

Privacy law—misuse of private information

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The tort of misuse of private information is focused on ‘the protection of human autonomy and dignity—the right to control the dissemination of information about one’s private life and the right to the esteem and respect of other people’ (*Campbell v MGN*).

In most cases, as in *Campbell*, the only alleged ‘misuse’ is the wrongful publication, or threatened publication, of personal information to the world at large. The defendant is often a media organisation and/or a person seeking to disclose information through the media.

However, a misuse of private information claim may be brought in respect of information disseminated less widely if that would unjustifiably interfere with the claimant’s right to respect for privacy under Article 8 of Part I of Schedule I to the **Human Rights Act 1998 (HRA 1998)**. This gives effect to the rights enshrined in the European Convention on Human Rights (ECHR).

However, the tort is not confined to publication of information, as the so-called ‘phone hacking’ litigation illustrated. In those claims by various individuals against news organisations, part of the alleged wrongdoing was the unlawful accessing of voicemails, and in *Gulati v MGN*, damages were awarded for the invasion of privacy arising from the (admitted) accessing of voicemails by which private information was acquired.

A claim for misuse of private information comprises a two-stage process:

- first, the claimant must establish that they have a reasonable expectation of privacy in the information concerned (the first stage)
- if the first stage is satisfied, a balancing exercise is undertaken of all the competing rights engaged (including of any third parties). This considers the rights of both the publisher and the public to impart and to receive the information (under **HRA 1998, Sch 1 Pt I**, art 10) and whether any countervailing public interest outweighs the claimant’s **HRA 1998, Sch 1 Pt I**, art 8 right (the second stage)

If a third party’s rights are affected, the court must take them into account in the above exercise. The two stages are considered below. While they are distinct in principle (and should be considered separately in assessing the merits of any claim), in any particular case, some matters, eg the extent to which other people already know the information, may affect both stages. Separately, it is worth emphasising that misuse of private information claims are highly fact-sensitive.

Brexit

The ECHR is an international treaty that protects the human rights of people in countries that belong to the Council of Europe, which is an entirely separate body from the EU. The UK continues to be a member of the Council of Europe and neither the **HRA 1998** nor the incorporation of the ECHR into UK law provided for by the **HRA 1998** are automatically impacted by Brexit. Note that the **EU-UK Trade and Cooperation Agreement** provides that the deal does not alter the UK’s obligations under the ECHR and that the deal can be terminated in the event of either side denouncing the ECHR.

The European Court of Human Rights (ECtHR) in Strasbourg has jurisdiction to rule on the application of the ECHR, and UK courts are required to take account of any decision of the ECtHR in giving effect to rights contained in the ECHR. Brexit does not impact the jurisdiction of the ECtHR, and therefore this Practice Note continues to provide commentary on ECtHR cases.

For more information, see:

- Q&A: **What does Brexit mean for the Human Rights Act 1998?**
- **LNB News 07/01/2021 77**: Comment—EU-UK Trade and Cooperation Agreement provisions on human rights

References:

Campbell v Mirror Group Newspapers Ltd [2004] UKHL 22 at para [51], [2004] 2 AC 457 at 473, [2004] All ER (D) 67 (May)

Human Rights Act 1998, Sch 1 Pt I, art 8

European Convention on Human Rights

Gulati v MGN Ltd [2015] EWHC 1482 (Ch), [2015] All ER (D) 199 (May)

Gulati v MGN Ltd [2015] EWCA Civ 1291, [2017] QB 149, [2015] All ER (D) 193 (Dec)

For information on the impact that Brexit has had on information law more generally, see Practice Note: [What does IP completion day mean for Information Law?](#)

EU case law before and after Brexit

This Practice Note also refers to EU cases from the European Court of Justice, which is separate from the ECtHR. Broadly, EU judgments handed down by the Court of Justice on or before 31 December 2020 continue to be binding on UK courts and tribunals (even if the EU courts later depart from them) until the UK courts exercise their powers to diverge. For the most part, EU case law made after 31 December 2020 is not binding on the UK, although the UK courts and tribunals may continue to 'have regard to' EU judgments if relevant.

For more detailed information on the treatment of EU case law, see Practice Note: [Introduction to retained EU law](#).

A reasonable expectation of privacy in the information concerned

The first stage is concerned with consideration of the claimant's [HRA 1998, Sch 1 Pt I](#), art 8 right to respect for private and family life.

[HRA 1998, Sch 1 Pt I](#), art 8 provides:

- everyone has the right to respect for their private and family life, their home and their correspondence
- 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

Whether an individual has a reasonable expectation of privacy in the item of information (or category of information) which is the subject of the claim will depend on the particular circumstances of the case. The question:

'is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.' (at para [36])

The 'reasonable expectation of privacy' test was considered by the Supreme Court in *Re an application by JR38 for Judicial Review (NI)*. While the minority of the Justices considered that the test, and its reliance on an expectation, should be approached with caution, the majority essentially approved the established approach, emphasising the objective (rather than subjective) nature of the 'expectation' of privacy. The same test applies whether the claimant is a child or an adult, although considerations may be relevant to children which mean that a particular child has a reasonable expectation of privacy where an adult would not (*Weller v Associated Newspapers*).

In *HRH The Duchess of Sussex v Associated Newspapers*, it was argued that Ms Markle's intention to publicise the letter that was the subject of the proceedings meant that there could be no reasonable expectation of privacy, on the basis that the intention to keep information private is an essential element of the cause of action for misuse of private information. Warby J disagreed, stating that:

'Consent to the disclosure complained of, or the absence of such consent, is one of the *Murray* factors. But *Murray* makes no mention of an intention to publish, and there is no authority that an intention to publish all or some of that information at some future date is fatal to a claim, still less that the absence of any such intention is a threshold issue on which the claimant bears the burden of proof.' (at para [90])

See News Analysis: [Misuse of Meghan Markle's private information but does she own copyright? \(HRH The Duchess of Sussex v Associated Newspapers Ltd\)](#).

Some types of information are obviously private, eg details about an individual's medical condition or sex life. As Eady J observed in *Mosley v News Group Newspapers*, 'people's sex lives are to be regarded as essentially their own business' (although sexual activity would not be

References:

Murray v Express Newspapers plc [2008] EWCA Civ 446 at para [36], [2009] Ch 481 at 502-503, [2008] All ER (D) 70 (May)

Re an application by JR38 for Judicial Review (Northern Ireland) [2015] UKSC 42, [2016] AC 1131, [2015] All ER (D) 11 (Jul)

Weller v Associated Newspapers Ltd [2015] EWCA Civ 1176, [2016] 3 All ER 357, [2015] All ER (D) 194 (Nov)

HRH The Duchess of Sussex v Associated Newspapers Ltd [2021] EWHC 273 (Ch) at paras [87]-[93]

Mosley v News Group Newspapers Ltd [2008] EWHC 1777 (QB), [2008] All ER (D) 322 (Jul)

private if it were abusive or amounted to harassment, *BUQ v HRE*). Where the answer is less obvious, the court will consider whether a reasonable person of ordinary sensibilities, if placed in the same situation as the subject of the publication, would find the disclosure offensive (*Campbell v MGN*). It may also consider what the publisher knew or ought to have known (*Weller v Associated Newspapers*).

Information about wrongdoing or iniquity is unlikely to engage rights under **HRA 1998, Sch 1 Pt I**, art 8, and misconduct by a public figure in their public role even less so (see *XKF* [2018] EWHC 1560 (QB) at para [10] (not reported by LexisNexis®). It may be relevant that convictions are spent, but this is not a decisive factor, and the court may conduct an investigation into the claimant's attempts to rehabilitate themselves as evidence of a reasonable expectation of privacy.

However, information concerning a person's involvement in a criminal investigation prior to charge will, in general give rise to a reasonable expectation of privacy. This was mentioned in *Sir Cliff Richard OBE v BBC*, in which Mann J made it clear that there is a (displaceable) reasonable expectation of privacy in relation to a pre-charge investigation and search by the police. In *ZXC v Bloomberg*, as the first appellate court to consider the point, the Court of Appeal took the opportunity to state that:

'those who have simply come under suspicion by an organ of the state have, in general a reasonable and objectively founded expectation of privacy in relation to that fact and an expressed basis for the suspicion.' (at para [82])

See News Analysis: **Reasonable expectation of privacy decision upheld (ZXC v Bloomberg LP)**.

In drawing a line between information which is private and that which is not, a distinction has been made in a number of cases between 'bare facts' and detailed accounts. For example, in *Donald v Ntuli* (an interim injunction decision), publication of the fact that the parties had previously been in a relationship was not restrained, but disclosure of intimate details about the relationship was prohibited. Similarly in *Hutcheson v News Group Newspapers* publication of the fact that the claimant had a second family, which he had previously kept secret from his wife and first family, was not restrained. The case was concerned with the publication of that 'bare fact' and not the details of his second family's life. A claim which is concerned with the disclosure of 'bare facts' could arguably be determined at the second stage, by reference to the proportionality of any interference, but, in *Hutcheson* at first instance, Eady J held that the claimant had no reasonable expectation of privacy in the fact that he had a second family and the Court of Appeal, while not deciding the point, held that, if he did, it was a borderline case.

If information is known to a small circle of people, like the claimant's friends and family, it does not necessarily follow that the claimant does not have a reasonable expectation that the information is private vis-a-vis the world at large.

Limits on private information

The Strasbourg jurisprudence emphasises that the concept of private life is 'a broad term not susceptible to exhaustive definition'. This raises the prospect of a fairly wide array of information satisfying the first stage. However, the cause of action does not protect against the dissemination of all information about a person's life, so while the concept of 'private life' within **HRA 1998, Sch 1 Pt I**, art 8 encompasses more than matters which are purely personal, it will not include all aspects of an individual's business or professional life or leisure activities (*R (Prescott) v General Council of the Bar*). See: **Privacy and misuse of private information—overview** for a discussion of the ambit of private life.

HRA 1998, Sch 1 Pt I, art 8 is only engaged where the interference is not trivial; the former Master of the Rolls, Lord Neuberger, observed that 'the courts should, in the absence of special facts, generally expect people to adopt a reasonably robust and realistic approach to living in the 21st century' (*Ambrosiadou v Coward*). A certain level of seriousness must be reached before **HRA 1998, Sch 1 Pt I**, art 8 is engaged, and this is one of the qualifications which prevents **HRA 1998, Sch 1 Pt I**, art 8 claims becoming 'unreal and unreasonable' (*R (Wood) v Metropolitan Police Commissioner per Laws LJ*).

In *Fearn v Board of the Trustees of the Tate Gallery*, the Court of Appeal considered an application for an injunction to prevent members of the public from using a gallery platform to observe property owners living in flats which were overlooked by the platform. The court upheld the decision to dismiss the application and, while that decision was primarily based on the court's refusal to extend the law of private nuisance to protect privacy rights, in reaching that conclusion it noted that there had never been a European decision in which overlooking by a neighbour had been held to be a breach of the Article 8 right. See News Analysis: **Tort of nuisance does not protect privacy rights (Fearn v Board of Trustees of the Tate Gallery)**.

References:

BUQ v HRE [2012] EWHC 774 (QB), [2012] IRLR 653, [2012] All ER (D) 78 (Apr)

Campbell v Mirror Group Newspapers Ltd [2004] UKHL 22, [2004] 2 AC 457, [2004] All ER (D) 67 (May)

Weller v Associated Newspapers Ltd [2014] EWHC 1163 (QB), [2014] All ER (D) 142 (Apr)

ETK v News Group Newspapers Ltd [2011] EWCA Civ 439, [2011] 1 WLR 1827, [2011] All ER (D) 197 (Apr)

Sir Cliff Richard OBE v BBC [2018] EWHC 1837 (Ch), [2019] 2 All ER 105, [2018] All ER (D) 111 (Jul)

ZXC v Bloomberg LP [2020] EWCA Civ 611 at para [82], [2020] 3 WLR 838 at 857, [2020] All ER (D) 97 (May)

NT 1 v Google LLC (Information Commissioner intervening) [2018] EWHC 799 (QB), [2019] QB 344, [2018] All ER (D) 45 (Apr)

Donald v Ntuli (Guardian News & Media Ltd intervening) [2010] EWCA Civ 1276, [2011] 1 WLR 294, [2010] All ER (D) 170 (Nov)

Hutcheson v News Group Newspapers Ltd [2011] EWCA Civ 808, [2011] All ER (D) 172 (Jul)

References:

R (Prescott) v General Council of the Bar [2015] EWHC 1919 (Admin), [2015] All ER (D) 66 (Jul)

Ambrosiadou v Coward [2011] EWCA Civ 409 at para [30], [2011] 2 FLR 617 at 624, [2011] All ER (D) 108 (Apr)

R (Wood) v Metropolitan Police Commissioner [2009] EWCA Civ 414 at para [22], [2009] 4 All ER 951 at 963, [2009] All ER (D) 208 (May)

Fearn and others v Board of the Trustees of the Tate Gallery [2020] EWCA Civ 104, [2020] 2 WLR 1081, [2020] All ER (D) 60 (Feb)

Previous relationships, private communications and storage of information

While the nature of the information tends to take centre stage, it is important not to lose sight of other relevant circumstances, especially where they may increase the range of information which is protected.

A pre-existing relationship between the claimant and the source of the information (such as may also give rise to an equitable duty of confidence) is likely to be of considerable importance in determining whether a person has a reasonable expectation of privacy in information shared in the course of that relationship, as per *Lord Browne v Associated Newspapers*. In that case, the Court of Appeal held that information which was ostensibly about business, but was shared during a relationship, was potentially capable of satisfying the first stage. A relationship could also mean that information which was otherwise too trivial to warrant protection may satisfy the first stage. For example, in *McKennitt v Ash* (affirmed on appeal), it was held that the claimant had a reasonable expectation of privacy in a description of the layout and décor of one of her homes, knowledge of which the defendant had acquired as a friend, but which is hardly information that goes to the core of a person's dignity.

The source of the information is also relevant. **HRA 1998, Sch 1 Pt I**, art 8 expressly refers to 'correspondence' and so information contained in emails, texts or other communications is likely to satisfy the first hurdle. In *Copland v UK*, the ECtHR held that an employer's monitoring of an employee's telephone, email and internet usage at work, without her knowledge, was a breach of **HRA 1998, Sch 1 Pt I**, art 8. In *Gulati v MGN Ltd*, the defendant did not contest that the information obtained from intercepting the claimants' voicemail messages was private. Information recorded in a person's diary (other than any record of public events like the results of a football match) is also likely to satisfy the first stage, as illustrated by *HRH Prince of Wales v Associated Newspapers*. In general terms, if information is not generally available to the public, including because of where it is kept by the claimant, that will be highly relevant to whether the claimant can establish a reasonable expectation of privacy.

Public figures

The reasonable expectation of privacy of a public figure is more circumscribed than that of a private individual. Public figures include not only politicians and those holding public office but may also extend to those in the arts and the world of sport (*Spelman v Express Newspapers*). A politician's press secretary was not a private figure, because of her job and because she had a secret affair with that politician who then left his wife (*Trimingham v Associated Newspapers*).

False information

False information may be the subject of a claim if the misinformation is of a personal nature (*McKennitt v Ash*). A claimant does not generally have to disclose what information is accurate and what is not (although the truth or falsity of the information may affect the second stage and the public interest in disclosure).

Public places

Publications concerning events which took place in public places pose particular difficulties. The rights under **HRA 1998, Sch 1 Pt I**, art 8 protect some aspects of an individual's life carried on in public but, at the same time, a person can expect to be observed, and even filmed by CCTV, when in a public place. However, many claims founded on information about things which happened in a public place involve the publication of photographs, and so the particularly intrusive nature of that medium is an important factor.

Photographs

The same principles govern the publication of information by way of photographs as by any other medium, but publishing images is particularly intrusive and so photographs have been the subject of a number of successful privacy claims including *Von Hannover v Germany*, *Murray v Express Newspapers* and *Weller v Associated Newspapers* (although the latter two cases were claims by children of famous parents, a factor which strengthened their claims). An attempt to restrain publication of an investigative journalist was unsuccessful in *Mahmood v BBC* [2014] EWHC 4207 (not reported by LexisNexis®).

References:

Lord Browne of Madingley v Associated Newspapers Ltd [2007] EWCA Civ 295, [2008] QB 103, [2007] All ER (D) 12 (May)

McKennitt v Ash [2005] EWHC 3003 (QB), [2006] IP & T 605, [2006] All ER (D) 02 (Feb)

Copland v United Kingdom (Application 62617/00) [2007] IP & T 600, [2007] ECHR 62617/00, [2007] All ER (D) 32 (Apr)

Gulati v MGN Ltd [2015] EWHC 1482 (Ch), [2015] All ER (D) 199 (May)

HRH Prince of Wales v Associated Newspapers Ltd [2006] EWCA Civ 1776, [2008] Ch 57, [2006] All ER (D) 335 (Dec)

Spelman v Express Newspapers [2012] EWHC 355 (QB), [2012] All ER (D) 51 (Mar)

Trimingham v Associated Newspapers Ltd [2012] EWHC 1296 (QB), [2012] 4 All ER 717, [2012] All ER (D) 248 (May)

McKennitt v Ash [2006] EWCA Civ 1714, [2008] QB 73, [2006] All ER (D) 200 (Dec)

References:

Von Hannover v Germany (Application 59320/00) [2004] ECHR 59320/00

Murray v Express Newspapers plc [2008] EWCA Civ 446, [2009] Ch 481, [2008] All ER (D) 70 (May)

Weller v Associated Newspapers Ltd [2014] EWHC 1163 (QB), [2014] All ER (D) 142 (Apr)

Weller v Associated Newspapers Ltd [2015] EWCA Civ 1176, [2016] 3 All ER 357, [2015] All ER (D) 194 (Nov)

Advancements in technology mean that it is increasingly important to take steps to safeguard personal photographs. See, for example, *Middleton v Persons Unknown*, in which Pippa Middleton secured an interim injunction preventing the use, publication or disclosure of photographs which were derived from or suspected on reasonable grounds to have derived from her iCloud account. For more information, see News Analysis: [In brief: Gagging order likely to be permanent at trial \(Middleton and another v Person Unknown or Persons Unknown\)](#).

An individual's image is part of their [HRA 1998, Sch 1 Pt I](#), art 8 right, being one of the chief attributes of an individual's personality (*Reklos v Greece*, *Von Hannover v Germany (No 2)*). In *R (Wood) v Metropolitan Police Commissioner*, Laws LJ held that 'an individual's personal autonomy makes him—should make him—master of all those facts about his own identity, such as his name, health, sexuality, ethnicity, his own image of which the cases speak'. In short, a photograph of an individual is going to contain personal information and even where that information is relatively anodyne or records something which occurred in a public place, it may well be information which satisfies the first stage.

More contentiously, although the law does not recognise a free-standing image right, misuse of private information claims in respect of photographs may, in effect, protect image. In *Weller v Associated Newspapers*, the publication of photographs of Paul Weller's children in a public place was held to infringe [HRA 1998, Sch 1 Pt I](#), art 8 rights despite the fact that one of the claimants (a teenager) had appeared in a magazine shoot and other publications.

The balancing exercise of competing rights

The second stage of a claim involves weighing up the reasonable expectation of privacy against the countervailing [HRA 1998, Sch 1 Pt I](#), art 10 right of the defendant (and possibly third parties) to freedom of expression.

[HRA 1998, Sch 1 Pt I](#), art 10 provides:

- 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
- 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

The approach to be taken when weighing up the competing rights under [HRA 1998, Sch 1 Pt I](#), art 8 and [HRA 1998, Sch 1 Pt I](#), art 10 is found in the four propositions expounded in *Re S (a child) (Identification: Restrictions on Publication)*:

'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.' (at para [17])

The 'intense focus' test requires consideration of the specifics of the case and the parties should address each particular item of information concerned. Generalities about the importance of the rights engaged are unlikely to be persuasive in determining a claim's outcome.

In some cases, it is not just [HRA 1998, Sch 1 Pt I](#), art 10 rights of others which are engaged but also the competing [HRA 1998, Sch 1 Pt I](#), art 8 rights of an individual who wants to tell their own story (*Re Roddy*), but in doing so the individual will disclose information about the claimant.

In determining a claim about a publication, the court must have particular regard to the importance of freedom of expression. In other words, because free speech is an important value within a democratic society, [HRA 1998, Sch 1 Pt I](#), art 10 is always engaged (even if it does not triumph) and a defendant does not need to satisfy any threshold of seriousness in order to rely on it, although in *PJS v News Group Newspapers*, Lord Mance JSC observed that mere reporting of sexual encounters with a view to criticising that person may not fall within the scope of [HRA 1998, Sch 1 Pt I](#), art 10 (although the case proceeded on the basis that [HRA 1998, Sch 1 Pt I](#), art 10 was engaged—see News Analysis: [Examining the effectiveness of celebrity injunctions](#)).

References:

Middleton v Person Unknown or Persons Unknown [2016] EWHC 2354 (QB), [2016] All ER (D) 85 (Sep)

Reklos v Greece (Application 1234/05) (2009) 27 BHRC 420

Von Hannover v Germany (No 2) (Applications 40660/08 and 60641/08) (2012) 32 BHRC 527, [2012] ECHR 40660/08

R (Wood) v Metropolitan Police Commissioner [2009] EWCA Civ 414 at para [21], [2009] 4 All ER 951 at 963, [2009] All ER (D) 208 (May)

Weller v Associated Newspapers Ltd [2014] EWHC 1163 (QB), [2014] All ER (D) 142 (Apr)

Weller v Associated Newspapers Ltd [2015] EWCA Civ 1176, [2016] 3 All ER 357, [2015] All ER (D) 194 (Nov)

References:

Re S (a child) (Identification: Restrictions on Publication) [2004] UKHL 47 at para [17], [2005] 1 AC 593 at 692, [2004] All ER (D) 402 (Oct)

Re Roddy (a child) (Identification: Restriction on Publication); Torbay Borough Council v News Group Newspapers [2003] EWHC 2927 (Fam), [2004] All ER (D) 150 (Feb)

PJS v News Group Newspapers Ltd [2016] UKSC 26, [2016] AC 1081, [2016] All ER (D) 135 (May)

However, in light of the 'intense focus' to be applied to the specific circumstances, the recognition of the value of free speech in general to society is unlikely to be decisive of any claim because [HRA 1998, Sch 1 Pt I](#), art 10 does not, on its face, carry a greater weight than other rights under the ECHR.

In respect of 'journalistic material', [section 12\(4\)](#) of the HRA 1998 also requires consideration to be given to the extent to which the information is in, or is about to enter, the public domain, the public interest and any relevant privacy codes (eg the Ofcom Broadcasting Code and the Editors' Code of Practice now enforced by the Independent Press Standards Organisation (IPSO), or the BBC's Editorial Guidelines).

Privacy codes have proved relevant in a number of decisions, in particular the (now defunct) Press Complaint's Commission Editors' Code of Practice provision that '[e]ditors must not use the fame, notoriety or position of a parent or guardian as sole justification for publishing details of a child's private life' (clause 6). This was referred to in, among other cases, *Murray v Express Newspapers* which concerned the publication of photographs of the author JK Rowling's young son.

One important factor in determining the balancing exercise is the extent to which the publication of the information contributes to a debate of general interest (see *Von Hannover v Germany*). The others are how well-known the person concerned is and the subject matter of the report, the claimant's prior conduct, the content/form and consequences of the publication and the circumstances in which the information was obtained and its veracity (*Axel Springer AG v Germany*, *Weller v Associated Newspapers*).

The first of those considerations (contribution to a debate of general interest) makes it appear that only information concerning serious subjects will outweigh the [HRA 1998, Sch 1 Pt I](#), art 8 rights engaged. However, in *Terry v Persons Unknown* (a without notice application), Tugendhat J observed that the 'freedom to criticise' other people's conduct is one way in which society debates issues and its values evolve. The information sought to be protected was that a footballer had an extramarital affair with a teammate's partner. Although the judge declined to express any view on the social utility of the information concerned, his judgment illustrates that, even where the information is more like gossip, there still needs to be sufficient justification to restrain free speech. While the media is entitled to criticise people, there is prima facie no public interest in the publication of private sexual encounters, even when they involve adultery or more than a couple (see *PJS v News Group Newspapers Ltd* and *Von Hannover v Germany (No 2)*).

The case of *Lord Browne v Associated Newspapers* is an example of where the public interest defence prevailed. The claimant was the chief executive of a large multinational company and the newspaper wished to publish allegations, made by his former partner, that he had misused corporate resources. Publication of the alleged misconduct was in the public interest, and, as the relationship was an integral part of the story, its publication was justified even though it had been conducted in private.

The outcome of many claims is likely to turn on the issue of proportionality. Whether the interference with [HRA 1998, Sch 1 Pt I](#), art 8 or [HRA 1998, Sch 1 Pt I](#), art 10 is disproportionate can explain why many claims involving photographs succeed, why the publication of information which is merely a bare fact has often not been restrained and why the repeated publication of photographs (or other information) which is already in the public domain may, nevertheless, amount to a breach of a person's [HRA 1998, Sch 1 Pt I](#), art 8 rights.

See Practice Note: [Practical and procedural matters in privacy proceedings](#).

The Supreme Court considered the issue of privacy injunctions in the context of court reporting in *Khuja v Times Newspapers*. It was asked to decide whether a High Court judge had erred in law when refusing to grant an application for a privacy injunction by the appellant, who had been arrested but released without charge during an investigation of sexual offences against children. The appellant had sought the injunction to prevent the respondents from reporting references to him during the subsequent trial of nine other men for those offences. The majority held that the judge had not erred in refusing him the injunction. The press had a strong presumptive right at common law and under the ECHR to report fairly and accurately everything said at public criminal proceedings. It was not displaced by any rights of privacy that the appellant had. The reporting would be intrusive and unpleasant for him and his family, but any such impact of the reporting on him and his family did not give rise to privacy rights outweighing the rights of the press to report the criminal case fully. The judgment is helpful in emphasising that the open justice principle includes a strong right for the press to report everything said and done in open court criminal proceedings. It makes it clear that, while it may be possible to obtain privacy injunctions in order to prevent other sorts of reporting, they will be almost impossible to obtain away in the context of court reporting. For more information, see News Analysis: [Open justice and criminal court proceedings \(Khuja v Times Newspapers Ltd\)](#).

References:

[HRA 1998, s 12\(4\)](#)

[Ofcom Broadcasting Code](#)

[IPSO Editors' Code of Practice](#)

[BBC Editorial Guidelines](#)

Murray v Express Newspapers plc [2008] EWCA Civ 446, [2009] Ch 481, [2008] All ER (D) 70 (May)

Von Hannover v Germany (Application 59320/00) [2004] ECHR 59320/00

Axel Springer AG v Germany (Application 39954/08) (2012) 32 BHRC 493, [2012] ECHR 39954/08

Weller v Associated Newspapers Ltd [2015] EWCA Civ 1176, [2016] 3 All ER 357, [2015] All ER (D) 194 (Nov)

Terry (formerly 'LNS') v Persons Unknown [2010] EWHC 119 (QB), [2010] 2 FLR 1306, [2010] All ER (D) 197 (Jan)

PJS v News Group Newspapers Ltd [2016] UKSC 26, [2016] AC 1081, [2016] All ER (D) 135 (May)

Von Hannover v Germany (No 2) (Applications 40660/08 and 60641/08) (2012) 32 BHRC 527, [2012] ECHR 40660/08

Lord Browne of Madingley v Associated Newspapers Ltd [2007] EWCA Civ 295, [2008] QB 103, [2007] All ER (D) 12 (May)

References:

Khuja (formerly known as PNM) v Times Newspapers Ltd [2017] UKSC 49, [2019] AC 161, [2017] All ER (D) 114 (Jul)

Publisher's perspective

In considering the public interest of any information, the court may have regard to the 'reasonable belief' of the publisher (*Terry v Persons Unknown*). With respect to the details of a story, due regard is paid to the editorial judgement of a media publisher as to what information is required to inform the public. However, the scope of this latitude is unclear and the case of *Campbell* illustrates how difficult it is to apply; two of their Lordships thought the photographs of the claimant were permissible as they added little to the story of Naomi Campbell's drug habit, three disagreed and the *Mirror* lost the action.

As Lord Hoffmann said in *Campbell*, 'judges are not newspaper editors', and as Lord Hope added in *Re British Broadcasting Corporation*, 'They are not broadcasting editors either'. It was put by Baroness Hale and Lord Toulson in *OPO v Rhodes* as follows:

'A right to convey information to the public carries with it a right to choose the language in which it is expressed in order to convey the information most effectively.' (at para [78])

Children

In cases involving children (as a party or because the disclosure affects the claimant's children), the child's interests carry substantial weight. While those interests are not a paramount consideration, a child's best interests are likely to dictate the outcome of the balancing exercise unless the countervailing interests are of great importance (see *ETK v News Group Newspapers*).

However, while many decisions involving children have come down against publication, this is not inevitable. In *AAA v Associated Newspapers*, the defendant was not restrained from publishing information about AAA and her paternity because her father was a prominent politician and his conduct in having a child as a result of an affair was relevant to his suitability for public office (see *Weller v Associated Newspapers*).

See also the judgment of Lady Hale in *PJS v News Group Newspapers*, in the context of whether an interim injunction should continue in a case where the publication which was not in the public interest, or at least at that stage had been deemed not to be in the public interest. Lady Hale concluded that the interests of the children should be fully considered at trial and not rendered nugatory by permitting the information to be further published.

Public domain

The extent to which the information has entered the public domain is highly relevant to the balancing exercise. However, merely because the information has been published previously is not decisive.

In the context of an interim injunction application, the fact that the identity of the claimant and the information about him had circulated on social media and could be found on the internet did not prevent the injunction being continued to protect him and his family from further unlawful intrusions into their private lives (*PJS v News Group Newspapers*). See Practice Note: [Privacy law—remedies](#) for more detail.

Moreover, the republication of personal information may cause an individual distress and be unjustified. The decision of the Court of Justice in *Google Spain v AEPD* (the so-called 'right to be forgotten case'), although it was concerned with data protection laws, illustrates that truth and previous publicity do not necessarily justify every sort of publication of personal information.

In the context of fairly unusual facts (the publication of the identity of an alleged police informant in Northern Ireland), the fact that the information had already been disseminated reasonably widely and was available on the internet did not prevent the NI Court of Appeal in *AB v Sunday Newspapers* from granting an interim injunction in misuse of private information to restrain further publication.

In *Burrell v Clifford*, the fact that the claimant had, himself, put the same information into the public domain at a later date, did not prevent the court finding that the defendant's earlier unauthorised disclosure of the same information amounted to misuse of private information. However, it did affect the damages awarded (as it did in some of the claims in *Gulati v MGN* where the information would have become public in due course).

References:

Terry (formerly 'LNS') v Persons Unknown [2010] EWHC 119 (QB), [2010] 2 FLR 1306, [2010] All ER (D) 197 (Jan)

Campbell v Mirror Group Newspapers Ltd [2004] UKHL 22 at para [59], [2004] 2 AC 457 at 474, [2004] All ER (D) 67 (May)

A-G's Reference (No 3 of 1999), Re British Broadcasting Corpn [2009] UKHL 34 at para [25], [2010] 1 AC 145 at 165, [2009] All ER (D) 175 (Jun)

OPO (by his litigation friend) v Rhodes [2015] UKSC 32 at para [78], [2016] AC 219 at 252, [2015] All ER (D) 177 (May)

ETK v News Group Newspapers Ltd [2011] EWCA Civ 439, [2011] 1 WLR 1827, [2011] All ER (D) 197 (Apr)

AAA v Associated Newspapers Ltd [2013] EWCA Civ 554, [2013] All ER (D) 224 (May)

Weller v Associated Newspapers Ltd [2015] EWCA Civ 1176, [2016] 3 All ER 357, [2015] All ER (D) 194 (Nov)

PJS v News Group Newspapers Ltd [2016] UKSC 26, [2016] AC 1081, [2016] All ER (D) 135 (May)

Google Spain SL v Agencia Española de Protección de Datos (AEPD), Case C-131/12, [2014] QB 1022, [2014] All ER (D) 124 (May) AC 1081, [2016] All ER (D) 135 (May)

AB v Sunday Newspapers t/a The Sunday World [2014] NICA 58, [2016] NI 179

Burrell v Clifford [2016] EWHC 294 (Ch), [2016] All ER (D) 206 (Feb)

Gulati v MGN Ltd [2015] EWHC 1482 (Ch), [2015] All ER (D) 199 (May)

Iniquity defence

In *Brake v Guy*, the High Court confirmed that the public interest (or 'iniquity') defence, available in 'traditional' breach of confidence claims, is in principle available in misuse of private information claims. The claimants argued that intrusion into fundamental rights such as the right to privacy found in Article 8 of the ECHR can only be justified either by qualifications to the fundamental right concerned (ie Article 8(2)) or balancing rights elsewhere in the ECHR (typically Article 10). The court disagreed, and held that the provisions of Article 8(2) and Article 10 of the ECHR are wide enough to cover the parameters of the iniquity defence as understood in relation to claims in breach of confidence.

For more information, see News Analysis: [The iniquity defence in claims for misuse of private information \(Brake v Guy\)](#).