that even before the HRA came into force in October 2000, the action for breach of confidence was in a process of development and had been identified as having the potential to protect some aspects of privacy.[16] We can identify three requirements of the action for breach of confidence.

p. 859

1. The information in question must have the 'necessary quality of confidentiality'.
2. The recipient of the information must be under an obligation of confidence.
3. The interest in confidentiality will be balanced against any public interest in disclosure.

The 'Necessary Quality of Confidentiality'

The action certainly protected commercial confidences or 'trade secrets'. In *Attorney-General v Guardian* [1987] 1 WLR 1248, it was found to extend to state secrets (and therefore prevented the defendant newspaper from publishing extracts from the book *Spycatcher*), but in such cases a positive public interest in protecting the confidence needed to be shown. It was important that the protected information must not be already in the public domain; and that it was not merely trivial. 'Confidence' extended to some information of a personal or sexual nature either within marriage (*Argyll v Argyll* [1967] Ch 302), or (more controversially) outside it (*Stephens v Avery* [1988] Ch 449). In the latter case, Sir Nicolas Browne-Wilkinson V-C held that personal information could be subject to a duty of confidence sufficient to give rise to an action to restrain its publication, even though the only relationship between the parties, at the time of disclosure, had been one of friendship.[17]

The Obligation of Confidence

It was for a long time considered essential that the information should have been conveyed to its recipient *subject to an obligation of confidence*. This was indeed the foundation of the action. Whereas 'confidentiality' is a quality of information, 'confidence' is a quality of the relationship between confider and the person confided in. This obligation would be binding on the conscience of the recipient and would provide a prima facie reason (subject to other considerations such as public interest, below) for protecting the confidence. Such an obligation, once established, could also bind a third party (such as a newspaper) coming into possession of the information with notice of it. The duty might be express (for example, a contractual term), or implied from the nature of the relationship within which the information was divulged.

In the more recent case law, it has been clearly stated that this sort of duty is no longer a *requirement* of the action for breach of confidence. The absence of any need for a distinct duty of confidence was described by Lord Hoffmann in *Campbell v MGN* [2004] 2 AC 457 at [48] as 'firmly established'. The question is whether this requirement ended with the Court of Appeal's ground-breaking decision in *Douglas v Hello!*, or before.

Even before the HRA, the judgment of Lord Goff in *Attorney-General v Guardian (No 2)* [1990] 1 AC 109 suggested that a **relationship** of confidence was no longer required in all cases. An obligation of confidence could arise where the information had not been deliberately divulged to the recipient at all. This case, however, did not alter the classification of breach of confidence as an action arising **in equity**, out of

obligations of confidence that are binding on the conscience of the defendant.[18] The recent developments outlined below undoubtedly take a further decisive step, protecting information *simply because of its private nature*.

p. 860 **Public Interest in Disclosure**

It was certainly realized before the HRA that public and private interests would have to be balanced when deciding whether to grant injunctions. Equally, it was realized that the 'public interest' in disclosure may engage Article 10 of the Convention. The 'public interest' in disclosure may be based on the need to disclose wrongdoing if that is indicated by the information concerned: 'there is no confidence in iniquity'.[19] Alternatively, there may be some other sort of public interest in disclosure. For example, in *W v Egdell* [1990] Ch 359, a doctor who suspected that his patient should not be released on parole because he posed a *danger to public safety* was justified in releasing details from a medical report—ordinarily subject to confidentiality—to relevant parties. In *Attorney-General v Guardian (No 2)* [1990] 1 AC 109, Lord Goff stated the general (pre-HRA) position like this:

> … although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply, as the learned judge pointed out, to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure.

Like the other elements listed above, the required balancing process has been transformed by the adaptation of the action to deal directly with privacy.

The traditional action for breach of confidence still exists, and it concerns information that was imparted subject to a duty of confidence (with the variations deriving from *A-G v Guardian Newspapers* referred to above). Alongside this has emerged a transformed action, in which the remedy for breach of confidence has become inhabited by a very different balancing process, based on the competing interests in privacy and expression. This second action has now broken away to be recognized as a tort, and is the subject of the remainder of this section.[20]

4.2 An Action in Tort in Respect of Private Information

The new case law stemming from *Douglas v Hello!* protects information *having a necessary quality of privacy*, against publication. There is no longer any need to show that the defendant is *bound in conscience* to keep the information private. Such cases are not 'breach of confidence' cases, since no confidence between the parties need be shown. They are to do with protection against (or remedies for) publication *of private information*.

Classification as a Tort

In *Vidal-Hall v Google*, the Court of Appeal had to decide whether this action should now be classified as a tort.

p. 861 **Lord Dyson MR and Sharp LJ, *Vidal-Hall v Google* [2015] EWCA Civ 311**

> 17 The issue of classification or nomenclature has been the subject of some discussion in the cases, and amongst academics. So far as we are aware, however, with the possible exception, on the defendant's case, of *Douglas v Hello! Ltd (No 3)* this is the first case in which the classification question has made a difference. Put shortly, if a claim for misuse of information is not a tort for the purposes of service out of the jurisdiction, but is classified as a claim for breach of confidence, then on the authority of the *Kitechnology* [1995] FSR765, which is binding on us, the claimants will not be able to serve their claims for misuse of private information on the defendant.
>
> 18 Although the issue as framed in this appeal in one sense is a narrow one, it is none the less appropriate to look at it in the broader context. Fifteen years have passed since the coming into force of the Human Rights Act 1998 in October 2000, which incorporates into our domestic law the Convention for the Protection of Human Rights and Fundamental Freedoms. And it is a decade now since the seminal decision of the House of Lords in *Campbell v MGN Ltd* [2004] 2 AC 457. The problem the courts have had to grapple with during this period has been how to afford appropriate protection to privacy rights under article 8 of the Convention, in the absence (as was affirmed by the House of Lords in *Wainwright v Home Office* [2004] 2 AC 406) of a common law tort of invasion of privacy.
>
> 19 We were taken to a number of cases by Mr White to establish what is in fact an uncontroversial proposition—that the gap was bridged by developing and adapting the law of confidentiality to protect one aspect of invasion of privacy, the misuse of private information. This addressed the tension between the requirement to give appropriate effect to the right to respect for private and family life set out in article 8 of the Convention and 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 (to which Sedley LJ pointed in one of the earliest cases in which this issue was addressed: *Douglas v Hello! Ltd* [2001] QB 967, para 111…)
>
> ….21 However, a number of things need to be said. First, there are problems with an analysis which fails to distinguish between a breach of confidentiality and an infringement of privacy rights protected by article 8, not least because the concepts of confidence and privacy are not the same and protect different interests. Secondly, as has been consistently emphasised by the courts, we are concerned with a developing area of the law. Although the process may have started as one of absorption (per Lord Woolf CJ) it is clear that, contrary to the submissions of the defendant, there are now two separate and distinct causes of action: an action for breach of confidence; and one for misuse of private information. Thirdly, it is also the case that the action for misuse of private information has been referred to as a tort by the courts.

Illustrating how far the law has developed, in *PJS v News Group Newspapers*, Lord Mance simply and consistently referred to avoidance of 'tortious invasion of privacy rights'.

The break-through decision behind these developments was *Douglas v Hello!*

Douglas v Hello! [2001] QB 967

A celebrity couple (Michael Douglas and Catherine Zeta-Jones) entered into a contract with *OK!* magazine,
p. 862 giving the magazine exclusive rights to publish photographs of the couple's ↵ wedding. All employees and guests at the wedding were explicitly instructed that no photography was allowed, except by the official photographer. Somehow, someone at the wedding took photographs and these fell into the hands of *OK!* magazine's rival, *Hello!*, which planned to publish them. Importantly, it was not clear whether these photographs were taken by somebody who had been invited to the wedding; by an employee; or by an intruder. Had they been taken by an intruder, then it could not be said that the photographs in question were taken *in breach of an obligation of confidence*; there would have been no relationship at all. It was this possibility which led the Court of Appeal to consider whether the publication of the photographs could instead be restrained on the basis that they were *private*.

Although the loss suffered by *OK!* was purely commercial in nature, the couple themselves also lost the opportunity to *control* the published images of this private event, despite their best efforts (see the contractual right of veto referred to at [140] below), and this could be described in terms of 'privacy'. It should be noted that this was an 'interim' action in which the claimants sought to prevent publication pending the full hearing on the merits. The Court of Appeal discharged the injunctions, but the claimants, and *OK!* magazine whose contractual rights to print the photographs were rendered less valuable, sought damages and these claims were assessed by the Court of Appeal in *Douglas v Hello! (No 3)* [2006] QB 125. In this later decision, the Court of Appeal accepted that the law in this area had moved so rapidly that it could now be seen that an injunction for the benefit of the Douglases should have been maintained in the present case.[21] This does not alter the far-reaching significance of this case. In fact, it shows how clearly the changes outlined by the Court of Appeal have been recognized within a short space of time.

Of the three judgments, that of Sedley LJ contains the clearest statement that information would now be protected on the basis that it is *private*.

Sedley LJ

110 … The courts have done what they can, using such legal tools as were to hand, to stop the more outrageous invasions of individuals' privacy; but they have felt unable to articulate their measures as a discrete principle of law. 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.

111 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, and in any event, 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 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. 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'. But the two sources of law now run in a single channel because, by virtue of section 2 and section 6 of the Act, the courts of this country must not only take into account jurisprudence of both the Commission and the European Court of Human Rights which points to a positive institutional obligation to respect privacy; they must themselves act compatibly with that and the other Convention rights. This, for reasons I now turn to, arguably gives the final impetus to the recognition of a right of privacy in English law.

p. 863 ↵ …

126 What a concept of privacy does … is accord recognition to the fact that the law has to protect not only those people whose trust has been abused but those who simply find themselves subjected to an unwanted intrusion into their personal lives. The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy.

The above paragraphs of Sedley LJ's judgment are clearly ground-breaking in that they recognize privacy itself as the basis of a cause of action, independent of the requirement for a relationship of confidence or trust. On his analysis, the HRA had given the final push to a change that had already been slowly taking shape. Now, since *Wainwright* and *Campbell*, we can clearly see that English law still recognizes no *general* action to protect privacy. But in some actions to restrain publication, privacy is protected in its own right.

Equally significant were the more detailed elements of Sedley LJ's judgment, considering the way in which privacy would need to be balanced against freedom of expression when considering remedies. Here he considered the relevant approach to a claim for an injunction to restrain publication. But first, Sedley LJ analysed the provisions of the HRA. His analysis is a defining moment in that it recognizes horizontality, *and* equity between rights. It does so through interpretation of section 12.

> 133 Two initial points need to be made about section 12 of the Act. First, by subsection (4) it puts beyond question the direct applicability of at least one article of the Convention as between one private party to litigation and another—in the jargon, its horizontal effect. Whether this is an illustration of the intended mechanism of the entire Act, or whether it is a special case (and if so, why), need not detain us here. The other point, well made by Mr Tugendhat, is that it is 'the Convention right' to freedom of expression which both triggers the section (see section 12(1)) and to which particular regard is to be had. That Convention right, when one turns to it, is qualified in favour of the reputation and rights of others and the protection of information received in confidence. In other words, you cannot have particular regard to article 10 without having equally particular regard at the very least to article 8 … The approach in this paragraph was cited with approval by both Lord Hope (in the majority) and Lord Hoffmann (dissenting) in *Campbell v MGN*, below.

Having concluded that Articles 8 and 10 were both given a degree of horizontal effect by section 12 of the HRA, Sedley LJ went on to consider how the two should be balanced given the nature of the rights themselves, and given the terms of section 12.

> 136 … It will be necessary for the court, in applying the test set out in section 12(3), to bear in mind that by virtue of section 12(1)(4) the qualifications set out in article 10(2) are as relevant as the right set out in article 10(1). This means that, for example, the reputations and rights of others—not only but not least their Convention rights—are as material as the defendant's right of free expression. So is the prohibition on the use of one party's Convention rights to
> p. 864 injure the Convention rights of others. Any other approach to section 12 would in my judgment violate section 3 of the Act.[22] Correspondingly, as Mr Tugendhat submits, 'likely' in section 12(3) cannot be read as requiring simply an evaluation of the relative strengths of the parties' evidence. If at trial, for the reasons I have given, a minor but real risk to life, or a wholly unjustifiable invasion of privacy, is entitled to no less regard, by virtue of article 10(2), than is accorded to the right to publish by article 10(1), the consequent likelihood becomes material under section 12(3). Neither element is a trump card. They will be articulated by the principles of legality and proportionality which, as always, constitute the mechanism by which the court reaches its conclusion on countervailing or qualified rights. It will be remembered that in the jurisprudence of the Convention proportionality is tested by, among other things, the standard of what is necessary in a democratic society. It should also be borne in mind that the much-quoted remark of Hoffmann LJ in *R v Central Independent Television plc* [1994] Fam 192, 203 that freedom of speech 'is a trump card which always wins' came in a passage which expressly qualified the proposition (as Lord Hoffmann has since confirmed, albeit extrajudicially, in his 1996 Goodman Lecture) as lying 'outside the established exceptions, or any new ones which Parliament may enact in accordance with its obligations under the Convention'. If freedom of expression is to be impeded, in other words, it must be on cogent grounds recognised by law.

The following paragraph gives a useful summary of the entire reasoning process where the privacy action is concerned:

> 137 Let me summarise. For reasons I have given, Mr Douglas and Ms Zeta-Jones have a powerful prima facie claim to redress for invasion of their privacy as a qualified right recognized and protected by English law. The case being one which affects the Convention right of freedom of expression, section 12 of the Human Rights Act 1998 requires the court to have regard to article 10 (as, in its absence, would section 6). This, however, cannot, consistently with section 3 and article 17, give the article 10(1) right of free expression a presumptive priority over other rights. What it does is require the court to consider article 10(2) along with 10(1), and by doing so to bring into the frame the conflicting right to respect for privacy. This right, contained in article 8 and reflected in English law, is in turn qualified in both contexts by the right of others to free expression. The outcome, which self-evidently has to be the same under both articles, is determined principally by considerations of proportionality.

5 The Present Law: Framework and Applications

In this section, we explain the structure of the action as it stands today (5.1), and consider some of the extensive case law with reference to particular types of publication, namely those relating to intimate details; photographs; children; and criminal investigations.

5.1 Framework: Elements of the Tort

The action in tort for misuse of private information has the following *two* requirements:

p. 865 #### The Claimant Must Have Had a ‘Reasonable Expectation of Privacy’ in the Information (or Images) in Question

This was the test adopted by the majority of judges in Campbell v MGN [2004] 2 AC 457, and it has been consistently applied and interpreted by the courts.

The Court Must Balance the Interest in Keeping the Information Private Against the Interest in Revealing the Information

This clearly involves interpretation of competing Convention rights (and potentially other interests too), in the light of provisions of the HRA. Article 10(2), as explained earlier, is the source of this balancing exercise. The right to freedom of expression in Article 10 is inherently qualified by other rights and interests. Further, Article 10 is interpreted chiefly in terms of public interest in disclosure. This is essential because in many but not all cases, the person who wishes to publicize the information will be a media defendant, and their ‘personal’ interest may be regarded as chiefly commercial. The applicable approach is now closely modelled

on the European Court of Human Rights' judgment in Von Hannover, extracted in Section 3. Defendants must show convincing reasons why there is a proportionate reason of public interest to justify publication in the face of a reasonable expectation of privacy.

It remains important to recognise that there is no hierarchy between the protected rights. This is often referred to in relation to the 'ultimate balance'. It is hard to give hard and fast guidance, where judgment of the proportionality of interference depends on an 'intense focus' on the circumstances of the case. The question is what is proportional in all those circumstances.

The 'Ultimate Balance'

The approach to balancing the demands of Articles 8 and 10 was summarized by Lord Steyn in the case of *Re S* [2005] 1 AC 594, in terms of four propositions:

> 17 ... First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.

This approach to the balancing process was approved and applied by the Supreme Court in *PJS v News Group Newspapers* [2016] AC 1081 and has been applied in many subsequent cases. Not surprisingly given the emphasis on the particular circumstances of the publication, the Court of Appeal has made plain that appellate courts should be slow to interfere with first instance decisions, provided they are reached on the correct principles (*AAA v Associated Newspapers* [2013] EWCA Civ 554; *Duchess of Sussex v Associated Newspapers* [2021] EWCA Civ 1810).

HRH Duchess of Sussex v Associated Newspapers [2021] EWCA Civ 1810

This case, concerning publication of a personal letter written by the Duchess of Sussex to her father, offers an
p. 866 opportunity to see how the courts interpret the two stages above. The ↵ case was complicated by the fact that the newspaper argued that the recipient of the letter had good cause to seek its publication since it could be said to vindicate him against certain allegations made in another newspaper; and by the fact that the defendants argued that the Duchess was in any event intending to publish the letter. The Court of Appeal determined that the two stages above had both been properly addressed by Warby J at first instance: there had been a reasonable expectation of privacy in the letter; and the balance required at stage 2 was determined in favour of the claimant.

Stage 1: reasonable expectation of privacy

In the following extract, the Court of Appeal summarises the approach of the judge below, Warby J., which was challenged by the defendants. The '*Murray* factors', referred to in para [39], are derived from the decision in *Murray v Associated Newspapers* [2015] EWCA Civ 488. These have become recognised as helpful to structuring the 'stage 1' question about reasonable expectation of privacy in a wide range of cases, though *Murray* itself concerned photographs of children.

37. At [64], [the judge] explained his approach to the first stage, stating the issue, which he said reflected the legal position, as: whether the claimant enjoyed a reasonable expectation that the contents of the Letter were private and would remain so. He said that: 'at this stage of the analysis the issue is binary, the only available answers being yes or no'. The judge then explained that '[t]he claimant will fail on the issue, and the defendant will succeed, only if the court concludes that the information at issue and/or the surrounding circumstances were such that it would be unreasonable for the claimant to expect the defendant to treat the information as private and not for publication or – putting it another way - that the reasonable person of ordinary sensibilities placed in the position of the claimant would not feel substantial offence at the disclosure in question'. The judge thought that '[f]actors relied on as undermining the claimant's case [at stage one], but which fall short of defeating it altogether, may come into play at the second, balancing stage'.

38. At [66], the judge asked and answered the two main stage one questions in the negative: the defence had not set out any case which, assuming it to be true, would provide a reasonable basis for finding that there was, at any material time, no reasonable expectation of privacy, and the defendant had no realistic prospect of successfully defending this issue at trial. Further, there was no real prospect of the court concluding after a trial that, at the time the Articles were published or later, the contents of the Letter were not private, or that the claimant did not enjoy a reasonable expectation that they would remain private.

39. The following was, the judge said, plain and obvious and pointed to a reasonable expectation of privacy [67]–[70]: none of the detailed contents of the Letter had entered the public domain. That was the 'very essence of the [Articles], which trumpeted that they "Revealed' the contents of the Letter 'for the first time' over four pages of 'World Exclusive' print coverage". The People Article had, as the Articles said, disclosed the existence of the Letter. In relation to the *Murray* factors, it was, objectively assessed, obvious that: (1) the claimant was a public figure, who had a high public profile, and about whom much was written and published, (2) the activity she was engaged upon in writing the Letter was not an aspect of her public role, but a communication to her father about his behaviour, (3) which she was doing in a private letter sent by courier to him alone, (4) the 'intrusion' involved the publication of much of the Letter over four pages of a popular newspaper and online to a very large readership, (5) there was no consent, (6) the unwanted disclosure was likely to
p. 867 cause the claimant at least some distress in the context, (7) the information was given to the defendant by the claimant's father. The judge said that the argument made it necessary for him to consider 6 aspects in more detail: the claimant's status and role, whether the Letter or its contents were private in nature, the character and location of the recipient, the public domain, other disclosures by the claimant and claimant's intentions.

40. The judge concluded that the defendant's allegation that the facts it relied upon as showing that claimant's conduct and familial relationships were subject to public scrutiny could not lead the court to conclude that they deprived the claimant of any reasonable expectation of privacy in the contents of the Letter.

41. On the private nature of the letter, the judge concluded that the facts pleaded by Associated Newspapers did not support the conclusion that the claimant had no right to expect that the contents of her Letter would be treated as private and would not be published.

42. On the nature of the contents of the Letter, it was plainly correspondence containing matter relating to the claimant's family life, so that article 8 was engaged. Whilst that was not conclusive as to claimant's reasonable expectation of privacy, the case that the Letter contained her deepest and most private thoughts and feelings corresponded with the description given in the Articles: 'Meghan's private letter revealing true tragedy of her rift with her father'. Associated Newspapers pleaded at [13.2] of its defence that 'as a general principle, a recipient of a letter is not obliged to keep its existence or contents private, unless there are special circumstances, such as a mutual understanding between sender and recipient that the contents of a letter should be kept private', but that approach was rightly not pursued. It was at odds with a large body of authority. None of Associated Newspapers' submissions was capable of supporting the conclusion, on the facts, that the claimant had no right to expect that the contents of her Letter would be treated as private. It was not a business letter. It was delivered only to Mr Markle. The majority of what was published was about the claimant's own behaviour and feelings. These features were reflected in the headline to the first Article and the language used. If it were appropriate to use that formulation, this information was the claimant's not her father's. What information related to Mr Markle did not relate to him alone. Mr Markle's undoubted right to tell his own life story did not override the claimant's right to keep the contents of her Letter private, which itself did not significantly impinge on Mr Markle's right. All he was prevented from doing was using the contents of the Letter as a means of telling his story. A close examination of the information showed that there was relatively little in the Letter that Mr Markle could claim was shared experience, engaging his privacy rights. The judge gave examples pointing out that, even where the Letter concerned his conduct, the focus was on the impact his actions had had on the claimant. Where the claimant accused Mr Markle of lying over denying that he was working with the paparazzi, the evidence showed he had, and the Articles bore out that he had apologised.

43. On the character and location of Mr Markle, neither the claimant's knowledge that Mr Markle was likely to disclose the Letter to the media, nor the fact that US law made publication lawful, was capable of defeating the claimant's case that objectively she had a reasonable expectation of privacy.

44. As to whether the Letter was in the public domain, Associated Newspapers' pleaded case fell short of alleging actual disclosure. All that was said was that the claimant permitted information about the existence of the Letter and a description of its contents to enter the public domain. There was no real prospect of any evidence arising that the contents of the Letter entered the public domain except through the Articles. Associated Newspapers' elaborate case as to how the People Article arose did not bear on the public domain issue, because contents were to be distinguished from description. The Book did not appear until August 2020, and, when it did, it did not contain any words from the Letter that had not

p. 868

> already been published by the defendant. Its pleaded case that the information in the Book about Mr Markle and the Letter could only have come from the claimant was manifestly untenable.
>
> 45. Although public domain disclosures of similar information might weaken a reasonable expectation of privacy, it was fanciful to suppose that any of the disclosures relied upon placed so much relevant information about these matters in the public domain that the claimant lost any right to privacy in the contents of the Letter.
>
> 46. As to the allegations that the claimant wrote the Letter either intending to disclose it or knowing disclosure to be very likely, the judge held that these allegations did not operate to rebut the claim to a reasonable expectation of privacy. Moreover, the inferential case that the claimant was 'considering using the Letter as part of a media strategy to improve or enhance her image' (which has now been dropped) had no sound basis in law. The claimant had no need to prove her intention to keep the Letter private in order to establish that she had a reasonable expectation of privacy.
>
> 47. On the basis of the reasons I have shortly summarised, the judge concluded at [95] that the claimant would be bound to win at trial on her reasonable expectation of privacy.

The Court of Appeal described the judge's approach, outlined above, as 'impeccable' ; and it therefore serves as a good example of how stage 1 should operate. Three features of the discussion deserve particular mention. First, the answer to the stage 1 question is 'binary' : either there is a reasonable expectation of privacy in the material under consideration, or there is not. Second, publication of some elements of that material, to some extent, does not necessarily destroy the reasonable expectation of privacy. Privacy is different from, for example, trade secrets, which might be protected by the law of breach of confidence : it is not necessarily destroyed by limited publication. Similarly, third, the fact that the letter's recipient might lawfully publish the letter in the United States, where he was situated, did not destroy the privacy argument in the UK.

Privacy interests can survive a certain amount of publicity and are not lost once and for all through some degree of disclosure. Degrees of disclosure are significant :see in particular *PJS v News Group Newspapers* [2016] AC 1081; *Sicri v Associated Newspapers Ltd* [2020] EWHC 3541 (QB) (where knowledge of a few neighbours did not destroy the claimant's interest in restraining publication in the national press).

Stage 2: determining the balance

Here, the newspaper argued that the judge had failed to apply the right test, and had required the defendant to satisfy a burden of proof to show that the publication was 'necessary' in the public interest. This, it was argued, went too far towards giving priority to the expectation in privacy, rather than treating the rights in privacy and expression as equally fundamental. The Court of Appeal reiterated the significance of the approach in *Re S*, extracted above, according to which the rights are indeed equally significant; but determined
p. 869 that the judge had not erred in this respect. The reasons why he referred to 'necessity' were to do with the ↵ defendants' own pleaded case, concerning the necessity of using the letter in reply to criticism of its recipient, Mr Markle. In finding that publication of the letter was not necessary for this task, the judge did not incorrectly state the overriding balancing task.

> 93. As I have already mentioned at [56] above, the judge dealt with the defendant's pleaded allegation that it was 'necessary, proper and in the public interest to publish the true and full story concerning the Letter and the response to it' so that the public was not misled. It is a slight irony that the cornerstone of their case on appeal is to say that he applied the wrong test by holding that the publication was not necessary. I can deal with this contention shortly. In my judgment, the judge correctly stated the test he was applying at [31] of his judgment, and completely understood that he was bound by the House of Lords' decisions in *Campbell* and *Re S*. Both are repeatedly referred to in his recent judgment in *Sicri* which he cited at [106].
>
> 94. I do not think that the judge thought that the defendant had any burden of proof requiring it to establish that it should be allowed to publish the Letter. Nor do I think that, on a fair reading of the judge's judgment, that he thought the defendant had to show that publication was necessary in the public interest in order to outweigh the claimant's reasonable expectation of privacy. I accept that the judge fell in to the shorthand use of the question whether the publication was necessary and proportionate in pursuit of a legitimate aim. In my judgment, he used the word necessary as meaning 'justified' just as Baroness Hale did at [152] in *Campbell* itself.

It is, therefore, worth noting the terms in which Warby J stated the approach to stage 2, which was approved by the Court of Appeal in the extract above. The following is an extract from his first instance judgment, and operates as a very useful statement of the approach to stage 2 currently taken by the courts:

Warby J, *HRH The Duchess of Sussex v Associated Newspapers* [2021] EWHC 273 (Ch)

> 31. At stage two, the question is whether in all the circumstances the privacy rights of the claimant must yield to the imperatives of the freedom of expression enjoyed by publishers and their audiences. The competing rights are both qualified, and neither has precedence as such. The conflict is not to be resolved mechanically, on the basis of rival generalities. The court must focus intensely on the comparative importance of the specific rights being claimed in the particular case; assess the justifications for interfering with each right; and balance them, applying a proportionality test. The court must have regard to the extent to which it is or would be in the public interest for the material to be published. The decisive factor at this stage is an assessment of the contribution which the publication of the relevant information would make to a debate of general interest. Other factors to be weighed in the balance are the subject-matter, how well-known the claimant is, the claimant's prior conduct, and editorial latitude. When examining the demands of free speech, the court should be slow to interfere in respect of matters of technique, form and detail; it should defer, to the extent appropriate on the facts, to the professional expertise and judgment of journalists and editors.

p. 870

5.2 Applications

Here we turn to some of the key categories of private information in which the courts have applied and developed the framework above, and in which it has been developed. These are cases relating to intimate details; photographs; children; and (emerging most recently) criminal investigations where there has been no charge.

Intimate Details

Although publications revealing intimate details are often 'trivial' in tone, the harm done should not be assumed to be trivial or even simple.[23] The difficulty is that there is a ready audience—and market—for such revelations.

A v B plc [2003] QB 195

A v B plc was an early exercise in providing guidelines for the award of interim injunctions after *Douglas v Hello!* In hindsight, Lord Woolf's approach does not appear true to the 'presumptive equality between rights' set out in *Douglas v Hello!* and reaffirmed in numerous cases. A review serves to illustrate how far the law has moved.

The claimant in this case, a married professional footballer, sought injunctions against a newspaper, in order to prevent disclosure of sexual relationships he had had with the second defendant and another woman. He also sought an injunction against the second defendant, preventing her from disclosing her 'kiss and tell' story to anyone 'with a view to its publication in the media'. He obtained these injunctions at first instance, but they were discharged by the Court of Appeal.

In *A v B*, Lord Woolf explained his general conclusion that the injunction should be discharged:

> 44 ... The degree of confidentiality to which A was entitled, notwithstanding that C and D did not wish their relationship with A to be confidential, was very modest.

Lord Woolf's approach in this case no longer represents the law and would not pass the test of compatibility with the *Von Hannover* decision, for at least two reasons.[24]

First, in para [11(v)], Lord Woolf asserted that there is no need to show an identifiable public interest in publication, in order to engage Article 10: restraining publication is a restriction of free speech per se and requires justification. This is directly opposed to the approach taken in *Von Hannover*, which held that the state must act to prevent even fairly anodyne photographs from being published, if there was a reasonable expectation of privacy in relation to them, and unless there was a distinct countervailing interest in expression attached to their publication.

Second, Lord Woolf treated *understandable* interest on the part of the public as equivalent to *legitimate* interest.
p. 871 This seems to mean that voyeurism—at least where celebrities are ↵ concerned—weighs in the balance in favour of publication, no matter how lurid the reporting concerned.[25] He added to this that courts should not

be the arbiters of taste. But the decision in *Von Hannover* requires a specific public interest in disclosure. Subsequently, courts have appealed directly to *Von Hannover* and, while not attempting to be 'arbiters of taste', they have nevertheless protected the expectation of privacy in sexual relationships—even if these are adulterous, unconventional, or based on a commercial transaction—and have demanded positive reasons to justify publication where there is some reasonable expectation of privacy. There has been a decisive shift therefore in the way that privacy in sexual relationships is protected.

A key illustration of how the law had changed on this issue is *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB); [2008] EMLR 20. Here the defendants published sensational stories in their newspaper and on the internet based on clandestine recordings of sexual encounters between the claimant and a number of women, who were paid for their participation.

Eady J awarded damages against the defendant for the invasions of privacy involved in the publications. His starting point was that there is a reasonable expectation of privacy in sexual activity between consenting adults in private, provided there is no serious breach of the criminal law: 'people's sex lives are essentially their own business'. Not only did this apply to encounters in the nature of an orgy, it could also apply where the transaction is purely commercial in nature (though in this instance, the evidence suggested the relationships were not purely commercial, and all the participants felt betrayed by the woman who had passed information and images to the newspaper). Clearly the public (or a section of it) was interested in the stories, but in order to justify publication, the defendants had to show a real reason why the public interest in publication outweighed the expectation of privacy already established. The newspaper attempted an argument based on the need to reveal that a person with a position of public importance (within the FIA) had conducted what they described as 'Nazi themed' orgies. Eady J examined this proposed public interest justification and determined that the orgies were not 'Nazi themed'. They only had a normal sadomasochistic flavour. Eady J's dismissal of the newspaper's claims is based on rejection of moralism: the revelation of 'unconventional' activities is not sufficient to engage legitimate public interest. The direct contrast with *A v B* on this issue is clear.

Eady J, ***Max Mosley v News Group Newspapers***

The Nazi and concentration camp theme

123 … since I have concluded that there was no such mocking behaviour and not even, on the material I have viewed, any evidence of imitating, adopting or approving Nazi behaviour, I am unable to identify any legitimate public interest to justify either the intrusion of secret filming or the subsequent publication.

'Depravity and adultery'

124 I need to consider, therefore, whether the residual S and M behaviour and other admitted
p. 872 aspects of what took place on March 28 could be said in themselves to be matters of legitimate journalistic investigation or public interest. Mr Warby described it as immoral, depraved and to an extent adulterous. Everyone now, thanks to the News of the World, probably holds an opinion on that, but even if there was adultery and even if one happens to agree that it was 'depraved', it by no means follows that they are matters of genuine public interest, as that is understood in the case law.

125 The modern approach to personal privacy and to sexual preferences and practices is very different from that of past generations. First, there is a greater willingness, and especially in the Strasbourg jurisprudence, to accord respect to an individual's right to conduct his or her personal life without state interference or condemnation. It has now to be recognised that sexual conduct is a significant aspect of human life in respect of which people should be free to choose. That freedom is one of the matters which Art.8 protects: governments and courts are required to afford remedies when that right is breached.

126 Secondly, as Lord Nicholls at [17]–[18] and Lord Hoffmann at [50] observed in *Campbell* in 2004, remedies should be available against private individuals and corporations (including the media) because, absent any serious element of public interest, they are obliged to respect personal privacy as much as public bodies. It is not merely state intrusion that should be actionable….

127 Thirdly, it is not for the state or for the media to expose sexual conduct which does not involve any significant breach of the criminal law. That is so whether the motive for such intrusion is merely prurience or a moral crusade. It is not for journalists to undermine human rights, or for judges to refuse to enforce them, merely on grounds of taste or moral disapproval. Everyone is naturally entitled to espouse moral or religious beliefs to the effect that certain types of sexual behaviour are wrong or demeaning to those participating. That does not mean that they are entitled to hound those who practise them or to detract from their right to live life as they choose.

128 It is important, in this new rights-based jurisprudence, to ensure that where breaches occur remedies are not refused because an individual journalist or judge finds the conduct distasteful or contrary to moral or religious teaching. Where the law is not breached, as I

> said earlier, the private conduct of adults is essentially no one else's business. The fact that a particular relationship happens to be adulterous, or that someone's tastes are unconventional or 'perverted', does not give the media *carte blanche*.

The key then is that to outweigh a reasonable expectation of privacy, the revelation must contribute to debate. It is not enough that there is a ready audience for it.

Having concluded that the claimant's Article 8 rights had been violated, a substantial award of damages was made, but no additional exemplary damages were included. The reason for this was that the action is closely modelled on the jurisprudence of the Strasbourg court. Strasbourg awards do not include an award of exemplary damages, and to do so would not be consistent with 'proportionality'.[26] While some in the media claimed that 'judge-made law' was now working too hard in favour of privacy and neglecting freedom of
p. 873 expression,[27] a Joint Committee of both Houses of Parliament concluded, after hearing ↵ evidence, not only that the courts were now striking a 'better' balance between privacy and free speech, but also that the levels of damages awarded had been 'too low to act as a deterrent': courts should be given the power to award exemplary damages for privacy violations, if necessary through legislation.[28]

The question of damages for invasions of privacy was visited again in the case of *Gulati and others v MGN Ltd* [2015] EWCA Civ 1291. This was a test case in which substantial damages awards made to a number of victims of 'phone hacking' by journalists were challenged on appeal. The highest award was £80,000, and others stood at £40,000, and it was argued that these were too high; and that they did not stand comparison with Strasbourg awards; further that they should be comparable to such awards, because of the influence of the Convention in developing the action to protect private information. Citing the comments of Lord Hoffmann in relation to libel damages in *The Gleaner*, extracted in Chapter 13, the Court of Appeal concluded that English law offered the appropriate guidance in this case—there was no need to reach results which were similar to Strasbourg awards:

Arden LJ, *Gulati v MGN Ltd*
[2015] EWCA Civ 1291

> 88 … English law has only recently recognised a civil wrong for intrusions of privacy. Initially the law of confidence was expanded by reference to the values to be found in articles 8 and 10 of the Convention. However, an action for breach of confidence did not completely coincide with a right of action for pursuing private information in violation of article 8: see *Vidal-Hall* [2015] 3 WLR 409, para 21. In *Vidal-Hall*, para 51, this court took the important step of holding that, in so far as a claim was based on the use of private information, the legal wrong was the tort of misuse of private information for the purposes at least of service out of the jurisdiction, rather than breach of confidence.
>
> 89 The court, when making an award for misuse of private information is not proceeding under either section 8 of the Human Rights Act 1998 or article 41 of the Convention. The question of the measure of damages is more naturally a question for English domestic law. I give two reasons for this. First, the conditions of the tort are governed by English law and not the Convention. That again makes it more appropriate for English domestic law to assess the measure of damages. Moreover, if damages awarded for misuse of private information within the law were excessive, there would be appropriate ways for the national authorities to reduce them. They would not have to wait to be given a lead by the Strasbourg court. Second, national courts are intrinsically better able to assess the adequacy of an award in their jurisdiction than an international body. This is one of the bases in which the Strasbourg court is likely to recognise that there is a margin of appreciation in its jurisprudence.

In a passage which helps to underline the significance of privacy and the need for press regulation, the Court of Appeal was clear in its condemnation of the defendants' conduct. The following paragraph answered the defendants' argument that where there were multiple claims, the court should 'step back', and look at the awards in their entirety. The Court saw no reason why the awards should be 'scaled back' on this basis.

p. 874

Arden LJ, *Gulati v MGN*

> 106 Indeed, so far as I can see, there were no mitigating circumstances at all. The employees of MGN instead repeatedly engaged in disgraceful actions and ransacked the claimants' voicemail to produce in many cases demeaning articles about wholly innocent members of the public in order to create stories for MGN's newspapers. They appear to have been totally uncaring about the real distress and damage to relationships caused by their callous actions. There are numerous examples in the articles of the disclosure of private medical information, attendance at rehabilitation clinics, domestic violence, emotional calls to partners, details of plans for meeting friends and partners, finances and details of confidential employment negotiations, which the judge found could not have been made if the information had not been obtained by hacking or some other wrongful means. The disclosures were strikingly distressing to the claimants involved.

PJS v News Group Newspapers Ltd [2016] UKSC 26; [2016] AC 1081

The decision of the Supreme Court in *PJS* decisively affirms the developments above. The claimant, a well-known figure in the music industry and partner of a well-known musician with whom he had two children, sought to restrain 'kiss and tell' revelations concerning his extra-marital sexual activities in a national newspaper. An interim injunction was awarded, but the newspaper sought its discharge: information about the identity of the claimant and his partner, and information about his activities, had already been printed in other jurisdictions, and were available on the internet to those who sought them. The Supreme Court maintained the injunctions. The Court emphasized that 'tortious interference with privacy', as Lord Mance described it, was quite different from breach of confidence. Privacy may well continue to be worth protecting even when certain details have been shared with some readers: confidentiality, by contrast, tends to be lost on publication.

In addition, the Supreme Court strongly defended the importance of privacy in relation to adulterous sexual relationships; the need for there to be some convincing public interest reason for publication where a reasonable expectation of privacy existed; and the need to take into consideration the privacy interests of children where revelations about their parents are threatened. We deal with the first two of these here; and the issue of children separately below.

In the following extract, Lord Mance explains that the Court of Appeal had erred in suggesting that section 12 enhances the weight to be given to freedom of expression:

> **Lord Mance, *PJS v News Group Newspapers***
>
> 19 There is, as all members of the Supreme Court conclude, a clear error of law in the Court of Appeal's reasoning in relation to section 12. For reasons given in para 20 below, it consists in the self-direction [2016] EWCA Civ 393 at [40] that section 12 enhances the weight which article 10 rights carry in the balancing exercise. …
>
> 20 The Court of Appeal's initial self-direction is … contrary to considerable authority, including authority at the highest level, which establishes that, even at the interlocutory stage, (i) neither article has preference over the other, (ii) where their values are in conflict, what is necessary is an intense focus on the comparative importance of the rights being claimed in the individual case, (iii) the justifications for interfering with or restricting each right must be taken into account and (iv) the proportionality test must be applied …

p. 875 ↵ The Justices concluded that the Court of Appeal had gone wrong, not only in regarding section 12 as elevating the importance of freedom of expression, but in considering that the defendant's planned revelations were supported by any public interest argument at all:

> **The reference to a limited public interest**
>
> 21 The Court of Appeal in my opinion also erred in the reference it made, at three points in its judgment (paras 13, 30 and 47), to there being in the circumstances even a limited public interest in the proposed story and in its introduction of that supposed interest into a balancing exercise: para 47(v). In identifying this interest, the Court of Appeal relied upon a point made by an earlier Court of Appeal in the *Hutcheson* case [2012] EMLR 2 (and before that by Tugendhat J in the *Terry* case [2010] 2 FLR 1306), namely that the media are entitled to criticise the conduct of individuals even where there is nothing illegal about it. That is obviously so. But criticism of conduct cannot be a pretext for invasion of privacy by disclosure of alleged sexual infidelity which is of no real public interest in a legal sense. It is beside the point that the claimant and his partner are in other contexts subjects of public and media attention factors without which the issue would hardly arise or come to court. It remains beside the point, however much their private sexual conduct might interest the public and help sell newspapers or copy.
>
> ...
>
> 24 In these circumstances, it may be that the mere reporting of sexual encounters of someone like the claimant, however well known to the public, with a view to criticising them does not even fall within the concept of freedom of expression under article 10 at all. But, accepting that article 10 is not only engaged but capable in principle of protecting any form of expression, these cases clearly demonstrate that this type of expression is at the bottom end of the spectrum of importance (compared, for example, with freedom of political speech or a case of conduct bearing on the performance of a public office). For present purposes, any public interest in publishing such criticism must, in the absence of any other, legally recognised, public interest, be effectively disregarded in any balancing exercise and is incapable by itself of outweighing such article 8 privacy rights as the claimant enjoys.

In the final paragraph above, Lord Mance questions whether Article 10 is engaged at all in the absence of a public interest reason for publication. But even setting this aside, there was no relevant public interest which was *capable* of being weighed in the balance. There was simply nothing to weigh against the claimant's privacy. A general approach to such cases was set out:

> 32 ... Every case must be considered on its particular facts. But the starting point is that (i) there is not, without more, any public interest in a legal sense in the disclosure or publication of purely private sexual encounters, even though they involve adultery or more than one person at the same time, (ii) any such disclosure or publication will on the face of it constitute the tort of invasion of privacy, (iii) repetition of such a disclosure or publication on further occasions is capable of constituting a further tort of invasion of privacy, even in relation to persons to whom disclosure or publication was previously made_ especially if it occurs in a different medium ...

p. 876

Photographs

Campbell v MGN [2004] UKHL 22; [2004] 2 AC 457

In this case, the House of Lords had its first opportunity to consider the development of a privacy action in *Douglas v Hello!*. The claimant, Naomi Campbell, was a renowned model, who had publicly stated that she did not take drugs. This was untrue, and it was common ground that this untruth put factual reporting of her drug addiction into the public domain: there is a public interest, engaging Article 10, in correcting untrue information, especially where the speaker is a role model. The defendant newspaper published articles which not only disclosed her drug addiction, but also detailed her self-help treatment through 'Narcotics Anonymous'. The reports gave details of group meetings and showed photographs of her in the street leaving the meetings.

By a majority (Lords Hope and Carswell and Baroness Hale), the House of Lords awarded modest damages. Lords Nicholls and Hoffmann dissented. The reasons for the narrowness of the majority do not relate to the most general questions about privacy and confidence, and the authoritative statements on these topics can be drawn from all five judgments. Significantly, these confirm the steps taken in *Douglas v Hello!* All five judges were agreed that certain elements of the reports—the bare fact of addiction, for example—were justified in the public interest. The difference of view was whether any of the remaining details were themselves sufficient to warrant an award of damages, or whether they should be regarded as within the area of journalistic discretion.

The issues must be approached in two stages, reflecting the two criteria for the new action that we outlined earlier. First, did the information have the necessary quality of privacy? Second, if the claimant's interest in privacy was weighed against the public interest in disclosure (protected by Article 10), where did the balance lie? Importantly, all the judges agreed that there was presumptive equality between these rights, *even* in a case between private individuals. Despite the prohibition on new causes of action, the House of Lords therefore endorsed the horizontal effect of Convention rights *within* causes of action as explained by Sedley LJ in *Douglas v Hello!* If anything, it was the two dissenting judges who most clearly endorsed the idea that the action for breach of confidence has been transformed and that it now recognized privacy as a protected interest.

Lord Nicholls (dissenting)

13 The common law or, more precisely, courts of equity have long afforded protection to the wrongful use of private information by means of the cause of action which became known as breach of confidence. A breach of confidence was restrained as a form of unconscionable conduct, akin to a breach of trust. Today this nomenclature is misleading. The breach of confidence label harks back to the time when the cause of action was based on improper use of information disclosed by one person to another in confidence. To attract protection the information had to be of a confidential nature. But the gist of the cause of action was that information of this character had been disclosed by one person to another in circumstances 'importing an obligation of confidence' even though no contract of non-disclosure existed: see the classic exposition by Megarry J in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, 47–48. The confidence referred to in the phrase 'breach of confidence' was the confidence arising out of a confidential relationship.

14 This cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship. In doing so it has changed its nature. In this country this development was recognised clearly in the judgment of Lord Goff of Chieveley in *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281. Now the law imposes a 'duty of confidence' whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential. Even this formulation is awkward. The continuing use of the phrase 'duty of confidence' and the description of the information as 'confidential' is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, 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.

p. 877

15 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. The extent to which the common law as developed thus far in this country protects other forms of invasion of privacy is not a matter arising in the present case. It does not arise because, although pleaded more widely, Miss Campbell's common law claim was throughout presented in court exclusively on the basis of breach of confidence, that is, the wrongful *publication* by the 'Mirror' of private *information*.

...

Given that the claimant had put her drug addiction into the public domain (by lying), Lord Nicholls expressly doubted (at [26]) whether further information about her treatment retained 'the character of private information'. However, he continued:

...

28 ... I would not wish to found my conclusion solely on this point. I prefer to proceed to the next stage and consider how the tension between privacy and freedom of expression should be resolved in this case, on the assumption that the information regarding Miss Campbell's attendance at Narcotics Anonymous meetings retained its private character. At this stage I consider Miss Campbell's claim must fail. I can state my reason very shortly. On the one hand, publication of this information in the unusual circumstances of this case represents, at most, an intrusion into Miss Campbell's private life to a comparatively minor degree. On the other hand, non-publication of this information would have robbed a legitimate and sympathetic newspaper story of attendant detail which added colour and conviction. This information was published in order to demonstrate Miss Campbell's commitment to tackling her drug problem. The balance ought not to be held at a point which would preclude, in this case, a degree of journalistic latitude in respect of information published for this purpose.

Lord Hoffmann (dissenting)

61 That brings me to what seems to be the only point of principle which arises in this case. Where the main substance of the story is conceded to have been justified, should the newspaper be held liable whenever the judge considers that it was not necessary to have published some of the personal information? Or should the newspaper be allowed some margin of choice in the way it chooses to present the story?

62 In my opinion, it would be inconsistent with the approach which has been taken by the courts in a number of recent landmark cases for a newspaper to be held strictly liable for exceeding what a judge considers to have been necessary. The practical exigencies of journalism demand that some latitude must be given. Editorial decisions have to be made quickly and with less information than is available to a court which afterwards reviews the matter at leisure. And if any margin is to be allowed, it seems to me strange to hold the 'Mirror' liable in damages for a decision which three experienced judges in the Court of Appeal have held to be perfectly justified.

p. 878

Baroness Hale

156 ... The editor accepted that even without the photographs, it would have been a front page story. He had his basic information and he had his quotes. There is no shortage of photographs with which to illustrate and brighten up a story about Naomi Campbell. No doubt some of those available are less flattering than others, so that if he had wanted to run a hostile piece he could have done so. The fact that it was a sympathetic story is neither here nor there. The way in which he chose to present the information he was entitled to reveal was entirely a matter for him. The photographs would have been useful in proving the truth

> of the story had this been challenged, but there was no need to publish them for this purpose. The credibility of the story with the public would stand or fall with the credibility of 'Mirror' stories generally.
>
> 157 The weight to be attached to these various considerations is a matter of fact and degree. Not every statement about a person's health will carry the badge of confidentiality or risk doing harm to that person's physical or moral integrity. The privacy interest in the fact that a public figure has a cold or a broken leg is unlikely to be strong enough to justify restricting the press's freedom to report it. What harm could it possibly do? Sometimes there will be other justifications for publishing, especially where the information is relevant to the capacity of a public figure to do the job. But that is not this case and in this case there was, as the judge found, a risk that publication would do harm. The risk of harm is what matters at this stage, rather than the proof that actual harm has occurred. People trying to recover from drug addiction need considerable dedication and commitment, along with constant reinforcement from those around them. That is why organisations like Narcotics Anonymous were set up and why they can do so much good. Blundering in when matters are acknowledged to be at a 'fragile' stage may do great harm.

Douglas v Hello! (No 3)

In *Douglas v Hello!* as we have seen, the Court of Appeal refused to grant interlocutory injunctions against publication of the photographs. However, there was a strong expectation that damages would be awarded.

In *Douglas v Hello! (No 3)* [2006] QB 125, the case returned to the Court of Appeal. A number of issues arose. Some of them relate to claims not by the couple themselves, but by *OK!* magazine. The arguments of *OK!* magazine, whose contractual interests were affected by the unauthorized publication of photographs by *Hello!*, are entirely related to commercial interests and some of the issues (particularly as regards the level of *intention* required) have been discussed in Chapter 2. *OK!*'s claim was dismissed by the Court of Appeal but succeeded on appeal to the House of Lords. The privacy claim was not subject to an appeal, and the Court of Appeal provided important clarification on a number of issues. The court's conclusions are further evidence of the rapid change in the law affecting this area.

p. 879 ↵ The judgment of the court was delivered by Lord Phillips MR. We will focus on four issues.

The Existence of a Privacy Interest

> 92 We should make clear at the outset that the only issue on liability was whether the photographs published by Hello! infringed rights of confidence or privacy enjoyed by the Douglases. As the judge recorded, Hello! did not seek to argue that it was in the public interest that they should publish the unauthorised photographs or that their article 10 rights of freedom of expression outweighed any rights of confidence or privacy that the Douglases enjoyed.
>
> ...
>
> 95 Applying the test propounded by the House of Lords in *Campbell v MGN Ltd* [2004] 2 AC 457, photographs of the wedding plainly portrayed aspects of the Douglases' private life and fell within the protection of the law of confidentiality, as extended to cover private or personal information.

What had, at the time of *Douglas v Hello!*, been a complex question of law—was there a privacy interest in the photographs at all?—had now become straightforward. There certainly was such an interest.

Balancing and the Award of an Injunction

It will be plain from para [92] of Lord Phillips' judgment (above) that following the decision in *Von Hannover*, and provided the required element of privacy is established, it will now be appropriate to weigh an interest in freedom of expression against the privacy interest of the claimant *only if there is a positive public interest reason supporting disclosure*. The general public interest in press freedom or absence of censorship will not be enough (or, to put it another way, there is no such general public interest).[29] Therefore in this case, nothing at all seems to have gone into the balance on the side of Article 10. This approach is inspired by *Von Hannover* and marks a significant change from the judgment of Sedley LJ in *Douglas v Hello!*, which was dominated by questions of balance. Indeed, without such questions of balance, there would have been no discussion of section 12, and therefore no horizontal effect for the Article 8 privacy right in the first place!

The discharge of the interlocutory injunction

251 We turn to an issue upon which we were not addressed, but which we believe justifies revisiting. It is the decision of this court in November 2000 [2001] QB 967 to lift the interlocutory injunction granted by Hunt J, restraining Hello! from publishing the unauthorised photographs. In our view, in the light of the law as it can now be seen to be, that decision was wrong, and the interlocutory injunction should in fact have been upheld.

p. 880

252 The reasons given by the three members of this court for concluding that an interlocutory injunction was inappropriate were slightly different. Brooke LJ considered that it was no more than arguable that the Douglases 'had a right to privacy which English law would recognise', and that their claim based on privacy was 'not a particularly strong one' (paras 60 and 95). Although Sedley LJ thought that the Douglases had 'a powerful prima facie claim to redress for invasion of their privacy', he considered that 'by far the greater part of that privacy has already been traded and falls to be protected, if at all, as a commodity in the hands of [OK!]': paras 137 and 144. Keene LJ, at para 171, was primarily influenced by the point that the 'court in exercising its discretion at this interlocutory stage must still take account of the widespread publicity arranged by the [Douglases] for this occasion'.

253 In our view, these analyses, and indeed the decision to discharge the injunction, did not give sufficient weight to ... the strength of the Douglases' claim for an injunction restraining publication of the unauthorised photographs. Although Sedley LJ took the view that they had a strong case in this connection, it would appear that Brooke and Keene LJJ were more doubtful. The Court of Appeal did not have the benefit of the reasoning in the House of Lords in *Campbell v MGN Ltd* [2004] 2 AC 457 or, even more significantly for present purposes, the reasoning of the European Court of Human Rights in *Von Hannover v Germany* 40 EHRR 1. Had the court had the opportunity to consider those two decisions, we believe that it would have reached the conclusion that the Douglases appeared to have a virtually unanswerable case for contending that publication of the unauthorised photographs would infringe their privacy.

254 Of course, even where a claimant has a very strong case indeed for contending that publication of information would infringe his privacy, there may be good reasons for refusing an interlocutory injunction. In the present case, however, we find it difficult to see how it could be contended that the public interest (as opposed to public curiosity) could be involved over and above the general public interest in a free press. Particularly so, as it was clearly the intention of the Douglases and OK! to publish a large number of (much clearer) photographs of the same event. The fact that the Douglases can be fairly said to have 'traded' their privacy to a substantial extent as a result of their contract with OK! does not undermine the point that publication of the unauthorised photographs would infringe their privacy.

A Claim in Confidence by OK! Magazine?

The Court of Appeal also decided that a claim in confidence by *OK!* magazine, on the basis that the publication breached a duty of confidence owed to them, could not succeed. It was inconsistent with the couple's claim that they had a retained right of privacy in the photos. The idea that these two positions are inconsistent was rejected by a majority of the House of Lords. Lord Hoffmann thought there could be commercial confidence in any material in which people were willing to pay for exclusive rights. In this instance, we should 'keep our minds on the money'.

Lord Hoffmann, *Douglas v Hello! and Others (No 3)* [2007] UKHL 21

> 118 ... your Lordships should not be concerned with Convention rights. 'OK!' has no claim to privacy under article 8 nor can it make a claim which is parasitic upon the Douglases' right
> p. 881 to privacy. The fact that information happens to have been about the personal life of the Douglases is irrelevant. It could have been information about anything that a newspaper was willing to pay for. What matters is that the Douglases, by the way they arranged their wedding, were in a position to impose an obligation of confidence. They were in control of the information.
>
> ...
>
> 124 ... Some may view with distaste a world in which information about the events of a wedding, which Warren and Brandeis in their famous article on privacy ... regarded as a paradigm private occasion, should be sold in the market in the same way as information about how to make a better mousetrap. But being a celebrity or publishing a celebrity magazine are lawful trades and I see no reason why they should be outlawed from such protection as the law of confidence may offer.

Children

In *Murray v Big Pictures Ltd* [2008] EWCA Civ 446, the Court of Appeal was willing to accept as arguable a claim for damages in respect of publication of a photograph taken in a public street and showing the author J. K. Rowling together with her family, including her 19-month-old son. The child might well have a 'reasonable expectation of privacy' in this sort of context, and it was wrong to suggest that the parents were merely bringing a claim on their own account, in the name of the child. In making the judgment in respect of rights violations, all would depend upon the circumstances of the case. But in this case, there were reasons which made the claim arguable. This case combines the issue of photographs and the issue of children.

Sir Anthony Clarke MR, *Murray v Big Pictures (UK) Ltd*

17 It may well be that the mere taking of a photograph of a child in a public place when out with his or her parents, whether they are famous or not, would not engage article 8 of the Convention. However, as we see it, it all depends upon the circumstances. We will return to the context below but it seems to us that the judge's approach depends too much upon a consideration of the taking of the photograph and not enough upon its publication. This was not the taking of a single photograph of David in the street. On the claimant's case, which must be taken as true for present purposes, it was the clandestine taking and subsequent publication of the photograph in the context of a series of photographs which were taken for the purpose of their sale for publication, in circumstances in which BPL did not ask David's parents for their consent to the taking and publication of his photograph. It is a reasonable inference on the alleged facts that BPL knew that, if they had asked Dr and Mrs Murray for their consent to the taking and publication of such a photograph of their child, that consent would have been refused.

18 Moreover, on the assumed facts, this was not an isolated case of a newspaper taking one photograph out of the blue and its subsequent publication. This was at least arguably a very different case from that to which Baroness Hale of Richmond referred in her now well known example, in *Campbell v MGN Ltd* [2004] 2 AC 457, para 154, of Ms Campbell being photographed while popping out to buy the milk. The correspondence to which we have referred shows that a news agency, a freelance photographer and two newspapers had photographers outside the Murrays's house in the period before publication of the photograph
p. 882 and a schedule exhibited to the particulars of claim shows that this was not an isolated event.... Since the whole point of putting the photograph on the website in order to sell the right to publish it was because of the media interest, including interest in David as JK Rowling's child, on the material available it seems to us to be likely that BPL was fully aware of the potential value of taking and publishing such photographs. The photograph could, after all, have been published with David's features pixelated out if BPL had wished. In these circumstances the parents' perception that, unless this action succeeds, there is a real risk that others will take and publish photographs of David is entirely understandable.

Similarly, in *Weller v Associated Newspapers* [2015] 1 WLR 1541; [2016] 1 WLR 1541, the Court of Appeal upheld the award of an injunction to restrain publication of photographs of the children of a musician on a family outing with their father. The children had not courted publicity nor had their parents sought to bring them into the public eye beyond speaking about them; nor did they perform any public functions; and the photographs and article related sole to details of their private life, with the sole purpose of satisfying public curiosity.

Nevertheless, the interests of the child though important are not uniquely significant. In *AAA v Associated Newspapers Ltd* [2013] EWCA Civ 554, the child's expectation of privacy was a highly significant factor, but other factors also weighed in the balance. In this case, the child's father was not the mother's partner, but a

well-known politician who had previously fathered another child as a result of an extra-marital relationship. The mother had shown at least an ambivalent attitude to making known the paternity of the claimant; and the story was considered to have a public interest element to it because of its reflection on a public figure.

In *PJS v News Group Newspapers*, the privacy interests of children whose father was the subject of 'kiss and tell' stories were seen as important by all members of the Supreme Court, and were particularly emphasized by Baroness Hale.

Baroness Hale, *PJS v News Group Newspapers* [2016] UKSC 26

> 72 I agree that this appeal should be allowed and the interim injunction restored for the reasons given by Lord Mance JSC. I wish only to add a few words about the interests of the two children whom PJS has with YMA. It is simply not good enough to dismiss the interests of any children who are likely to be affected by the publication of private information about their parents with the bland statement that these cannot be a trump card. Of course they cannot always rule the day. But they deserve closer attention than they have so far received in this case, for two main reasons. First, not only are the children's interests likely to be affected by a breach of the privacy interests of their parents, but the children have independent privacy interests of their own. They also have a right to respect for their family life with their parents. Secondly, by section 12(4)(b), any court considering whether to grant either an interim or a permanent injunction has to have particular regard_ to any relevant privacy code. It is not disputed that the Independent Press Standards Organisation Editors Code of Practice, which came into force in January, is a relevant Code for this purpose. This, as Lord Mance JSC has explained, at para 36, provides that 'editors must demonstrate an exceptional public interest to over-ride the normally paramount interests of children under 16'.

p. 883

Investigation

An important area of growth in the action for misuse of private information relates to reporting of investigation on suspicion of wrongdoing. It has quickly become established that there is in many cases a reasonable expectation of privacy in the fact of investigation and arrest, falling short of a charge. This reflects the fact that suspicion can be raised and investigation commenced on relatively slight evidence, sometimes including the assertions of malicious people or those with ulterior motives, and that the implications for individuals of widespread publication are very significant.

Richard v BBC

Prior to this decision, the situation in relation to reporting of investigation falling short of charge was not clear. In *Khuja v Times Newspapers* [2017] UKSC, the Supreme Court had decided a more specific question, about whether to award an interlocutory injunction to someone who had previously been under suspicion for involvement in serious child sexual abuse, to prevent his name from being published in reports of a trial of those who had been charged. The injunction was not awarded, although two members of the Court dissented.

But even the majority judges emphasised that this was a narrow decision related to reporting of court proceedings, and doubted that there was any presumption—as had previously been suggested—that the public is inclined to make a clear distinction between suspicion, and guilt.

In *Richard v BBC*, *Khuja* was distinguished, and the claimant's privacy rights were held to have been engaged, when the BBC broadcast extensive and dramatic coverage of a police raid on his home in connection with allegations of abuse that were later found to have been groundless. The balance at stage 2 came down strongly in favour of protection of privacy. The claimant's case was a particularly strong one and the behaviour of the broadcaster particularly unacceptable on the facts. The evidence showed that a journalist had been given information about the impending raid, which that journalist must have known ought not to have been shared, and had implied to the police that there would be early publication of the intended investigation unless access was given. While the police had admitted liability, the broadcaster was found to bear a greater percentage of the liability. In terms of the potency of their contribution to harm, and the gravity of their breach, they bore more of the responsibility.

Mann J, *Richard v BBC* [2018] EWHC 1837 (Ch), 3 WLR 1715

> 248. It seems to me that on the authorities, and as a matter of general principle, a suspect has a reasonable expectation of privacy in relation to a police investigation, and I so rule. As a general rule it is understandable and justifiable (and reasonable) that a suspect would not wish others to know of the investigation because of the stigma attached. It is, as a general rule, not necessary for anyone outside the investigating force to know, and the consequences of wider knowledge have been made apparent in many cases …. If the presumption of innocence were perfectly understood and given effect to, and if the general public was universally capable of adopting a completely open- and broad-minded view of the fact of an investigation so that there was no risk of taint either during the investigation
> p. 884 or afterwards (assuming no charge) then the position might be different. But neither of those things is true. The fact of an investigation, as a general rule, will of itself carry some stigma, no matter how often one says it should not. This was acknowledged in *Khuja v Times Newspapers* Ltd [2017] 3 WLR 351 …. The trial judge had acknowledged that some members of the public would equate suspicion with guilt, but he considered that members of the public generally would know the difference between those two things …. Lord Sumption was not so hopeful. He observed:
>
> 'Left to myself, I might have been less sanguine than he was about the reaction of the public to the way PNM featured in the trial.'

At stage 2, Mann J struck the relevant balance in the following way.

The striking of the balance

315. Having considered all those matters I am now in a position to consider how the various factors are to be weighed against each other. I have come to the clear conclusion that Sir Cliff's privacy rights were not outweighed by the BBC's rights to freedom of expression. This is an overall evaluative exercise which is not a precise scientific measuring one, but the most significant factors are as follows.

316. First, for reasons that are apparent elsewhere in this judgment, the consequences of a disclosure for a person such as Sir Cliff are capable of being, and were, very serious. The failure of the public to keep the presumption of innocence in mind at all times means that there is inevitably going to be stigma attached to the revelation, which is magnified in this case by the nature of the allegations against him, which were allegations (especially in the then climate) of extreme seriousness. There are also likely to be other invasive consequences of the kind referred to by Sir Richard Henriques in his report, which I have quoted above. Reporting on the investigation and the search was a serious invasion which required an equally serious justification (as the Guidelines acknowledge).

317. The main point urged in favour of disclosure is the public interest point formulated by Mr Millar. I acknowledge a very significant public interest in the fact of police investigations into historic sex abuse, including the fact that those investigations are pursued against those in public life. The public interest in identifying those persons does not, in my view, exist in this case. If I am wrong about that, it is not very weighty and is heavily outweighed by the seriousness of the invasion.

318. Also weighing against the interests of freedom of expression in this case is the style of the reporting. A lower key report of the search and investigation (for example, done merely by a measured reading of the relevant facts by a presenter in the studio) would, on my findings be a serious infringement, and would not be outweighed by the BBC's rights of freedom of expression. What the BBC did was more than that. It added drama and a degree of sensationalism (and not just pictorial verification) by the nature of its coverage. The impact of the invasion was, in my view, very materially increased. Adding impact is, after all, the purpose of adding pictures to a story. That is what the BBC did, quite handsomely.

...

321. Last under this head I deal with a very broad point raised by Mr Millar. He submitted that the case against the BBC raised 'issues of great, arguably of constitutional, importance for the freedom of the press in this country.' If Sir Cliff's claim were successful it would undermine the long-standing press-freedom to report the truth about police investigations (respecting the presumption of innocence), and if that freedom is undermined then that should be a matter for Parliament and not the courts.

p. 885

322. I think that Mr Millar may have been overstating the constitutional importance of this case a bit. I agree that the case is capable of having a significant impact on press reporting, but not to a degree which requires legislative, and not merely judicial, authority. The fact is that there is legislative authority restraining the press in the form of the Human Rights Act, and

> that is what the courts apply in this area. That Act will have had an effect on press reporting before this case because of Article 8, and the balancing exercise between Articles 8 and 10 is done by the courts under and pursuant to the legislation. The exercise that I have carried out in this case is the same exercise as has to be carried out in other, albeit less dramatic, cases. If the position of the press is now different from that which it has been in the past, that is because of the Human Rights Act, and not because of some court-created principle.

As a consequence of the decision in *Richard*, it is now accepted by the courts that the privacy rights of someone under police investigation falling short of a charge are engaged. The decision was approved by the Court of Appeal in *ZXC v Bloomberg LLP* [2020] EWCA Civ 611; [2021] QB 28, although this decision is (at the time of going to press) subject to an appeal to the Supreme Court. Whether a claimant's right to privacy is outweighed by a defendant's right to expression is of course a matter for consideration at stage 2, but the principle of 'open justice' has not been thought to extend to mere investigation falling short of charge. A further important example at first instance is *Sicri v Associated Newspapers* [2020] EWHC 3541 (QB).

6 Intrusion

Not all invasions of privacy involve *publication*, whether of photographs or of information. While breach of confidence has not previously been recognized as a tort, there are certain other actions which clearly are torts and may serve in the protection of privacy. These include trespass (Chapters 2 and 18), nuisance (Chapter 11), and the action in *Wilkinson v Downton* (Chapter 2).

The judgment of the House of Lords in *Wainwright v Home Office* [2004] 2 AC 406 ruled out development of a general tort capable of dealing with 'intrusion'. In this case, the claimants had been subjected to a humiliating strip search on a visit to prison. This search was found to have been in contravention of the applicable Prison Rules; however, there was no finding of any particular intent to humiliate the claimants, nor even to breach the rules. The searches were aimed at identifying whether visitors were carrying drugs.

The case was decided after the decision of the Court of Appeal in *Douglas v Hello!*, but before the decision of the House of Lords in *Campbell*.

Lord Hoffmann, *Wainwright v Home Office*

p. 886

31 There seems to me a great difference between identifying privacy as a value which underlies the existence of a rule of law (and may point the direction in which the law should develop) and privacy as a principle of law in itself. The English common law is familiar with the notion of underlying values—principles only in the broadest sense—which direct its development. A famous example is *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, in which freedom of speech was the underlying value which supported the decision to lay down the specific rule that a local authority could not sue for libel. But no one has suggested that freedom of speech is in itself a legal principle which is capable of sufficient definition to enable one to deduce specific rules to be applied in concrete cases. That is not the way the common law works.

32 Nor is there anything in the jurisprudence of the European Court of Human Rights which suggests that the adoption of some high level principle of privacy is necessary to comply with article 8 of the Convention. The European Court is concerned only with whether English law provides an adequate remedy in a specific case in which it considers that there has been an invasion of privacy contrary to article 8(1) and not justifiable under article 8(2). So in *Earl Spencer v United Kingdom* 25 EHRR CD 105 it was satisfied that the action for breach of confidence provided an adequate remedy for the Spencers' complaint and looked no further into the rest of the armoury of remedies available to the victims of other invasions of privacy. Likewise, in *Peck v United Kingdom* (2003) 36 EHRR 719 the court expressed some impatience, at paragraph 103, at being given a tour d'horizon of the remedies provided and to be provided by English law to deal with every imaginable kind of invasion of privacy. It was concerned with whether Mr Peck (who had been filmed in embarrassing circumstances by a CCTV camera) had an adequate remedy when the film was widely published by the media. It came to the conclusion that he did not.

33 Counsel for the Wainwrights relied upon Peck's case as demonstrating the need for a general tort of invasion of privacy. But in my opinion it shows no more than the need, in English law, for a system of control of the use of film from CCTV cameras which shows greater sensitivity to the feelings of people who happen to have been caught by the lens. For the reasons so cogently explained by Sir Robert Megarry V-C in *Malone v Metropolitan Police Comr* [1979] Ch 344, this is an area which requires a detailed approach which can be achieved only by legislation rather than the broad brush of common law principle.

34 Furthermore, the coming into force of the Human Rights Act 1998 weakens the argument for saying that a general tort of invasion of privacy is needed to fill gaps in the existing remedies. Sections 6 and 7 of the Act are in themselves substantial gap fillers; if it is indeed the case that a person's rights under article 8 have been infringed by a public authority, he will have a statutory remedy. The creation of a general tort will, as Buxton LJ pointed out in the Court of Appeal [2002] QB 1334, 1360, para 92, pre-empt the controversial question of the extent, if any, to which the Convention requires the state to provide remedies for invasions of privacy by persons who are not public authorities.

> 35 For these reasons I would reject the invitation to declare that since at the latest 1950 there has been a previously unknown tort of invasion of privacy.

Lord Hoffmann went on to explain that even if section 8 of the HRA had been in force at the time of the strip search in question, it should not necessarily be assumed that damages would have been available in this case. Retaining the traditional tort law perspective, he felt that here too, intention might be relevant. In *Wainwright v UK* (26 September 2006) [2008] 1 PLR 398, the European Court of Human Rights held, however, that the UK was in violation of the applicants' rights under Article 8 of the Convention, and also under Article 13 (failure to provide an adequate domestic remedy).

p. 887

7 Conclusions

i. The story of tort law where protection of privacy is concerned has been one of real interaction between common law, and Convention rights. The development of a tort of misuse of private information is the most strikingly novel feature of tort law in the last twenty years. The mechanism for creating such a development in the courts has been use of the existing cause of action for breach of confidence; but this has been achieved by using enactment of the Human Rights Act 1998 as the occasion for deep entrenchment of Articles 8 and 10 in English law. The result is not just a 'transformed' action for breach of confidence, but a new cause of action protecting privacy, which is now recognized as a tort.

ii. The development of a tort of misuse of private information has inevitably led the courts into controversial areas, since it is often (though not always) the press whose intention to publish information is restricted by the new action. Key to the operation of the new action is the balancing of privacy rights (protected by Article 8) against freedom of expression (protected by Article 10). Freedom of expression has no presumptive priority, and while in principle both weigh equally in the scales, the courts have followed the lead of the European Court of Human Rights. Provided there is a reasonable expectation of privacy, the courts will require some reason of public interest in favour of publication, if anything at all is to be placed in the balance against a privacy right. Where the reason for publication is merely satisfaction of public curiosity about private lives, the balance will, simply, fall in favour of privacy.

iii. At the same time, the behaviour of sections of the UK's press in recent years has served to underline the need for effective regulation—a course which continues to prove elusive. The case of *Gulati v MGN* gave some insight into this behaviour and its effects on individuals. The extensive impact of violations of privacy whether financial, personal, or relating to health, are illustrated by the experiences of Cliff Richard after revelations about investigations which led to no charges were sensationally broadcast by the BBC. As is also illustrated by the case of Max Mosley, privacy is a vulnerable commodity, and it can be formidably difficult to overcome the interests of the press in seeking publication of what will arouse the curiosity of the public, no matter how different this may be from the legal approach to 'public interest'. Some have argued that in the age of the internet, the Supreme Court judgment in *PJS*, similarly, is merely a holding back of the tide of publication, given the intervention of the internet. Just

as the interests of the press in publication of sensationalist stories helps to explain the development of the action for privacy, the same interests also indicate the problems that lie in the way of any effective control through the law.

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Notes

[1] [2020] EWHC 3541 (QB).

[2] This means (simply) that the right can be derived from the legal material itself and without having to seek a justification elsewhere.

[3] Warren felt that his wife had been harassed by the press, which was printing too many details of parties at their home. The last straw was intrusive coverage into the wedding of their daughter. Speaking of the Warrens’ daughter, and given the extraordinary influence of the Warren and Brandeis article, William Prosser later suggested that hers was the original ‘face that launched a thousand law suits’ (Prosser, ‘Privacy’, at 423).

[4] G. Phillipson, ‘Judicial Reasoning in Breach of Confidence Cases Under the Human Rights Act: Not Taking Privacy Seriously’ (2003) EHRLR 53, cites D. Zimmerman, ‘Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort’ (1983) 68 Cornell L Rev 291. Zimmerman suggests that the defence of ‘newsworthiness’ has effectively destroyed the protection sought by Warren and Brandeis against unwelcome intrusion and publication. A broader line is drawn around press freedom in the United States than in England.

[5] Prosser is here referring to *state* jurisdictions within the United States.

[6] Particularly regarding sexual freedom and obscene material.

[7] This was only one of seven ways that Wacks suggested privacy had become irretrievably confused with other issues; it may, however, be the most important.

[8] Exemplified by *Kaye v Robertson* [1991] FSR 62, where only creative use of the tort of malicious falsehood enabled the court to award any remedy to an actor whose photographs lying in a coma were taken and published by newspapers to illustrate an apparent exclusive ‘interview’ (for which no permission had in fact been given). What the court really sought was a remedy against the intrusion and publication of the photograph, rather than a falsehood about the exclusivity of the story.

[9] See the discussion of *McKennitt v Ash* and *PJS v News Group Newspapers*, later in this section.

[10] See G. Phillipson, ‘Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act’ (2003) 66 MLR 726–58.

[11] As to the first see *HRH Prince of Wales v Associated Newspapers* [2006] EWHC 522 (affirmed [2006] EWCA Civ 1776)—the heir to the throne has a reasonable expectation of privacy in his diaries. As to the second, see *Campbell v MGN* (extracted below)—photographs taken in the street may be the subject of an injunction if there is a reasonable expectation of privacy.

[12] See M. A. Sanderson, ‘Is Von Hannover v Germany a Step Backwards for the Substantive Analysis of Speech and Privacy Interests?’ [2004] EHRLR 631–44. Sanderson argues that the low-grade nature of the publications dominated the decision in *Von Hannover*, so that the Court never analysed the nature of the privacy interest very closely.

[13] *Sciacca v Italy* (2005) 43 EHRR 330.

[14] See also Lord Steyn, '2000–2005: Laying the Foundations for Human Rights Law' (2005) 4 EHRLR 349.

[15] As we will see, equality between the rights was not so clearly recognized in *A v B plc* [2003] QB 195, for example, but it was endorsed by the House of Lords in *Campbell v MGN* [2004] UKHL; [2004] 2 AC 457.

[16] *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804 per Laws LJ; W. Wilson, 'Privacy, Confidence and Press Freedom: A Study in Judicial Activism' (1990) 53 MLR 43, commenting on *Stephens v Avery* [1988] Ch 449.

[17] The information here was not trivial. It related to a lesbian affair conducted by the plaintiff with a woman who had then, perhaps as a consequence, been murdered by her husband.

[18] See, for example, the discussion of breach of confidence in Sarah Worthington, *Equity* (Clarendon Press, 2003), chapter 5.

[19] *Fraser v Evans* [1969] 1 QB 349; Brooke LJ *Douglas v Hello!* at [65].

[20] For a 'hybrid' case, involving issues of both confidentiality and privacy, se *HRH Prince of Wales v Associated Newspapers* [2006] EWHC 522 (Ch).

[21] *OK!* lost their claim based on breach of confidence, but succeeded on appeal to the House of Lords.

[22] Section 3 provides that 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way that is compatible with the Convention rights'. The only legislation being interpreted in this case was of course the HRA itself.

[23] For exploration of the complex harms and motives which may confront the law see J. Richardson, 'If I Cannot Have Her Everybody Can: Sexual Disclosure and Privacy Law', in J. Richardson and E. Rackley (eds), *Feminist Perspectives on Tort Law* (Routledge, 2012).

[24] For further discussion see G. Phillipson, 'Judicial Reasoning in Breach of Confidence Actions Under the Human Rights Act: Not Taking Privacy Seriously?' (2003) EHRLR Supp. 54.

[25] The style of reporting was described as a matter of taste not law, and a question for the Press Complaints Commission and the customers of the newspaper concerned, not for the courts.

[26] Touching on these issues, see K. Hughes, *Horizontal Privacy* (2009) 125 LQR 244–7. For discussion of other non-compensatory damages see N. Witzleb, 'Justifying Gain-based Remedies for Invasion of Privacy' (2009) OJLS 1–39.

[27] Most notably, on the part of Paul Dacre, Editor in Chief of Associated Newspapers, Speech to the Society of Editors, November 2008.

[28] Joint Committee on Privacy and Injunctions, 2012, para 134.

[29] In *Von Hannover*, for example, the European Court of Human Rights rejected the view of the German Federal Constitutional Court that there was a lightweight but potentially useful category of journalism which could be called 'infotainment'.

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