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Restrictions on media communications in the interests of truth or privacy

By

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1. This paper challenges the bad image that has been gained by the United Kingdom law of defamation and explains why I do not consider that that image is fair or warranted.

2. It then goes on to address a key development in English publication law: the increasing focus upon whether a defamatory statement or private information is in the public interest rather than whether it is true or false. I discuss what impact this change might be said to have made to the law and to the practice of journalism in the United Kingdom.

Introduction

3. Before the passing of the Human Rights Act in 1998 the United Kingdom[1] did not have a declaration of rights. The traditional common law approach focussed attention on restrictions on the freedoms each citizen was said to enjoy[2]. Defamation - the principal means of enabling a person to vindicate his or her reputation – was one such restriction. Freedom of speech operated as an answer to a defamation claim, mainly through the defences of justification (truth) and fair comment[3]. Protection for defamatory factual statements to the world at large, which could not be proved to be true, was given, in the main, by categories of statutory qualified privilege, for instance, to a fair and accurate report of Parliamentary or court proceedings.

4. By the 1990s at least, defamation law was widely considered too weighted in favour of claimants. To treat freedom of speech as something that could be restricted meant it was too easy to restrict in any particular case. Reports of investigations by newspapers

[1] Scotland has a different legal system but those differences are not relevant to this paper.

[2] See ***Liberty Intact: Human Rights in English Law*** by Sir Michael Tugendhat (OUP, 2017)

[3] See ***McDonald's Corp v Steel (No1)*** [1995] 3 All ER 615, CA.

into matters of public concern, which could be construed as reflecting badly on public figures domestic or foreign, were risky and could be costly.

5. At the same time, claimants were insufficiently protected from exposure in the press when it came to their private information. This was seen most vividly in ***Kaye v Robertson***, where Gordon Kaye, an actor who had been injured when an object had fallen through his car window during a storm, had his hospital room entered by tabloid journalists, whilst he was unconscious. They proceeded to 'interview' him. On an application for an interim injunction to stop the publication of an interview he did not, and could not, consent to, the Court of Appeal considered there was a gap in the law which did not allow it directly to protect his privacy[4].

6. Primarily through the use of the European Convention on Human Rights, incorporated into domestic law through the passing of the Human Rights Act 1998, which set out a *right* to freedom of expression (in article 10[5]) and a *right* to respect for private life (in article 8[6]), the courts have developed the common law through a number of highly influential decisions, most notably ***Reynolds v Times Newspapers***[7] , which established a public interest defence to libel claims, and ***Campbell v MGN***[8] , which created the tort of misuse of private information.

[4] [1991] FSR 62. Glidewell LJ (with whom Bingham and Leggatt LLJ agreed) said, '*It is well-known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy. The facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals*.'

[5] 10(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. (2) The exercise of these freedoms, 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.

[6] 8(1) Everyone has the right to respect for his private and family life, his home and his correspondence. 8(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.

[7] [2001] 2 AC 127. The hearing took place before the incorporation into law of the HRA on 2 October 2000 but the case proceeded on the basis that the HRA was in force.

[8] [2004] 2 AC 457

7. There have been other notable and significant developments.

8. In defamation law, the abuse of process doctrine has been extended to allow the courts to strike out claims which are found to interfere with freedom of expression and do not meet a test of necessity for the protection of reputation[9]. There have been measures introduced to cap costs and damages. General damages for libel and slander are capped at around £300,000 and any damages award must be proportionate to the harm caused to reputation.[10] There has been the passing of the Defamation Acts 1996 and 2013, the second of which includes greater restrictions on all claims, particularly for corporate entities and foreign publishers.[11] There is now a 'serious harm' test in section 1 of the 2013 Act which must be overcome by all claimants. Juries no longer decide defamation claims.

9. These are developments which give greater weight to the media's ability to communicate. On the other side of the coin, the public and journalists have greater access to official information these days, a development partly influenced by article 10. This can be seen both through legislation, such as the Freedom of Information Act 2000, and through decisions of the courts[12].

10. The legal landscape, therefore, is very different today from the 1980s or 1990s. Whatever criticisms have been made in the past, the balance now struck between reputation and speech is unquestionably more balanced in favour of defendants. The available statistical evidence suggests that defendants, including media defendants, are sued less frequently and, when they are, they have a good chance of succeeding at

[9] The leading case is ***Jameel v Dow Jones & Co Inc*** [2005] QB 946

[10] ***Rai v Bholowasia*** [2015] EWHC 382 (QB) at [179]

[11] See sections 1 and 9, Defamation Act 2013. Section 1 reads as follows:

(1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.

(2) For the purposes of this section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss.

[12] ***Guardian News Media Limited v City of Westminster Magistrates' Court*** [2013] QB 618; ***Kennedy v Information Commissioner*** [2015] AC 455

trial.[13] On the other hand, the balance now struck between privacy and speech might be said to be less defendant-friendly but is also, I would suggest, fairer than in the past.

The Public Interest and Defamation

11. The ***Reynolds*** public interest defence has now been placed on a statutory footing in section 4 of the Defamation Act 2013. It reads as follows:

(1) It is a defence to an action for defamation for the defendant to show that—
(a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
(b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

(2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.

(3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.

(4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.

(5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.

(6) The common law defence known as the Reynolds defence is abolished.

12. There are two distinct defences under section 4.

13. The first defence, under s4(1), is designed to protect investigative journalism and builds on the case law that gave rise to what became known as the ***Reynolds*** defence[14]. A

[13] See for instance https://inforrm.wordpress.com/2017/06/06/judicial-statistics-2016-issued-defamation-claims-down-by-17-lowest-recorded-number-for-any-year-for-which-records-are-available/ and https://inforrm.wordpress.com/2016/06/04/judicial-statistics-2015-issued-defamation-claims-down-by-40-the-second-lowest-number-since-1992/ and
[14] In particular, ***Flood v Times Newspapers*** [2012] 2 AC 273

publisher will avoid having to pay damages if sufficient care is taken in respect of defamatory statements published (1) which are in the public interest; and (2) in respect of which the defendant had a reasonable belief that publishing the statement was in the public interest. The touchstone is not whether the defamatory allegation is substantially true, but whether the publisher acted responsibly. To have done so, the publisher generally must have taken steps prior to publication to seek to verify the truth of the imputation conveyed.

14. The second defence, under section 4(3) of the 2013 Act, which I will come on to later, places on a statutory footing a sub-species of the ***Reynolds*** defence called 'reportage'[15], a term borrowed from the USA.

Reynolds defence

15. The ***Reynolds*** defence was influenced in part by what had been said by Justice Brennan in ***Sullivan v New York Times***[16]: that requiring a speaker to prove the truth of defamatory statements in court imposed too great a chill on speech.

16. It was not the first occasion on which English judges acknowledged, and took account of, the chilling effect of defamation law. The House of Lords did so, for instance, in ***Derbyshire County Council v Times Newspapers***[17] where it was held that a local or national government body could not itself bring defamation proceedings[18]. This was because, as Lord Keith explained, '*It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism.*'

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[15] ***Al-Fagih v HH Saudi Research & Marketing (UK) Ltd*** [2002] EMLR 13

[16] ***Sullivan New York Times***, 376 US 254, 270 (1964).

[17] [1993] AC 534

[18] Lord Keith said at 548, '*What has been described as 'the chilling effect' induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public…*'

17. ***Reynolds***, however, was the most significant recognition of the potential for chilling. In ***Reynolds***, the House of Lords did not accept the argument pressed upon them by *The Times* that there should be a generic qualified privilege defence for all speech that could be classified as political speech. Nor were their Lordships attracted by the position in the United States (as I understand it) whereby a claimant who is a public figure must surmount a test of proving malice on the part of the publisher whatever the subject-matter. The House of Lords did not recognise a privilege based on the personality or status of the claimant. Instead, it set a test of responsible journalism which a defendant had to meet in respect of information, the publication of which was in the public interest, whatever its subject matter, and whoever was the claimant.

18. At the time ***Reynolds*** was decided, in 1999, other jurisdictions were developing the common law to establish public interest defences, for instance, in Australia[19], New Zealand[20] and Canada.[21] The balance was struck differently in different places although no jurisdiction outside the USA adopted ***Sullivan***.

19. As Mr Justice Warby, the High Court judge currently in charge of media cases for England and Wales, explained earlier this year in ***Yeo v Times Newspapers***[22], a case involving a politician claimant suing a newspaper over a sting operation:

'... [The public interest] *defence sets a lower threshold than justification* [truth]. *It should be less challenging to establish that the articles represented responsible journalism on a matter of public interest than to prove their substantial truth…'*

[19] ***Lange v Australian Broadcasting Corporation*** (1997) 189 C.L.R. 520 – the common law of Australia recognises publication on a "government or political matter" as an occasion of qualified privilege and the necessary reciprocity exists between the media and the public. However, where publication related to a "government or political matter", the defendant also had to satisfy the requirement of reasonable conduct. This meant reasonable grounds for believing the imputation was true. Conduct would not be reasonable unless the defendant had sought a response from the person defamed and published the response. It was still open to a claimant to prove malice. There is a now a uniform defamation act.

[20] ***Lange v Atkinson*** [2000] NZCA 95; [2000] 3 N.Z.L.R. 385 – establishing a version of privilege for media publications about persons elected or standing for election to Parliament. This is closer to, but not identical to, the position The Times sought to argue in ***Reynolds***. Unlike England and Australia, there is no requirement of reasonable inquiry or verification. It can be defeated by malice.

[21] ***Grant v Torstar Corp, Toronto Star Newspapers Ltd*** [2009] SCC 61; (2009) 314 DLR (4th) establishing a new defence of "responsible communication on matters of public interest."
[22] [2017] EMLR 1 at [128]

20. In ***Yeo***, Times Newspapers succeeded on both its defences of public interest and truth.

The Impact of *Reynolds*

21. Is it possible to determine what impact the defence has had in the United Kingdom?

22. The s4(1) public interest defence allows public interest stories, which may not have been published in the past, to enter the public domain. That is surely a good thing. Journalism on matters of public interest should usually be encouraged.

23. It may very well also have had the indirect effect of improving standards of press conduct. In ***Reynolds***, Lord Nicholls identified a series of indicia of responsible journalism which allow journalists to '***Reynolds***-check' articles before publication. By way of example of how press behaviour may have been influenced, part of a claim by a claimant who complained of harassment of her from oppressive approaches by journalists was struck out in July of this year, in ***Lisle-Mainwaring v Associated Newspapers***. Whilst oppressive methods of newsgathering can be harassing, the judge found that the conduct of the journalists, in seeking comment from the claimant and backing off when asked to do so, was '*a tribute to **Reynolds** and the higher professional standards it has encouraged.*'

24. But there are problems with the defence as well. It allows serious charges to be published to the world at large without the means to hold the press to account in a legal framework for the truth or falsity of those charges. Whilst the requirement for the publisher of a defamatory statement, relying upon a defence of responsible journalism, to show that steps were taken to seek to verify the truth of the imputation is a very significant safeguard, there is force in what Lord Hobhouse said in ***Reynolds***, that

'... There is no human right to disseminate information that is not true. No public interest is served by publishing or communicating misinformation. ....'

25. This shifting of the balance in defamation law, in many cases, away from a legal examination of the truth to an examination of how responsibly the journalist prepared

the story or whether he or she believed the accusation, may send (or may already have sent) the unfortunate message that truth is less valued by society. This at the very time that we more than ever need to be able to differentiate between true and fake news.

26. If one accepts, as United Kingdom law recognises, that a deserved reputation is something to be protected because it is of real value for both individuals and society as a whole, the public interest defence can leave claimants without a means of vindication if the court upholds the defence and is not called upon to engage on the issue of truth. It can also leave the public in the dark over whether a defamatory story is true.

27. In ***Economou v de Freitas***[23], decided last year, the defendant was the father of Eleanor de Freitas, a young woman who suffered from bi polar affective disorder. Miss de Freitas had a relationship with the claimant, Mr Economou. The following month, she accused him of rape. He was arrested but not charged. He began a private prosecution against her, alleging that she had accused him falsely with intent to pervert the course of justice. Unusually, the prosecution was taken over by the Crown Prosecution Service. Four days before the date of trial, she killed herself.

28. For the purposes of the inquest into his daughter's death, Mr de Freitas wanted the coroner to consider the role played by the Crown Prosecution Service. In pursuit of that aim, he released press statements, gave media interviews and wrote an article for publication. Mr Economou complained that he had been defamed by Mr De Freitas in a succession of broadcasts and articles in November and December 2014. Mr Economou issued proceedings against Mr de Freitas in respect of the words attributable to him in each publication, but not against the broadcaster or the newspaper publishers.

29. Truth was not raised as a defence at trial. Issue was taken with matters such as whether the articles referred to the claimant and the defendant's responsibility for publication and, in addition, the defendant relied upon the defence under s4(1).

30. The Judge, Mr Justice Warby, upheld the public interest defence finding that it was wrong to require a person who contributed material for use in a media article or broadcast to undertake all the enquiries which would normally be expected of a

[23] [2017] EMLR 4

journalist. A person who passed information to a journalist for publication, when the truth or falsity of the information was not within his knowledge, might still rely on the s.4(1) defence, and such a person was entitled to rely on the journalist to carry out some at least of the necessary investigation and to incorporate such additional material as might be required in order to ensure appropriate protection for the reputation of others.

31. The case is important for two reasons. First, it holds that members of the public and citizen journalists who seek to avail themselves of the public interest defence do not necessarily have to meet the same standards of responsible journalism as the mainstream media. However, it also exposes the problem with the defence, described above. The claimant was left without the means to vindicate his reputation in circumstances where a defence of truth was not raised and it may be considered to have been desirable that there had been a finding one way or the other.

Reportage

32. Turning to the reportage defence under s4(3), Defamation Act 2013, to which I earlier referred, there is a defence where it can be shown that the defamatory statement was, or formed part of, '*an accurate and impartial account of a dispute to which the claimant was a party.'* It recognises the media in its role as a neutral or disinterested reporter, rather than as an investigator or polemicist.

33. The reportage defence may be thought to serve the 'marketplace of ideas' theory, the famous justification for freedom of speech expressed by Justice Oliver Wendell Holmes,

'…that the best test of truth is the power of the thought to get itself accepted in the competition of the market.'[24]

34. In other words, give people the platform to debate, and the public the access to listen and read, and truth will drive out falsity.

[24] ***Abrams v United States*** 250 US 616, 624 (1919)

35. But can we still recognise this as a justification for the reportage defence or freedom of speech generally?

36. The British journalist and former editor of *The Spectator*, Mathew D'Ancona, wrote in his 2017 book, *Post-Truth: The New War on Truth and How to Fight back,*

'... there is a difference between a structured marketplace of ideas, and a babel of shrieking voices in which anything goes and common ground not only shrinks but is positively shirked.'[25]

37. The internet may be the great democratising force of our lifetime. It allows anyone to enter the marketplace of ideas but the results of such access have been, let's say, a bit mixed[26]. We know, not least, from the financial crisis of 2008 that markets of all kinds can become dysfunctional. We also know from the US presidential election and our Brexit referendum that stories which can be said to relate to a matter of public interest can be false and yet gain widespread currency.

38. Protection for reportage allows the media to invite people to be heard and to debate. That is a usually a good thing. But to come within s4(3) of the defence opposing contributors are usually to be presented as if they hold positions of equal legitimacy and weight. The media sits on the fence and cannot, if it wishes to avail itself of the defence, opine on who is right and who is wrong.

39. This may be desirable in some cases but not others. After all, are there two (or more) positions of equal legitimacy and weight on every story? Is it beneficial for the quality

[25] The retired Court of Appeal Judge, Sir Stephen Sedley, was dismissive of the 'marketplace of ideas' as a justification of the right of free speech in an essay written in 1999 entitled, ***The Right to Know*** published in ***Ashes and Sparks: Essays on Law and Justice*** *(CUP, 2011).* He wrote, '*... we know that truth does not necessarily drive out falsehood: as often as not the reverse happens…. We know that, as in any real marketplace, the huckster's megaphone can down the voices of honest traders; the snake-oil merchant can prosper while the market gardener goes home empty-handed… It was the century of mass communication – our century – which was the century of mass murder driven by lie machines…. It is our good fortune to live in a society where there are means – mostly journalistic, sometimes forensic, very occasionally parliamentary –of outing it, but untruths may logically be carried, knowingly or not, by the same vehicles...*'

[26] See, for instance, ***Cheap Speech and What it Has Done (to American Democracy)*** by Richard L. Hasen, August 2017 at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3017598

of our media, if what Kingsley Amis called 'pernicious neutrality', is now encouraged by s4(3)?

40. Take Holocaust Denial, admittedly an extreme example. A Google search identifies any number of people prepared to assert that the Holocaust did not happen. But if a media organisation sets up a dispute between a denier and a historian is it a real debate? Of course not. There is an overwhelming body of evidence on one side and not the other. The United Kingdom has benefited more as a society from having Mr Justice Gray's powerful judgment in the ***Irving v Lipstadt*** libel trial, determining the truth of the charges against David Irving, that he was a Holocaust denier and a deliberate manipulator of historical evidence, than if the issue in the case had been about whether Deborah Lipstadt, his academic accuser, had done a sufficient amount of research or whether "both sides" had been reported fairly. Some might argue that Irving should not have been allowed to sue but if someone in his position is allowed to do so then it might be felt that the public interest is better served by a legal regime whereby the court investigates and comes to a determination as to where the truth lies in a case of that kind[27].

41. Consider what the academic and free speech campaigner Timothy Garton Ash writes, in his book *Free Speech: Ten Principles for a Connected World*[28] on the Irving case. As a result of Mr Justice Gray's judgment, as Garton Ash put it,

'Irving was now publicly and authoritatively discredited. But when, some years later, Austria imprisoned him for Holocaust denial, that jail term enabled him to pose as a martyr for free speech. A prestigious student society at Oxford subsequently invited him to speak in a debate about free speech. Which was the better way to counter his lies?'

[27] Another example is climate change. In an article in *The Guardian* on 29 August 2017 entitled, *Why are the crucial questions about Hurricane Harvey not being asked?* George Monbiot commented, *'In the UK, the BBC this month again invited the climate-change denier Nigel Lawson on to the Today programme, in the mistaken belief that impartiality requires a balance between correct facts and false ones. The broadcaster seldom makes such a mess of other topics, because it takes them more seriously.'*

[28] Atlantic Books, 2016

42. Criminal proceedings which restrict freedom of speech might be a step too far but the likes of D'Ancona and Garton Ash recognise that civil legal proceedings exploring the truth can, in some cases, serve the public interest.

Conclusion on Defamation

43. There is no easy or obvious answer to how the balance between reputation and freedom of speech is best struck and, as I have said above, I consider that the balance these days is, notwithstanding some of the issues raised, pretty fair.

44. One interesting question is whether it might have been better for Parliament to have developed a public interest defence along similar lines to the defences in the ***Electronic Commerce (EC Directive) Regulations 2002/ 2013*** which is directly binding on EU member states. The defences in the Regulations play a similar role to s230 of the US Communications Decency Act 1996[29] which confers immunity from liability for providers and users of an 'interactive computer service' or ISPs.

45. Regulation 19[30], for instance, provides that the information society services (a term used in the EU to denote, for instance, ISPs) will not be liable for damages, other pecuniary remedies or criminal sanctions to information society services (ISS) from claims for defamation and suchlike when they host information but, significantly, it still allows a court to grant an injunction against the ISS. Notably, Facebook did not take issue with injunctive relief on these terms in the Northern Ireland case of ***CG v Facebook***[31].

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[29] *No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.*

[30] *Where an information society service is provided which consists of the storage of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that storage where—*
(a) the service provider—
(i) does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or
(ii) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information, and (b) the recipient of the service was not acting under the authority or the control of the service provider.

[31][2017] EMLR 12 at [37]: '*Although Regulation 19 of the 2002 Regulations exempts an ISS provider from damages or other pecuniary remedy or criminal sanction where it has no actual knowledge of unlawful activity*

46. To strike the balance in a similar way could allow a court to grant a declaration of falsity, if it was satisfied that the accusation was untrue, thereby enabling a wrongly traduced claimant to secure a court vindication of his or her reputation, whilst at the same time protecting a responsible publisher from paying damages (and possibly costs).

Misuse of Private Information

47. Turning to the tort of misuse of private information, the absence of a remedy for the invasion of privacy was a major failing of United Kingdom law and not to be able to protect the dissemination of personal data or information now would be unthinkable.

48. The misuse of private information tort was developed from the equitable doctrine of breach of confidence but, whilst there remains an overlap, the tort is now recognised as separate and distinct from breach of confidence and as protecting different values. It is less about secrecy and more about securing human dignity and autonomy[32].

49. Its application requires what has become known, since the passing of the Human Rights Act, as the 'new methodology'. That means balancing the right to respect of private, family and home life (which is found in article 8) with the right to freedom of expression (under article 10). They are qualified rights and neither has precedence over the other when they are both engaged[33].

50. The touchstone of when information concerns private life, so as to engage article 8, is whether the person concerned has a reasonable expectation of privacy in respect of the particular information. This is a fact-sensitive question taking into account, for instance,

or information and is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful, there was no prohibition on the court granting an injunction to deal with the continuation of the harassment by McCloskey. Facebook did not take issue with the injunctive relief ordered by the learned trial judge requiring it to terminate the Predators 2 page as a remedy in respect of the harassment claim against McCloskey.'

[32] ***PJS v News Group Newspapers Ltd*** [2016] AC 1081

[33] ***Re S (A Child)(Identification: Restrictions on Publication)*** [2005] 1 AC 593

the attributes of the claimant; the nature of the activity in which the claimant is engaged; the place at which it is happening; and the absence of consent[34].

51. If there is a reasonable expectation of privacy, then it is for the defendant to demonstrate that there is a justification for publishing the private information, what is often still known as a public interest defence[35].

52. In two leading decisions[36] the European Court of Human Rights identified the following points to consider where the right to freedom of expression required to be balanced against the right to respect for private life:

    a. The contribution the publication of the private information makes to a debate of general interest;
    b. How well-known was the person whose private information was concerned and what was the subject of the report?
    c. The prior conduct of the person concerned;
    d. The content, form and consequences of the publication of the private information; and
    e. in the case of private information contained in photographs, the circumstances in which the photographs were taken.

53. The truth or falsity of the private information is not a central issue in a misuse of private information claim[37]. Most claims brought, though, appear to be in respect of true information. Many claims have been brought to prohibit the publication of the fact of,

[34] ***Murray v Express Newspapers plc*** [2009] Ch 481

[35] The IPSO Code defines public interest in the following way: The public interest includes, but is not confined to: detecting or exposing crime, or the threat of crime, or serious impropriety; protecting public health or safety; protecting the public from being misled by an action or statement of an individual or organisation; disclosing a person or organisation's failure or likely failure to comply with any obligation to which they are subject; disclosing a miscarriage of justice; raising or contributing to a matter of public debate, including serious cases of impropriety, unethical conduct or incompetence concerning the public; disclosing concealment, or likely concealment, of any of the above; There is a public interest in freedom of expression itself.

[36] ***Von Hanover v Germany (no2)*** [2012] EMLR 826 (QB); ***Axel Springer AG v Germany*** (2012) 55 EHRR 6

[37] In ***McKennitt v Ash*** [2008] QB 73 Longmore LJ said, '*....I would hold that provided the matter complained of is by its nature such as to attract the law of breach of confidence, then the defendant cannot deprive the claimant of his article 8 protection simply by demonstrating that the matter is untrue. Some support is given to that approach by the European cases shown to us by Mr Browne that indicate that article 8 protects "reputation", broadly understood; but it is not necessary to rely on those cases to reach the conclusion that I have indicated.'*

or details about, for instance, an adulterous affair or other information the public exposure of which would be a cause of embarrassment or harm to the individual or his/her family.

54. The tort of misuse of private information unquestionably restricts the media's ability to publish true information, sometimes defamatory information which would not be restricted under the torts of libel and slander. The justification for doing so is that there is often no public interest in the publication of private information and the media simply wish to sell papers with stories focusing upon prurient details about the private lives of the rich or famous[38].

55. Whilst there is often a strong justification for such restraints, one concern that has been expressed is that it is often rich and famous men (footballers and hedge fund managers) who use the law to prevent the revelation of extra-marital affairs coming out in the media and becoming known to their spouses or partners[39]. It tends to serve the interests of the powerful.

56. Another is that the law might be said to make newspapers less interesting to read and hence fewer people will buy them. This may have the effect of reducing the amount of money the media has to spend on genuine investigative journalism[40].

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[38] See ***PJS v News Group Newspapers*** [2016] AC 1081 where the Supreme Court held at [21] (per Lord Mance) that '*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'* and at [32] that, '*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.*'

[39] See *Wayne Rooney's infidelity exposes the law's misogyny* by Gill Phillips in *The Guardian* on 13 September 2010 at https://www.theguardian.com/media/2010/sep/13/wayne-rooney-infidelity-law-misogyny

[40] See ***K v News Group Newspapers*** [2011] 1 WLR 1827 where Ward LJ said at [37],…. '*To restrict publication simply to save the blushes of the famous, fame invariably being ephemeral, could have the wholly undesirable chilling effect on the necessary ability of publishers to sell their newspapers. We have to enable sales if we want to keep our newspapers. Unduly to fetter their freedom to report as editors judge to be responsible is to undermine the pre-eminence of the deserved place of the press as a powerful pillar of democracy. These considerations require the court to tread warily before granting this kind of injunction.'* Although the Supreme Court was not impressed with this point in ***PJS***, see footnote 38 above.

57. An aspect of the way the tort has developed is that the rights of third parties who may be affected by public disclosure of the ostensibly private information can be taken into account. That usually means the children or the partner of the claimant. A curious situation has arisen where, in order to protect the children and the family life of the claimant in question, the courts often have to assist the claimant in covering up his own, on the face of it, discreditable, behaviour; behaviour which in some cases might be said to damage the family more than the revelation of that behaviour in the press. The recognition of this has led courts to framing injunctions, in some cases, to prohibit publication to the world at large but not prohibiting publication to friends and family.

58. All cases are different and as the tort of misuse of private information has developed, its application by the courts, particularly at the interim injunction stage[41], has become more nuanced, sophisticated and balanced but the restriction on media communications in the interests of privacy throws up some tricky problems for a society that values the public interest in telling the truth[42].

[41] See the ***Practice Guidance: Interim Non-Disclosure Orders*** [2012] 1 WLR 1003

[42] See ***Napier v Pressdram*** [2010] 1 WLR 934 where Toulson LJ in the Court of Appeal said at [42],

'…. As Cross J observed in Printers and Finishers Ltd v Holloway [1965] 1 WLR 1 *, 6, the law would defeat its own object if it seeks to enforce in this field standards which would be rejected by the ordinary person. Freedom to report the truth is a precious thing both for the liberty of the individual (the libertarian principle) and for the sake of wider society (the democratic principle), and it would be unduly eroded if the law of confidentiality were to prevent a person from reporting facts which a reasonable person in his position would not perceive to be confidential.*'

and ***Rhodes v OPO*** [2016] AC 219 at [77] where Baroness Hale and Lord Toulson in the Supreme Court said at [77],

'Freedom to report the truth is a basic right to which the law gives a very high level of protection (see, for example, Napier v Pressdram Ltd [2010] 1 WLR 934 *, para 42.) It is difficult to envisage any circumstances in which speech which is not deceptive, threatening or possibly abusive, could give rise to liability in tort for wilful infringement of another's right to personal safety. The right to report the truth is justification in itself. That is not to say that the right of disclosure is absolute, for a person may owe a duty to treat information as private or confidential. But there is no general law prohibiting the publication of facts which will cause distress to another, even if that is the person's intention. The question whether (and, if so, in what circumstances) liability under* Wilkinson v Downton [1897] 2 QB 57 *might arise from words which are not deceptive or threatening, but are abusive, has not so far arisen and does not arise for consideration in this case.'*