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KISS & TELL STORIES AND SNATCHED PHOTOGRAPHS

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Current practical issues in privacy cases against the press

After an introductory look at the emergence of the tort now named "misuse of private information" and the judicial approach to the grant of relief in such cases, this paper considers five current practical issues which frequently arise where action is taken against the media for intrusion on privacy. They are:

(1) Is the guidance provided by the Court of Appeal in the Flitcroft case, *A -v- B plc* [2003] QB 195, as regards the privacy rights of public figures still good law ?

(2) Is *Woodward -v- Hutchins* [1977] 1 WLR 760 still good law in relation to the defence of public interest ?

(3) What false statements fall foul of Article 8 ECHR ?

(4) What needs to be established to show that information has entered the public domain sufficiently for privacy rights to be lost ?

(5) At what stage is Article 8 engaged in relation to photographs taken without the consent of their subject ?

The emergence of misuse of private information as a tort

It is hardly open to argument that since the start of the new millennium a significant shift has taken place between freedom of expression and the legitimate expectation of citizens to have their private lives protected. As Lord Hoffmann pointed out in *Jameel -v- Wall Street Journal Europe Sprl* [2007] 1 AC 359 [38] this is in contrast to the position in defamation:

> *"Until very recently, the law of defamation was weighted in favour of claimants and the law of privacy weighted against them. True but trivial intrusions into private life were safe. Reports of investigations by the newspaper into matters of public concern which could be construed as reflecting badly on public figures domestic or foreign were risky. The House attempted to redress the balance in favour of privacy in* Campbell -v- MGN Ltd *[2004] 2 AC 457 and in favour of greater freedom for the press to publish stories of genuine public interest in* Reynolds -v- Times Newspapers Ltd *[2001] 2 AC 127."*

Influenced by Article 8 ECHR, a shift has also taken place from a tort based on infringement of confidential information to one involving the "*misuse of private information*", as Lord Nicholls described *"the essence of the tort"* in *Campbell* [14]. The English courts are now treating privacy in the very wide sense in which it was defined by Lord Mustill in *R -v- Broadcasting Standards Commission, ex parte BBC* [2001] QB 885 [48] namely as *"an affront to the personality, which is damaged both by the violation and by*

the demonstration that the personal space is not inviolate" (quoted by Lord Hoffmann in *Campbell* (478c-d). Where personal information is disclosed, *"the offence is caused because what the claimant could reasonably expect would remain private has been made public. The intrusion into the private domain is, of itself, objectionable"*: per Lord Phillips MR in *Douglas -v- Hello! Ltd (No.3)* [2006] QB 125 [107].

As the Court of Appeal made clear in *Douglas -v- Hello! Ltd (No.3)*, the decision in *von Hannover -v- Germany* (2005) 40 EHRR 1 created a positive obligation on member states to protect privacy as between individuals. In this area Convention rights operate not only vertically as between individuals and the state, but also horizontally between individuals themselves. In *von Hannover* [57], the ECHR indicated that Article 8 may require *positive* steps to be taken in order to ensure effective respect for private 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."

● *"Kiss 'n Tell": the protection of private life extends to relationships with other people*

It did not require the passage of the Human Rights Act 1998 to afford a measure of protection to the victims of kiss and tell stories in the tabloids. In *Stephens -v- Avery* [1988] Ch 449, Sir Nicolas Browne-Wilkinson V-C restrained the publication of details of a lesbian relationship confided by the claimant to a third party. The Court applied orthodox principles of confidentiality to the issue, starting from the incontrovertible point that *"to most people the details of their sexual lives are high on their list of those matters which they regard as confidential"* (454g-h). Thus, information concerning sexual conduct between two people conveyed to a third party in confidence remained confidential, albeit that both parties to the sexual act were free to disclose that information.

Jacob J applied *Stephens -v- Avery* in March 1997, when he granted an injunction against *The Sun* to restrain further publication of details of a gay affair conducted by Michael Barrymore whilst still married: *Barrymore -v- News Group Newspapers Ltd* [1997] FSR 600. Again orthodox principles of confidentiality were applied, and the Judge's approach was typically straightforward:

*" .... common sense dictates that, when people enter into a personal relationship of this nature, they do not do so for the purpose of it subsequently being published in The Sun or any other newspaper. The information about the relationship is for the relationship and not for a wider purpose. It is well established that in many cases the law will spell out a duty of confidence when information is given for a limited purpose": (**602**)*

"The fact is that when people kiss and later one of them tells, that second person is almost certainly breaking a confidential arrangement. It all depends on precisely what they do... when one goes into detail (as in The Sun article) about what Mr Barrymore said about his relationship with his wife and so on, one has crossed the line into breach of confidence" (603).

Since the start of the new millennium the Strasbourg court has sought on more than one occasion to define Article 8 rights, albeit in somewhat metaphysical terms. In *PG & JH -v- UK* (25 September 2001) the ECHR recognised *"a right to identity and personal development and the right to establish and develop relationships with other human beings."* It is this which is the foundation of the *"zone of interaction with others [which] even in a public context, may fall within the scope of private life"*: see *von Hannover* [50]. In other words, this is the *"social dimension"* , which extends beyond the private family circle, to which the Court refers [69]. Similarly, in *van Kuck -v- Germany* (12 September 2003) the Court indicated that Article 8 *"protects the right to personal development, and the right to establish and develop relationships with other human beings and the outside world."* [69]

Naturally, defendants often try to counter the enforcement of Article 8 rights by invoking their own rights under Article 10 to tell their story. This was the lynchpin of the defence in *McKennitt -v- Ash* [2006] EMLR 178, but (as Eady J said)

in writing about a person of *"world-wide fame"*, Ms Ash had to be able to offer *"some unique insight"* or *"fresh angle"* concerning the claimant [69]. The Judge held that the book would be of no interest to general readers, but for the fact that the defendant was *"giving an account of her intimate dealings with a person who is known to many millions of people, throughout the world"* [89]

"It is the central role of Ms McKennitt, and the revelations about her, which provide the main reason for people to acquire the book."

The Judge's approach was that it did not follow that, because one can reveal one's own private life, one can also expose confidential matters in respect of which others are entitled to protection: [77]. In adopting this approach, Eady J was doing no more than reflecting the qualified nature of the right under Article 10. As stated in Art.10(2), the exercise of the right to freedom of expression may be restricted by such safeguards as are necessary in a democratic society *"for the protection of the reputation or rights of others, [or] for preventing the disclosure of information received in confidence."*

The judicial approach to the grant of relief

Where protection is sought for private information, the Court's task is to embark on a two-stage process:

(1) First, it must identify whether there is a reasonable expectation of privacy such as to engage Article 8 at all. This is the threshold test.

(2) Then if the answer is affirmative, it proceeds to perform the task of balancing the competing Convention rights, applying the test of proportionality to each. This balancing stage is sometimes called "parallel analysis".

In performing what Lord Steyn in ***In re S (A Child)*** **[2005] 1 AC 593** [17], called *"the ultimate balancing act"*, neither Article 8 nor Article10 *"has* **as such** [Lord Steyn's emphasis] *precedence over the other"*. Where they come into conflict, *"an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary".*

The issues whose consideration is involved at the first threshold stage may recur at the second stage. For example, questions of relative triviality or degrees of public domain may be relevant at the balancing stage, even though they are not such as to cause the action to fail at the threshold stage. Of course, there may well be some cases where the information is so utterly useless or trivial as to fall within Lord Goff's second limiting principle in ***AG -v- Guardian Newspapers (No.2)*** **[1990] 1 AC 109, 282d-e** and therefore fail at the first stage. But in cases where the information engages Article 8, questions of *relative* triviality may still arise at the second balancing stage: see Eady J in ***McKennitt -v- Ash*** [67]. As the Judge said (employing a double negative) [58]:

"... the mere fact that information concerning an individual is 'anodyne' or 'trivial' will not necessarily mean that Article 8 is not engaged.".

In ***McKennitt***, the trial judge described some information as being *"trivial and of no consequence"* [139]. This non-intrusive material failed the threshold test, since (in the Judge's words) it was *"anodyne, and not such as to attract any obligation of confidence".* In contrast, where the subject-matter of the information was such as to attract particular respect under Article 8 (for example, because of *"the traditional sanctity accorded to hearth and home"*), there was nothing illogical in affording protection to *"relatively trivial details"* see [135, 139]. What is more, it is hardly likely that such information will contribute to *"a debate of general interest"*, which the ECHR regarded as *"the decisive factor"* in ***von Hannover*** [76].

Eady J in ***McKennitt*** came in for some criticism in the media for affording protection to details of Ms McKennitt's household minutiae, but having heard her evidence he was entitled to find that it was *"intrusive and distressing..... to be exposed to curious eyes and it is utterly devoid of any legitimate public interest"* [138]. His approach was consistent with that of Lord Hoffmann in

Campbell -v- MGN Ltd, who in argument raised the example of an innocuous photograph of him in his study at home taken from the garden next door. That would merit protection, despite its lacking the potential to harm. It would be objectionable, *"even if there is nothing embarrassing about the picture itself"*: see Lord Hoffmann [75].

I: Is the guidance provided by the Court of Appeal in the Flitcroft case as regards the privacy rights of public figures still good law?

In March 2002 in *A -v- B plc* [2003] QB 195 the Court of Appeal (Lord Woolf CJ, Laws & Dyson LJJ) set down guidelines intended to assist the judiciary and the parties to deal with urgent interim applications in a proportionate manner and without being burdened by copious reference to the authorities. Not surprisingly, the new and liberal guidelines were hailed by the media, but questions soon began to be asked as to whether they were consistent with proper respect being paid to Article 8.

● *The Naomi Campbell case: House of Lords: 6 May 2004*

In *Campbell -v- MGN*, the newspaper defendant had published an article, accompanied by a photograph of the claimant leaving a meeting of Narcotics Anonymous, thereby exposing her deceit that she did not take drugs. Although the House divided 3-2 as to the result of the appeal, there was a commonality of approach as to the threshold test for private information. The House rejected the *"highly offensive to a reasonable person"* formulation, which had been adopted by Gleeson CJ in *Australian Broadcasting Corporation -v- Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 [42], and propagated by Lord Woolf CJ in the Flitcroft case, *A -v- B plc* [11(vii)]

Lord Nicholls (who dissented on the facts) in *Campbell* [22] thought that Gleeson CJ's approach *"could be a recipe for confusion"* as a threshold test. Firstly, it was *"suggestive of a stricter test of private information than a reasonable expectation of privacy"*; and secondly, it tended to bring into account considerations which went more properly to issues of proportionality; *"for example, the degree of intrusion into private life, and the extent to which the publication was a matter of proper public concern".*

The House appeared unanimous in adopting the reasonable expectation test:

(1) Lord Nicholls stated [21]:

"Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy".

(2) Lord Hope also spoke in terms of a reasonable expectation [85]:

"... a duty of confidence will arise whenever the party subject to the duty is in a situation where he knows or ought to know that the other person can reasonably expect his privacy to be protected."

(3) Baroness Hale [134] was to the same effect, pointing out that once a reasonable expectation is established, *"the exercise of balancing article 8 and article 10 may begin."*

(4) Lord Carswell agreed with Lord Hope and Baroness Hale [161].

● *The von Hannover case: 24 June 2004:*

The decision of the European Court in *von Hannover*, the month following the House's decision in *Campbell*, showed that English common law and the Strasbourg jurisprudence were consistent in adopting the reasonable expectation threshold test. The ECHR held that German law failed to protect Princess Caroline's rights under Article 8 by denying her the right to prevent the publication of photographs of her going about her daily life, and that there was a *positive* obligation on states to protect privacy rights.

The Court considered first the ambit of the concept of private life:

"… private life, in the Court's view, includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings": [50].

It followed from the Court's definition of private life that:

"…there is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life'": [50].

The Court applied the test of legitimate or reasonable expectation to the matters in respect of which an individual was entitled to claim protection for his private life: ***§51, p24***. It concluded that there was no doubt that the publication of photographs of Princess Caroline in her daily life fell within the scope of her private life, whether she was on her own or with other people [53]. The Court considered that:

"… a fundamental distinction needs to be made 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" [63].

The Court went on to hold that the situation regarding Princess Caroline *"does not come within the sphere of any political or public debate because the published photos and accompanying commentaries relate exclusively to details of [her] private life"* [64]. The Court reiterated:

"… the fundamental importance of protecting private life from the point of view of the development of every human being's personality. The protection… extends beyond the private family circle and also includes a social dimension" [69].

It is notable that in its conclusion the Court considered that:

"… the decisive factor in balancing the protection of private life against the freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest" [76].

The fact that Princess Caroline was well-known to the public made no difference to the Court's finding that her article 8 rights had been infringed:

"… 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" [77].

● *Douglas -v- Hello (No.3): the appeal after the trial: 18 May 2005:*

In ***Douglas -v- Hello! Ltd (No.3)*** [2006] QB 125, the Court of Appeal took the opportunity to consider the impact on English law of the decision in ***von Hannover***. Although the publishers of *OK!* subsequently went successfully to the Lords, the House dismissed Hello!'s cross-petition for permission to appeal in relation to the dismissal by the Court of Appeal of *Hello!*'s appeal against the judgment in favour of the Douglases personally based on the infringement of their privacy right. The Court of Appeal summarised the effect of the ***von Hannover*** decision in these terms:

"… the ECHR has recognised an obligation on member states to protect one individual from an unjustified invasion of private life by another individual and an obligation on the courts of a member state to interpret legislation in a way which will achieve that result" [49].

In so far as private information is concerned, the English courts are required to adopt as the vehicle for discharging that obligation, *"the cause of action formerly described as breach of confidence"*: [53]. This means that:

"The court should, in so far as it can, develop the action for breach of confidence in such a manner as will give effect to both Article 8 and Article 10 rights."

The Court summarised the effect of the majority decision of the House in ***Campbell*** thus [82]:

"What the House was agreed upon was that the knowledge, actual or imputed, that information was private will normally impose on anyone publishing that information the duty to justify what, in the absence of justification, will be a wrongful invasion of privacy. The House was also agreed that, when Article 8 and Article 10 are both engaged, one does not start with the balance tilted in favour of Article 10."

The Court considered that *"for the adjective 'confidential' one can substitute the word 'private'"*: [83]. It then went on to pose the question as to what was the nature of private information, providing the answer that:

"... it must include information that is personal to the person who possesses it and that he does not intend shall be imparted to the general public. The nature of the information... may suffice to make it plain that the information satisfies these criteria."

● *A -v- B considered in the light of von Hannover:*

In his *Blackstone Lecture,* Sedley LJ commented that the implications of the ***von Hannover*** case *"for our own law are far-reaching. They make it extremely doubtful whether the Flitcroft case could now be decided as it was."* His doubts and those expressed by academic commentators such as ***Fenwick & Phillipson*** *(Media Freedom under the Human Rights Act* (2006) pp.795-800) focus on [11(xii)] of Lord Woolf's judgment. In the passage concerned which analyses the privacy rights of public figures, there are certainly a number of statements which it is hard to reconcile with the Strasbourg approach.

(1) Firstly, Lord Woolf does not define the term *"a public figure"*, although he regards such individuals as having a limited expectation of privacy: *"even trivial facts relating to a public figure can be of great interest to readers..."*. No distinction is made between politicians in the exercise of their functions and individuals who may be well known because of the position which they occupy in society (eg. royalty or show business personalities). By failing to define public figures, Lord Woolf fails to apply what the ECHR in ***von Hannover*** called *"the fundamental distinction"* between reporting facts capable of contributing to a debate in a democratic society relating to politicians and details of the private life of individuals who do not exercise official functions: [63]. This failing seriously detracts from the weight to be attached to Lord Woolf's starting principle that *"a public figure is entitled to a private life"*.

(2) Lord Woolf also seems to have considered that "*role models whose conduct could well be emulated by others*" have decreased expectations of privacy. This is hardly logical: it would, if anything, be an argument for preventing anti-social behaviour by role models from becoming publicly known. Baroness Hale in ***Campbell*** [151], questioned *"why, if a role model has adopted a stance which all would agree is beneficial rather than detrimental to society, it is so important to reveal that she has feet of clay"*. Sedley LJ acidly commented in the *Blackstone Lecture*:

"... one has to wonder what our moral custodians imagine goes on in young people's minds... is it conceivably going to suggest to them that the great thing about being a professional footballer, or any other kind of media star, is that you can sleep with just about anyone ?"

(3) A similar point to that made by Baroness Hale had been made by Lord Phillips MR in ***Campbell*** [41]:

"For our part we would observe that the fact than an individual has achieved prominence on the public stage does not mean that his private life can be laid bare by the media. We do not see why it should necessarily be in the public interest that an individual who has been adopted as a role model, without seeking this distinction, should be demonstrated to have feet of clay."

(4) Also open to criticism is Lord Woolf's statement that *"the public have an understandable* ***and so*** [emphasis added] *legitimate interest in being told [trivial facts relating to a public figure]".* This, he suggests, is a situation that can appropriately be taken into account at the secondary balancing stage. Leaving aside the *non sequitur,* this contention

wholly ignores the repeated occasions upon which this Court and the House of Lords have distinguished between what is truly in the public interest and what is interesting to the public. As *Fenwick & Phillipson* (p.796) state:

"Woolf CJ offered no argument as to how the Court of Appeal, which of course is bound by its previous judgments, could in this case lay down dicta that so clearly depart from this well-established distinction."

(5) Baroness Hale in *Jameel -v- Wall Street Journal Europe Sprl* [2007] 1 AC 359 [147] is only the most recent of those who have distinguished between a real public interest in communicating and receiving information and information which interests the public:

"... the most vapid tittle-tattle about the activities of footballers' wives and girlfriends interests large sections of the public but no one could claim any real public interest in our being told all about it."

(6) In *Campbell* in the Court of Appeal, Lord Phillips MR said that Lord Woolf's guidance had been misunderstood by some [40]:

"When Lord Woolf CJ spoke of the public having "an understandable and so a legitimate interest in being told" information, even including trivial facts, about a public figure, he was not speaking of private facts which a fair-minded person would consider it offensive to disclose. That is clear from his subsequent commendation of the guidance on striking a balance between article 8 and article 10 rights provided by the Council of Europe Resolution 1165 of 1998."

(7) Lord Woolf's approach is also at odds with the statement of Lord Hope in *Campbell*, that it was *"not enough to deprive Miss Campbell of her right to privacy that she is a celebrity and that her private life is newsworthy"* [120].

(8) Nor can Lord Woolf's approach be reconciled with that of the ECHR in *von Hannover*, which stated that articles *"of which the sole purpose was to satisfy the curiosity of a particular readership regarding the details of the applicant's private life cannot be deemed to contribute to any debate of general interest to society* **despite the applicant being known to** ***the public*** [emphasis added] [65]. In such situations, as the ECHR makes clear, freedom of expression calls for a narrower interpretation [66]. It is (in the words of the resolution of the Parliamentary Assembly of the Council of Europe of 26 June 1998) *"a one-sided interpretation of the right to freedom of expression"* to try to justify an infringement of Art.8 rights by *"claiming that readers are entitled to know everything about public figures"* [67].

Lord Woolf also contended that *"if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest."* *Fenwick & Phillipson* (p.799) comment that *"a cruder definition of the public interest is hardly imaginable."* Sedley LJ limits himself to stating that *"these considerations are unlikely to survive the recent jurisprudence of the European Court of Human Rights"*.

● *Where does A -v- B plc stand after the Court of Appeal decision in McKennitt ?*

In *McKennitt*, Buxton LJ (with whom Latham and Longmore LJJ agreed) stated unequivocally that *"the width of the rights given to the media by A -v- B plc cannot be reconciled with von Hannover's case"* [62]. The Court was not inhibited from applying *von Hannover*, because *A -v- B plc* had not ruled definitively on the content and application of Article 10, and no Convention authority of any sort was even mentioned [63].

Buxton LJ seems to have recognised that courts asked to apply *A -v- B plc* were left in a quandary, but wherever they were left, he said [64]:

"... it seems clear that A -v- B plc cannot be read as any sort of binding authority on the content of articles 8 and 10. To find that content, therefore, we do have to look to von Hannover's case. The terms of that judgment are very far away from the automatic limits placed on the privacy rights of public figures by A -v- B plc.".

II: Is Woodward -v- Hutchins [1977] 1 WLR 760 still good law in relation to the defence of public interest ?

Questions as to the public interest in the information arise at the secondary stage, when the Court has to perform the balancing operation of *"weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure"* , to quote the words of Lord Hope in ***Campbell*** [85]. For a defence of public interest to override an obligation of confidentiality, whether under contract or in equity, there ought to be a pressing public need to know the information: see ***Lion Laboratories -v- Evans*** [1985] QB 526, 537. As Stephenson LJ said (537c):

"The public are interested in many private matters which are no real concern of theirs and which the public have no pressing need to know."

Stephenson LJ's words were an explicit echo of those of Lord Wilberforce in ***British Steel -v- Granada Television*** [1981] AC 1096, 1168:

"There is a wide difference between what is interesting to the public and what it is in the public interest to make known".

The present defence of public interest to an action for breach of confidence stems from the so-called iniquity rule. As Griffiths LJ pointed out in ***Lion Laboratories*** (550c), the rule evolved *"because in most cases where the facts justified a publication in breach of confidence, it was because the plaintiff had behaved so disgracefully or criminally that it was judged in the public interest that his behaviour should be exposed."*

In ***McKennitt***, Eady J held that "*a very high degree of misbehaviour must be demonstrated*" to trigger the public interest defence [97] This standard is somewhat less strict than that in ***Beloff -v- Pressdram*** [1973] 1 AllER 241, 260, where Ungoed-Thomas J stated that on the authorities the defence did not extend beyond:

"... the disclosure justified in the public interest, of matters carried out or contemplated, in breach of the country's security, or in breach of law, including statutory duty, fraud or otherwise destructive of the country or its people, including matters medically dangerous to the public; and doubtless other misdeeds of similar gravity."

- *The criticism of Woodward -v- Hutchins:*

Over the years it has been a common tactic (indeed it was used unsuccessfully in ***McKennitt***) for defendants to argue that the public interest demands that information be published in order to expose the claimant's double-standards or hypocrisy. Invariably the submission is supported by reference to ***Woodward -v- Hutchins***, a Court of Appeal decision which has been the subject of much criticism (both judicial and academic), and where the judgments were given *ex tempore* after two hours of argument late one evening. Bridge LJ stated (765d):

"It seems to me that those who seek and welcome publicity of every kind bearing upon their private lives so long as it shows them in a favourable light are in no position to complain of the invasion of their privacy by publicity which shows them in an unfavourable light."

Toulson & Phipps (*Confidentiality* (2006) 2nd ed: §6-072) comment that the result in ***Woodward -v- Hutchins*** *"may well be regarded as an instance of judicial idiosyncrasy"*. This is an echo of the words of Gummow J in ***SK&F Ltd -v- Dept of Community Services*** [1990] FSR 617, 663*:*

"I would accept... that an examination of the recent English decisions shows that the so-called "public interest" defence is not so much a rule of law as an invitation to judicial idiosyncrasy by deciding each case on an ***ad hoc*** *basis as to whether, on the facts overall, it is better to respect or to override the obligation of confidence."*

Whilst recognising that no duty of confidentiality can be absolute, ***Toulson & Phipps*** (§6.074) caution against the weakening of the ability to depend on the principle of confidentiality which would occur, *"if the public interest limitation became too broad, or as has been said of some*

decisions, idiosyncratic in its operation." They also point (§3-115-121) to the tension between the decision in ***Woodward -v- Hutchins*** and the Court of Appeal's subsequent decision in ***Schering Chemicals -v- Falkman Ltd.*** [1982] 1 QB 1. In both cases the defendants' professional skills were engaged to produce good publicity for the plaintiffs and were then used by them to produce bad publicity. In ***Woodward -v- Hutchins*** this was regarded as a reason for refusing an injunction, but in ***Schering*** as a reason for granting it. The irony is all the greater (as ***Toulson & Phipps*** point out (§3-121)) for the paradox that the public interest in knowing the truth about the pregnancy testing drug, Primodos, was far greater than any public interest in the private lives of Tom Jones and his friends. They therefore suggest that the approach in ***Schering*** is to be preferred.

Tugendhat & Christie (*The Law of Privacy and the Media* (2002) §9.30-9.31) also subject ***Woodward -v- Hutchins*** to criticism and cite a number of academic criticisms, including (fn.88, p.343) the view of ***Brearley & Bloch*** (*Employment Contracts and Confidential Information* (1999) 2nd ed. §6.12) that the case stretches the just cause defence to extraordinary limits, so that it should be applied with the greatest circumspection. ***Tugendhat & Christie*** adopt the fundamental criticism of ***Toulson & Phipps*** *"that the court paid little regard to the defendant's duties as an employee"*.

In ***Douglas -v- Hello! Ltd. (No.1)*** [2001] QB 967 [96], Brooke LJ referred to what he called *"the very general principles stated by members of this court in* ***Woodward -v- Hutchins****"*. He described it as:

"... a case which preceded modern developments in practice (at any rate in the Queen's Bench Division) in relation to breach of confidence claims and which was concerned with the appropriateness of an injunction framed in astonishingly wide terms."

Further doubt was cast on ***Woodward -v- Hutchins*** at first instance in ***Campbell -v- Frisbee*** [2002] EWCA Civ 1374 in March 2002. Lightman J, after pointing out that it was an *ex tempore* decision, said that there were a number of reasons (including the information being in the public domain) for refusing an injunction apart from the passages usually cited in support of the argument that the exposure of hypocrisy justifies a breach of confidence. The Judge considered that the continuing applicability of the decision might be open to question on the ground that it did not accord with modern developments in relation to breach of confidence claims. In their judgment "reluctantly" allowing Ms Frisbee a trial on the merits, the Court of Appeal stated that *"Lightman J may well be right to suggest that* ***Woodward -v- Hutchins*** *should no longer be applied."* [34]

- *The approach of the Court of Appeal in McKennitt to Woodward -v- Hutchins*

It is fair to say that the Court of Appeal in ***McKennitt*** [33-36] were lukewarm about ***Woodward -v- Hutchins.*** Buxton LJ noted that it dated back *"to an era when the Convention had not invaded the consciousness of English lawyers",* but nevertheless it had never been overruled. After remarking that the case had come in for a good deal of criticism, of which the most relevant was that *"the court was not reminded of the relevance of the contractual relationship between the agent and his former employers"*, Buxton LJ dismissed it as largely lacking any direct authority in or relevance to the ***McKennitt*** case.

III: What false statements fall foul of Article 8 ECHR ?

- *Article 8 rights extend to the right to reputation:*

It is clear by now that the Strasbourg case-law recognises that the right to respect for private life embraces the right to reputation. This is necessary to protect human dignity, which is damaged by the publication of false personal information.

In *Radio France -v- France* (2005) 40 EHRR 706 the ECHR ruled that there had been no violation of Article 10 in relation to the conviction of broadcasters for false allegations that the Deputy Mayor of Paris had supervised the deportation of Jews in the Second World War. The allegations were obviously highly defamatory, and the parties before the Court did not disagree that the interference with the Applicants' Article 10 rights was in pursuit of the legitimate aim in Art.10(2) of *"protecting the reputation and rights of others"*. The Court noted that [31]:

"... the right to reputation does indeed figure among the rights safeguarded by Art.8 of the Convention, as an element of the right to respect for private life."

In *Cumpana & Mazare -v- Romania* [2005] 41 EHRR 200 the Court was concerned with the criminal conviction for libel of journalists who had made false allegations of bribery in the award of government contracts. It was nothing to the point that the story would have been unquestionably of significant public interest, if it were true. The Court held that the restriction on the Applicants' freedom of expression met a pressing social need, but that the penalty imposed had been disproportionate. The Court stated that its task was [91]:

"... to ascertain whether the domestic authorities struck a fair balance between, on the one hand, the protection of freedom of expression as enshrined in Art.10, and on the other hand, the protection of the reputation of those against whom allegations have been made, a right which, as an aspect of private life, is protected by Art.8 of the Convention. That provision may require the adoption of positive measures designed to secure effective respect for private life even in the sphere of the relations of individuals between themselves."

● *The English case law in relation to false privacy*

There is no principled reason why a claimant should not be afforded protection from a false statement whose subject-matter trespasses into the area where there is a reasonable expectation of privacy. A false statement can be just as intrusive, if not more so, than a true one. Sometimes, too, the falsity of particular details aggravates the fact that private information is being disclosed at all. In *Campbell* [102] Lord Hope observed that such inaccuracies as were published did not detract from the private nature of what was published:

"... there is a vital difference between inaccuracies that deprive the information of its intrusive quality and inaccuracies that do not.....".

The decision of Eady J in *Beckham -v- Gibson* (unreported, 29 April 2005) appears to illustrate that the Court will protect information both true and false, provided it is private in nature:

"It would defeat the purposes of the injunction, if [the Claimants] are compelled to spell out which revelations are true, false, or a grain of truth and are distorted."

The same approach can be seen at work in the decision of Tugendhat J in *W -v- Westminster City Council* [2005] EWHC 102 (QB), cited by Eady J in *McKennitt* [78]. A claim was brought in libel in relation to allegations of paedophilia and sexual abuse of a minor. This was dismissed on the ground of qualified privilege: (2004) EWHC 2866 (QB), but a subsequent claim for infringement of Article 8 succeeded, even though it was accepted that the material complained of was untrue, and the Judge granted declaratory relief under s.8 Human Rights Act.

In an article (*"Privacy and Celebrity" (2001/2) Yearbook of Copyright & Media Law* p.18) Michael Tugendhat QC (as he then was) had argued that *"privacy can be infringed by a false allegation as well as by a true one"*. This was because the Article 8 privacy right included the right to the protection of honour and reputation. In *Tugendhat & Christie* (*Privacy and the Media:* §2.30), the argument was advanced again (this time by reference to *Rotaru -v- Romania* (2000) 8 BHRC 449) that the right to reputation was recognised as part of the right to private life. In *Rotaru* the Court held that the collection by the State of information about an individual's political

activities was an interference with his private life. The Court considered that was *"all the more so in the instant case as some of the information has been declared false and is likely to injure the Applicant's reputation."* [44]

● *False commercial information is treated differently:*

The Court treats false commercial information differently for reasons which may seem obvious: see Sedley LJ's judgment in ***Interbrew SA -v- Financial Times Ltd.*** [2002] EMLR 446 [27], where the relevant information related to the plans of an international trading corporation for a take-over bid. Gray J drew the distinction between the situation in ***Interbrew*** and the situation where false and intrusive private information is published about an individual, when writing extra-judicially in *Essays in Honour of Sir Brian Neill* (2003, p.193):

"It is difficult to see how a quasi-proprietorial right of confidence could be asserted over information which is fictitious. By contrast the right of privacy, in the sense of personal autonomy or the right to be let alone, would be breached by the publication of untrue personal information".

Today there would be a remedy for the lacuna in the law revealed by the facts of ***Charleston -v- News Group Newspapers Ltd.*** [1995] 2 AC 65, where a claim in libel was brought in respect of photographs with the claimants' faces superimposed on near-naked models in pornographic poses. Lord Bridge expressed *"considerable sympathy with [the] point of view"* (69e) that *"the law ought to give some redress to the plaintiffs against the publication of such degrading faked photographs irrespective of what the accompanying text may have said."* Charles Gray QC for the defendants in argument pointed the way to the remedy which would exist today: *"If any offence is felt by the plaintiffs it has to be cured by an aspect of the law of privacy which is available in other jurisdictions"* (68b-c). Indeed, publicity placing someone in a false light is one of the four categories of privacy torts recognised in American law: see the seminal article by ***Dean Prosser:*** *"Privacy"* (1960) 48 Cal LR 383, 389, cited by ***Tugendhat & Christie*** (§3.03).

In line with the American approach, the definition of privacy contained in the ***Recommendation on Mass Communication Media and Human Rights*** adopted by the Council of Europe on 23 January 1970 included *"private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts"*.

The approach of the Court of Appeal in McKennitt to false privacy:

In ***McKennitt*** [78]-[79], the court rejected the argument that in relation to the statements in Ms Ash's book alleged to be false, the claimant should have sued in defamation. The Court distinguished the facts of that case from one where a claim in confidence was brought, even though the nub of the complaint was the falsity of the allegations, in order to circumvent the rule in ***Bonnard -v- Perryman*** [1891] 2 Ch 269 and obtain an interlocutory injunction [79]. Without relying on the European case-law, Buxton LJ stated [80]:

"... 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."

Longmore LJ warned judges against being sidetracked into an irrelevant inquiry into the truth of the allegation (save in cases like ***Interbrew*** which, he said, were entirely different) [86]:

"The question in a case of misuse of private information is whether the information is private, not whether it is true or false. The truth or falsity of the information is an irrelevant inquiry in deciding whether the information is entitled to be protected.....".

IV: What needs to be established to show that information has entered the public domain sufficiently for privacy rights to be lost ?

● *Availability on the Internet:*

The issue of the extent to which information has entered the public domain, like the question of triviality, may not be exclusively a threshold question at the first stage. Each issue involves questions of degree. Of course there may be cases where the information is (to use the words of Lord Goff in ***AG -v- Guardian Newspapers Ltd. (No.2)*** **[1990] 1 AC 109, 282**) *"so generally accessible that in all the circumstances it cannot be regarded as confidential"*. But sometimes the Court will have to consider the degree to which the material is accessible to the public. Thus the order made by Butler-Sloss P in ***Venables & Thompson -v- News Group Newspapers*** **[2001] Fam 430** [105] protecting the killers of Jamie Bulger from identification expressly provided that mere accessibility on the Internet or publication outside England and Wales was not sufficient to constitute availability in the public domain. This is now an almost standard term.

In the aftermath of the ***Venables & Thompson*** injunction, the President found the *Manchester Evening News* in breach of the order because they had published information indicative of the whereabouts of the boys which was obtainable by searching government websites and publications available in libraries: see ***HM Attorney General -v- Greater Manchester Newspapers Ltd.*** (unreported, 4 December 2001). The President said that she had been somewhat troubled by the question whether the information published by the paper was in the public domain [27]. She concluded that [33]:

"... accessibility to the general public of Government statistical information is, in the present context, theoretical and therefore not generally accessible to the public. This information was not public knowledge."

● *The test for the grant of an injunction:*

The test applied by Lord Keith in ***AG -v- Guardian Newspapers Ltd. (No.2)*** **[1990] 1 AC 109, 260e** to the need for an injunction was whether *"all possible damage"* had been done. Lord Keith took the example of the ***Argyll*** case and said that:

"... if the Duke had secured the revelation of the marital secrets in an American newspaper, the Duchess could reasonably claim that publication of the same material in England would bring it to the attention of people who would otherwise be unlikely to learn of it and who were more closely interested in her activities than American readers."

In ***McKennitt***, Eady J applied these dicta, when he held [81]:

"... it does not necessarily follow that because personal information has been revealed impermissibly to one set of newspapers, or to readers within one jurisdiction, that there can be no further intrusion upon a claimant's privacy by further revelations. Fresh revelations to different groups of people can still cause distress and damage to an individual's emotional or mental well-being."

In ***WB -v- Bauer Publishing Ltd.*** **[2002] EMLR 145** Eady J was not persuaded that publication of the claimant's name on two occasions in *The Times* meant that his identity was conclusively in the public domain so as to excuse re-publication by the defendants' magazine. The Judge took account of the distinction drawn by Lords Keith and Goff respectively in ***AG -v- Guardian Newspapers Ltd. (No.2)*** **[1990] 1 AC 109** at **260e-h** and **287c-d** between government or state secrets and those relating to a person's private life. He went on [26]:

"It may be more difficult to establish that confidentiality has gone for all purposes in the context of personal information, by virtue of its having come to the attention of certain readers or categories of readers."

● *General accessibility is not the determinative test for public domain where personal information is involved:*

In ***Green Corns Ltd. -v- Claverley Group Ltd.*** **[2005] EMLR 748** Tugendhat J observed [78]:

"There will be cases where personal information about a person (usually a celebrity) has been so widely published that a restraint upon repetition will serve no purpose, and an injunction will be refused on that account. It may be less likely that that will be so when the subject is not a celebrity. But in any event, it is not possible in a case about personal information simply to apply Lord Goff's test of whether the information is generally accessible, and to conclude that if it is, then that is the end of the matter."

62. Tugendhat J gathered together numerous cases to illustrate what he was saying [79]-[80]. He then concluded that in the case before him, the information was not in the public domain *"to the extent, or in the sense, that republication could have no significant effect, or that the information is not eligible for protection at all."* [81]. Publication or republication still risked doing serious harm.

In the ***Green Corns*** case the newspaper defendant published the addresses of homes operated by the claimant for troubled children against which neighbours were campaigning. Tugendhat J commented at that [56]:

"There is nothing new about the recognition of the sensitivity of addresses. The risks associated with disclosure of personal addresses have long been recognised."

Tugendhat J had before him evidence that neighbours knew of the addresses of the properties and that details were available at the Land Registry [72]-[73]. Nevertheless he still granted an injunction, declining to hold that republication would have no further significant effect [81]. Amongst the cases cited by Tugendhat J were the ***Venables*** case and a decision of Lawrence Collins J in ***Mills -v- News Group Newspapers*** [2001] EMLR 957 [27] that there was jurisdiction to restrain the publication of an address as an unwarranted invasion of privacy – particularly where there was a threat to safety.

A similar approach was adopted in ***Douglas -v- Hello (No.3)*** the Court accepted as cogent the submission that OK! did not lose *"the protection of the law of confidentiality until [their authorised photographs] were so generally available to the public that they no longer retained any commercial value capable of exploitation."* [139]

A broadly similar approach was employed by Eady J in ***Beckham -v- Gibson.*** *"Just because the information is in the public domain, it is not necessarily beyond the realms of protection".* The rationale for this approach is to be found in the protection of human autonomy and personal dignity which is the crux of Article 8. Where commercial or governmental secrets are widely disclosed, further protection may be pointless. But each fresh publication of private information is likely to cause additional distress to the subject of the information. Indeed in many cases, the more it is repeated, the greater the injury is likely to become.

There may, however, be cases involving personal information, where *"the dam is effectively burst"* and *"the material is so widely accessible that an [injunction]... would make very little practical difference":* see ***Mosley -v- News Group Newspapers Ltd.*** [2008] EWHC 687 (QB) *per* Eady J [36]. In the ***Mosley*** case the evidence was that between 30 and 31 March 2008 the online version of the *News of the World* article was visited 435,000 times and the edited footage of the claimant in the brothel was viewed 1.42m times [7]. In these circumstances the Judge reluctantly reached the conclusion that [36]:

"... although this material is intrusive and demeaning, and despite the fact that there is no legitimate public interest in its further publication, the granting of an order against this Respondent at the present juncture would merely be a futile gesture."

V: At what stage is Article 8 engaged in relation to photographs taken without the consent of their subject ?

● A picture is worth at least a thousand words:

The significance of the covert photography of the claimant in ***Campbell*** was explained by

Baroness Hale [155]. It was not simply that the photographs added to the impact of what the words of the accompanying story conveyed, it also added to the information given in those words:

"In context, it also added to the potential harm, by making her think that she was being followed or betrayed, and deterring her from going back to the same place again."

For Lord Hope it was the covert photographs of the claimant which tipped the balance in her favour between her Article 8 rights and those of the newspaper under Article 10 [121]. Had the text stood alone, the journalist's margin of appreciation would have afforded the defendants the benefit of the doubt. However, he considered that:

"The reasonable person of ordinary sensibilities would.... regard publication of the covertly taken photographs, and the fact that they were linked with the text....., as adding greatly overall to the intrusion which the article as a whole made into her private life."

Lord Hoffmann (who, together with Lord Nicholls, dissented) acknowledged that *"the widespread publication of a photograph of someone.... in a situation of humiliation or severe embarrassment, even if taken in a public place, may be an infringement of the privacy of his personal information"* [75]. In this context he referred to the pre-HRA decision of ***Hellewell -v- Chief Constable of Derbyshire*** [1995] 1 WLR 804, 807g-h, where Laws J stated:

"If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would.... as surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted and proceeded to publish it. In such a case, the law would protect what reasonably might be called a right of privacy, although the name accorded to the cause of action would be breach of confidence."

A striking example of the court's willingness to take account of the particularly intrusive character of photographs was the decision of Ouseley J in ***Theakston -v- MGN Ltd.*** [2002] EMLR 398. The Judge refused Jamie Theakston an injunction preventing publication of a story recounting how he had visited a Mayfair brothel and engaged in sexual activities with three prostitutes (one, according to Theakston). Ouseley J clearly had doubts whether the information was confidential, since the brothel was not a private place, and the relationship, if it could be called a relationship at all, lasted no longer than was necessary for the sexual activities to take place:

"It is difficult to see why the protection of confidentiality should be imposed essentially for one party to a fleeting transaction for money when there is no reason to suppose that at the time the other party would have considered the relationship or the activity confidential for one moment."

However, the Judge took a different view of the photographs taken during the visit, regarding them as *"particularly intrusive into the claimant's own individual personality"* [78]:

"... even though the fact that the claimant went to the brothel and the details of what he did there were not to be restrained from publication, the publication of photographs taken there without his consent could still constitute an intrusion into his private and personal life and would do so in a peculiarly humiliating and damaging way."

Six years after the ***Theakston*** case there is abundant authority that the intrusive effect of a photograph can be greater than the information which it conveys. As it was put by the Court of Appeal in ***Douglas -v- Hello!(No.3)*** [105]:

"... insofar as a photograph does more than convey information and intrudes on privacy by enabling the viewer to focus on intimate personal detail, there will be a fresh intrusion of privacy when each additional viewer sees the photograph.....".

In ***D -v- L*** [2004] EMLR 1, Waller LJ equated covert tape recording with covert photography [24]. He also made the point that *"it is no answer to the claim to restrain the publication of an improperly taken photograph that the information portrayed by the photograph is already available in the public domain"* [23]. This difference was

emphasised by Lord Hoffmann in *Campbell* when he posited a situation in which there might be a public interest in disclosing sexual misbehaviour, but where the addition of salacious details (or intimate photographs) would be disproportionate to any legitimate purpose and likely to be intrusive and demeaning [60].

● *Photography in the street*

Baroness Hale's now familiar statement in *Campbell* that Naomi Campbell could have had no complaint if she had been photographed *"going about her business in a public street"* or *"when she pops out to the shops for a bottle of milk"* [154] hardly seemed open to question at the time it was made, but after *von Hannover* one cannot be so sure. (The Courts must, of course, follow the House rather than Strasbourg where the two conflict: see *Kay -v- Lambeth LBC* [2006] 2 AC 465). The reason given by Baroness Hale was that *"there is nothing essentially private about that information nor can it be expected to damage her private life."* The facts in *John -v- Associated Newspapers Ltd.* [2006] EMLR 772, where Sir Elton John had been photographed in baseball cap and a tracksuit at the gate to his house in a London street, were found by Eady J to be analogous to Baroness Hale's example. There was nothing about the circumstances or the information conveyed by the photograph of Sir Elton which would have made its publication intrusive or insensitive.

Of course, the fact that a photograph is taken in the street is not determinative of the issue whether there is a reasonable expectation of privacy. The location is not conclusive – all the circumstances need to be taken into account, including what the photographs show. Thus in *Peck -v- UK* (2003) 36 EHRR 41 the offending photographs were CCTV footage taken at night on Brentwood High Street of Mr Peck attempting suicide.

● *The position after the JK Rowling case:*

The recent judgment of the Court of Appeal in *Murray -v- Big Pictures (UK) Ltd.* [2008] EWCA Civ 446 shows how far the law has moved since *von Hannover* (at any rate, potentially, since there is still to be a trial of the facts). Back in 2001 in *Attard -v- MGN Ltd.* (unreported, 9 October 2001), Connell J doubted that Article 8 was engaged after a photograph was taken and published of the survivor of the Maltese conjoined twins in her push-chair in the street in Gozo. In *Hosking -v- Runting* [2005] 1 NZLR 1 the New Zealand Court of Appeal rejected an action for breach of confidence after photographs were taken of the 18-month-old twins of a television personality being pushed down the street by their mother. (Incidentally on the day these words were written, Saturday 10 May 2008, *The Times* published an unpixellated photograph of David Cameron taking his daughter Nancy to nursery school in a push-chair.)

In the *Murray* case, Patten J (who gave summary judgment for the Defendant picture-agency) thought the facts were indistinguishable from *Hosking -v- Runting.* But the Court of Appeal rejected the New Zealand court's two stage process of analysis in first, asking whether the facts gave rise to a reasonable expectation of privacy, and then considering whether publication of those facts would be considered highly offensive to an objective reasonable person. Sir Anthony Clarke MR (in line with Lord Nicholls' approach in *Campbell*) emphasised that [40]:

" ... it is only the first question that has to be asked in order to decide whether Article 8 is in principle engaged. If it is the second question may be relevant in carrying out the balancing exercise as between the rights under article 8 and the rights under article 10."

The Court of Appeal allowed the defendant's appeal and directed a trial of all the issues, adding the pious hope *"unless of course they can be settled"* [64]. We are therefore left to speculate whether the trial judge will find that

David (19-months-old when the photograph was taken) had a reasonable expectation of privacy *"in the sense that a reasonable person in his position would feel that the photograph should not be published"* [39]. But that is only the first step according to the Court of Appeal; it does not mean that David would have (as Patten J put it) a guarantee of privacy [58]. The balance then needs to be struck between the child's Article 8 rights and the publishers' rights to freedom of expression. However, this is unlikely to favour the publishers, if the ***von Hannover*** approach is employed of looking to see what contribution the photograph(s) make to *"a debate of general interest"*.

The Master of the Rolls treated it as being *"of some importance"* that the action was brought by David's parents, only on his behalf and not on their own [12]. The claim was confined to respect for his private life, and did not extend to the family life of his parents and other family members [13]. The Court of Appeal dissented from the Judge's view that it was artificial for the parents to bring the action in David's name, and thought that he had focussed too much upon the parents and not enough upon the child [16]. Whilst the child plainly has his own privacy rights, the emphasis attached to them by the Court of Appeal is striking, given that at his age he was likely to be oblivious to both the taking and the publication of the photograph. Yet the Judge was criticised for placing too much consideration on the taking of the photograph, and not enough upon its publication [17].

The Court of Appeal may well have been right to treat it as *"a reasonable inference... that [the Defendant] 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"* [17], but it is not immediately obvious how the presence or absence of consent is relevant to the issue of whether David had a reasonable expectation of privacy.

Equally, although one can see how in the light of ***von Hannover*** and given the assumed facts, the Court should have attached importance to the fact that *"this was not an isolated case of a newspaper taking one photograph out of the blue and its subsequent publication"* [18], a feeling emerges that the Court was concerned that action against the present defendant served *pour encourager les autres* for the future. Thus the Court concluded:

> *"In these circumstances the parents' perception that, unless this action succeeds, there is a real risk that* ***others*** [emphasis added] *will take and publish photographs of David is entirely understandable."*

It can hardly have been the court's intention to suggest that liability against A today might result from the court's assessment of how B and C may behave tomorrow. If the court is concerned about the future welfare of children, then it should consider whether to exercise the injunctive jurisdiction *contra mundum*, which was relied upon by Balcombe J in ***In re X (a Minor) (Wardship: Injunction)*** [1984] 1 WLR 1422 (the Mary Bell case), and considered in detail in ***In re Z (a minor): (Identification: Restrictions on Publication)*** [1997] Fam 1 (the Flora Keays case). In this context it needs to be borne in mind that where a final (as opposed to an interlocutory) *in personam* injunction is made against A, it is not contempt of court under the *Spycatcher* principle for B to commit the act from which A is restrained: see ***Jockey Club -v- Buffham*** [2003] QB 462 [23]. Thus a final injunction against Big Pictures would not bite on third parties.

Finally, the Master of the Rolls viewed the fact that David was a child as of greater significance than the Judge [45]. This would seem to indicate that it may be easier for a child to establish a reasonable expectation of privacy than an adult in equivalent circumstances. The Court not unreasonably concluded that *"the photograph would not have been taken or published if [David] had not been the son of JK Rowling"* [46]. But it also said:

"If a child of parents who are not in the public eye could reasonably expect not to have photographs of him published in the eye, so too should the child of a famous parent."

The Court's decision can perhaps best be viewed in policy terms in relation to the protection of growing children. But if the issue is to be resolved as a matter of policy, then there is an uneasy tension in the court's reasoning – between the facts of the present case and the universal principle. On the one hand, the Court states that *"the question whether there was a reasonable expectation of privacy is a question of fact*" [41]. But later it treats the issue as a virtually open and shut issue of *law* on the undisputed facts of the present case [57]:

"It seems to us that, subject to the facts of the particular case, the law should indeed protect children from intrusive media attention, at any rate to the extent of holding that a child has a reasonable expectation that he or she will not be targeted in order to obtain photographs in a public place for publication which the person who took or procured the taking of the photographs knew would be object to on behalf of the child. That is the context in which the photograph of David were taken."

Were the House of Lords to consider it right to grant permission for an interlocutory appeal, it would provide the opportunity to explore the extent to which the House's approach in ***Campbell*** was consistent with that of Strasbourg in ***von Hannover***. The ***Murray*** case raises in an acute form the important question of whether adults or children (or both) have a right not to be photographed in a public place without their consent, where the resulting photograph shows nothing humiliating or embarrassing and the circumstances in which the photograph was taken did not amount to harassment. Should the answer be that children have such rights, but not adults, then the question is why. The Court of Appeal have not provided a clear explanation.