

Privacy: A Tort by Any Other Name

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Private faces in public places

Are wiser and nicer

Than public faces in private places

—Dedication, in W. H. AUDEN, *THE ORATORS: AN ENGLISH STUDY* (1932)

The Claimant, for reasons best known to himself, enjoyed having his bottom shaved—apparently for its own sake rather than because of any supposed Nazi connotation. He explained to me that while this service was being performed he was (no doubt unwisely) “shaking with laughter.” I naturally could not check from the DVD, as it was not his *face* that was on display.¹

Albeit without reference (or apology) to W. H. Auden but in similar, frequently droll terms throughout his recent judgment, Mr. Justice Eady dismissed the *News of the World*'s defense to a claim by motor racing Formula One President Max Mosley following publication of articles and photographs that depicted him engaged in sadomasochistic sexual activities, described by the newspaper as a “Nazi orgy.”²

Mosley sued successfully for breach of confidence and/or unauthorized disclosure of personal information, said to infringe his rights of privacy as protected by Article 8 of the European Convention on Human Rights and Fundamental Freedoms (the Convention). The day after the High Court ordered the tabloid to pay £60,000 in damages plus costs (estimated at over half a million pounds per party), the claimant issued a new claim of defamation for the injury to his reputation arising from the newspaper's false imputations of Nazism, dishonesty, and hypocrisy.

When Libel Lacks the Lash

For decades, English libel law was the cause célèbre of those criticized in the media, but this favorite cause of action now has a rival, if not a substitute. As

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the law pertaining to Article 8 develops apace, claimants wishing to keep out of the public domain embarrassing and defamatory, albeit true, information about themselves have resorted to this alternative cause of action. Why risk losing a defamation suit before a jury (where truth is an absolute defense to an otherwise actionable publication) and render oneself subject to the vagaries of the jury's moral code when claimants can now add to their weaponry a civil suit relating to breach of privacy?

Indeed, under Mr. Justice Eady's *Max Mosley v. News Group Newspapers Ltd.* decision, Mosley has the benefit already of a determination of the facts, thus removing from the jury an opportunity to consider or take into account those tricky truths that might have encouraged any “right-thinking member of the public” to recoil with distaste or disapproval and thus deny Mosley a remedy for his allegedly tarnished reputation.

As the famous 1970s comedy *No Sex Please, We're British*³ commentates, the level of prurience and sexual proclivity practiced in private by the British populace, while feasting on a diet of shameless titillation dished up by its tabloid media, is matched only by its propensity to stereotype culturally and view all nationalities east of Dover as promiscuous, permissive, and pretentious.

Britain's laws, though, are far more worthy of comment. Any introduction of European principles or philosophies promoting the protection of private or personal information was resisted assiduously by media interests for decades because they regard Convention-based moral, privacy, or reputational rights as prohibitionist and inimical to England's proud imperial tradition of free trade, if not free speech. Either that or no one told the Brits that the war is over and they'd joined the European Union.

How ironic then that the *Mosley* decision, which identifies so many elements of national and cultural stereotyping, should confirm how far Britain has come down the road to Strasbourg since the unhappy case of actor Gordon Kaye, best known for his starring role

in the British TV comedy *'Allo, 'Allo* as the hapless René Artois. The character, among other things, was embroiled in the Nazi looting of valuable “art” (a cuckoo clock and a painting, *Fallen Madonna with the Big Boobies*) while the Germans occupied his village in France during World War II.⁴

In March 1990, Gordon Kaye sought relief for the *Sunday Sport*'s intrusion into his privacy by the publication of photographs and an alleged interview.⁵ The tabloid newspaper (described by the Court of Appeal with an almost audible sniff of disdain as “renowned for far-fetched scoops and containing advertisements for pornographic material”) gained access to his private hospital room, ignoring the notices prohibiting such entry. The newspaper purported to interview Kaye at length—although he was lying semiconscious in a hospital bed at the time, recovering from brain surgery following an accident—and took photographs using flash photography before being ejected by security staff. Contorting itself to afford Kaye a remedy and injunctive relief (“malicious falsehood” did the trick), the Court of Appeal was, however, constrained to rule that there was at that time no actionable right of privacy in English law.

Lord Justice Bingham (who later joined the House of Lords Judicial Committee as Lord Bingham of Cornhill) recorded as follows:

Any reasonable and fair-minded person hearing the facts [of this case] would in my judgment conclude that these defendants had wronged the plaintiff. I am therefore pleased to be persuaded that the plaintiff is able to establish, with sufficient strength to justify an interlocutory order, a cause of action against the defendants in malicious falsehood. Had he failed to establish any cause of action, we should of course have been powerless to act, however great our sympathy for the plaintiff and however strong our distaste for the defendants' conduct.

The case nonetheless highlights, yet again, the failure of both the Common Law of England and Statute

to protect in any effective way the personal privacy of individual citizens. This has been the subject of much comment over the years, including by Professor Markesinis (the German Law of Torts, Second Edition 1990, page 316) where he writes:

“English Law, on the whole, compares unfavourably with German Law. True, many aspects of the human personality and privacy are protected by a multitude of existing torts but this means fitting the facts of each case in the pigeon-hole of an existing tort and this process may not only involve strained constructions; often it may also leave a deserving plaintiff without a remedy.”

The defendants’ conduct towards the plaintiff here was a “monstrous invasion of his privacy.” . . . If ever a person has a right to be let alone by strangers with no public interest to pursue, it must surely be when he lies in a hospital recovering from brain surgery and in no more than partial command of his faculties. It is this invasion of his privacy which underlies the plaintiff’s complaint. Yet it alone, however gross, does not entitle him to relief in English Law.

. . . We cannot give the plaintiff the breadth of protection which I would, for my part, wish. The problems of defining and limiting a tort of privacy are formidable, but the present case strengthens my hope that the review now in progress may prove fruitful.

Three months later, in June 1990, that hoped-for review by the Calcutt Committee recommended to Parliament a formulation of a statutory tort of privacy, clearly defined yet flexible enough to deal with the wide range of unforeseeable circumstances that might arise.⁶ Yet no privacy statute was passed. With the impetus of a combination of Article 8 of the Convention, decisions of the European Court of Human Rights (ECtHR) in Strasbourg, and the Human Rights Act 1998, it was left to the judges to bring about changes in the law.⁷

The Laws, They Are A-Changin’

Article 8 of the Convention guarantees the right to respect for privacy, with Article 8(1) providing that *everyone*, including private citizens and public figures, paupers and princes, has the right to respect for private and family life, home, and correspondence. Article 8(2)

sets out the limited circumstances in which that right can be restricted. Article 8 imposes not only a negative but also a positive obligation on the state to respect and, therefore, to promote the interests of private and family life.⁸

In 2003, the Strasbourg court found that the United Kingdom had violated Article 8 by failing to offer any remedy to Geoffrey Peck.⁹ Peck had been filmed by local (government) authority CCTV cameras as he walked, in some distress, through the streets of Brentwood. He had attempted to commit suicide by cutting his wrists with a kitchen knife (in the street, but not on camera). CCTV images were subsequently published in the media, but his legal claims were rejected out of hand.

Yet it was not this decision against the UK but an ECtHR ruling against Germany on an application brought by Caroline von Hannover, Princess of Monaco,¹⁰ that continues to have the biggest impact on the UK’s domestic law. Germany had developed a sophisticated and nuanced privacy law, which attempted to strike an appropriate balance between the competing rights to privacy and freedom of expression. However, the ECtHR held that German law was insufficient and noncompliant with Convention standards in failing to afford Princess Caroline a remedy for invasion of her privacy when photographs were published of her dining at a street café with members of her family.¹¹

The Strasbourg court rejected the argument that there should be no restriction on the publication of photographs taken in a public place, holding that the right to privacy existed even in public places. As it stated, “There is . . . a zone of interaction of a person with others, even in a public context, which may fall within the scope of ‘private life.’”¹² In addition, it held that there was “no doubt” that “the publication by various German magazines of photos of the applicant in her daily life either on her own or with other people falls within the scope of her private life.”¹³ The photographs had been taken of the princess in public places, but they nonetheless related solely to her private life.¹⁴

Even though Princess Caroline was a public figure who had been the subject of years of media coverage, she had a right to privacy. There was no reason to impose any restriction on her right to privacy under Article 8(2) because there

was no public interest in the publication of the photographs and articles, which were devoid of any contribution to political or public debate.¹⁵ The ECtHR took a narrow and high-minded view of what constituted the public interest in this context:

. . . The Court considers 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. While in the former case the press exercises its vital role of “watch-dog” in a democracy by contributing to “impart[ing] information and ideas on matters of public interest”, it does not do so in the latter case.¹⁶

The *von Hannover v. Germany* decision also hints that it may be necessary to go even further to protect an individual’s rights under Article 8(1), at least as far as photographs or other images are concerned. In its decision, the ECtHR referred expressly to the positive obligation of the state to comply with its positive obligation under the Convention “to protect private life and the right to control the use of one’s image.”¹⁷ The development of “image rights” is interesting and important but still at the embryonic stage. The wider question of the protection of privacy is, however, coming of age in Britain.¹⁸

At Last, the Beginning . . .

Under the Human Rights Act 1998 (HRA) (in force in October 2000), the English court, as a “public authority,” has an obligation to act “compatibly” with certain Convention rights, including Article 8 (HRA § 6). It is also required to take into account decisions of the ECtHR (HRA § 2), including *von Hannover*. The transformation of domestic law in relation to the protection of “private information”¹⁹ has come about by treating the rights protected by Article 8 as being “absorbed” into the cause of action for breach of confidence to create what is, in effect, a new tort of “misuse of private information.”²⁰ The Court of Appeal has made clear that Articles 8 and 10 are “the very content of the domestic tort that the English court has to enforce” and that

where the complaint is of the wrongful publication of private information, the court has to decide two things.

First, is the information private in the sense that it is in principle protected by article 8? If “no,” that is the end of the case. If “yes,” the second question arises: in all the circumstances, must the interest of the owner of the private information yield to the right of freedom of expression conferred on the publisher by article 10?²¹

The landmark domestic decision *Naomi Campbell v. MGN Ltd.*²² was decided after the HRA came into force but before the ECtHR decided *von Hannover*. The House of Lords recognized that supermodel Naomi Campbell’s claim against a tabloid newspaper, which had published an article and photographs about her attendance at Narcotics Anonymous meetings, did not fit easily into the traditional analysis of the cause of action for breach of confidence, so it devised a new cause of action for “misuse of private information” or the “unjustified publication of private information.” The essence of that claim was the publication, without consent, of information about which a person had a “reasonable expectation of privacy.”²³ The court ruled that the newspaper was entitled to reveal the fact of Campbell’s drug addiction given her previous false public denials of drug use. The article, however, included details relating to her treatment, as well as a photograph of Campbell, taken in the street, emerging with others from a Narcotics Anonymous meeting. Campbell won on liability and was awarded damages of £3,500 (a tiny fraction of the legal costs, which amounted to over £1 million on the claimant’s side alone) and an injunction.

The case revealed striking differences in approach among the judges and demonstrated that the decision could have gone either way. A total of nine judges considered the case, five of whom would have found for the newspaper. The trial judge was in Campbell’s favor, the Court of Appeal was 3–0 the other way, and the decisive and final decision for Campbell was by 3–2 majority in the House of Lords. The critical factor in that decision turned out to be the publication of the photograph taken in the street, an issue about which the judges took very different views:

- Lord Nicholls thought that the photograph added nothing of an

essentially private nature and noted that Campbell had expressly made no complaint about the taking of the photograph.²⁴

- Lord Hoffmann considered that individuals could not object to being photographed in the street but that the publication of such a photograph showing the individual in a state of severe embarrassment or distress might infringe privacy.²⁵
- Lord Hope considered that the real issue was whether publicizing the content of photographs taken in the street would be “offensive” and whether the public’s right to be informed justified dissemination of a photograph taken without authorization. The photographs of Campbell were not pictures of a street scene in which she happened to appear but were “taken deliberately, in secret and with a view to their publication in conjunction with the article and, in the context, were a gross interference with her privacy.”²⁶
- Baroness Hale noted that the mere fact that a photograph was taken covertly did not make the information contained in it confidential; “the activity photographed must be private.” A photograph of Campbell in the street, going about her daily business, such as making a trip to the store for a bottle of milk, would not have infringed her privacy; but in the context of this article, a connection to her Narcotics Anonymous meeting meant that her privacy was invaded.²⁷
- Lord Carswell’s decision to agree with Lord Hope and Baroness Hale resulted in the decision going in Campbell’s favor.²⁸

The outcome of this narrow and finely balanced difference of judicial opinion about the editorial decision to publish the text and photographs was that the newspaper received an injunction and the massive bill for both parties’ legal fees.

Get the Picture? Yes, but Can We See It?

Precisely what the legal standards are on the publication of photographs of individuals taken in the street remains a vexed question. After *Naomi Campbell*, Sir Elton John failed to prevent the *Daily Mail* from publishing a photograph

taken as he walked from his car into his London home.²⁹ In that case, the judge held that the photograph was equivalent to one showing him “popping to the shops for some milk.” But this may be a transitional position, overly favorable to the media. *Naomi Campbell* was decided before the Strasbourg decision in *von Hannover*, which clearly envisages greater privacy rights relating to photographs of individuals taken in public places than had been previously afforded by English law.³⁰ A later Court of Appeal observed that a decision in favor of Campbell would have been more readily reached in the light of *von Hannover*:

Very extensive argument and discussion was seen as required before Ms Campbell was able to enjoin the publication of photographs of her in the public street, and then only because of their connexion with her medical condition. Had the House had the benefit of *Von Hannover* a shorter course might have been taken.³¹

There is no doubt that photographs have a special place in the development of privacy rights. Photographs and other recordings have long been regarded as particularly intrusive. An application for an injunction in a case involving the exposure of sexual conduct in a tabloid newspaper (a children’s television presenter was photographed during a drunken visit to a Mayfair brothel) resulted in the court banning the publication of the photographs but permitting the publication of the story of what had taken place.³² Photographs may also be “special” in the sense that prior publication may be no defense to a privacy claim: each subsequent publication of a photograph showing subjects in their private lives, e.g., “a film star, . . . photographed with the aid of a telephoto lens, lying naked by her swimming pool,” may be a “fresh intrusion” into privacy.³³ However, as the judge’s decision refusing to grant Mosley an interim injunction to prevent the publication of “intrusive and demeaning” material demonstrates, once material has received widespread publicity, it may have entered the public domain to such an extent that there is nothing left for the law to protect.³⁴

The latest Court of Appeal decision on privacy and photographs is *Murray v. Big Pictures (UK) Ltd.*³⁵ The picture agency, Big Pictures (UK) Ltd. (BPL), had taken with a long-lens camera and

sold for publication a color photograph of nineteen-month-old David, son of celebrated *Harry Potter* author J. K. Rowling, being pushed in a buggy down an Edinburgh street by his parents. The photograph showed “David’s face in profile, the clothes he was wearing, his size, the style and colour of his hair and the colour of his skin.” It also showed his father pushing the buggy, and his mother walking alongside it. The photograph was taken without their knowledge or consent; in fact, the parents made clear in correspondence, before publication, that they positively objected to the publication of any photographs of David.³⁶

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David’s parents started proceedings in the child’s name, alleging infringement of his right to privacy under Article 8 of the ECtHR. They also made a claim under the Data Protection Act 1998, a statute of such convoluted drafting that it is the source of pain to practitioners and courts alike. BPL applied to strike out the claim. The judge did so, entering judgment in BPL’s favor. In his view, even taking all the facts alleged in the claimant’s favor, BPL’s case was plainly correct and bound to succeed. But the Court of Appeal took a different view, finding the claim “arguable” and allowing the appeal. Although the judge had given permission to appeal on the ground that the case raised an important point about the relationship between the decisions of the House of Lords in *Naomi Campbell* and the ECtHR in *von Hannover*, a point on which he was 100 percent correct, the Court of Appeal decided that because this was an appeal in a striking-out case (not after trial), it was not necessary to analyze the decision in *von Hannover* in any detail. It did, however, say that its views, as expressed in the judgment, were consistent with *von Hannover*.³⁷

This was a lost opportunity to clarify the law on a point of practical everyday importance to a wide range of media. In

the absence of a definitive view from the court about the limits of privacy rights in connection with photographs in public places, the law remains up in the air, leaving both claimants and defendants uncertain of their rights. That said, the *Murray* case, which involved photographs of a child of celebrity parents with no redeeming public interest element, hardly presents the most promising set of facts to produce a decision in favor of media publication and freedom of expression. This is particularly true if, as assumed at the strike-out stage, this was not an isolated case of a newspaper taking one photograph and publishing it. Photographers had been outside the child’s home in the period before the publication of the photographs, and this was no chance event. Arguably, at the least, this is very different from a famous person being photographed while on an errand.

Privacy: Not Just Pictures

In the first case to go to trial after the recognition of a right to prevent the misuse of private information, Loreena McKennitt, the Canadian folk singer, sued over a book by a former friend and colleague that divulged detailed private information about, among other things, her home, her private life, and her grief at the death of her fiancé. Mr. Justice Eady found for McKennitt, granting an injunction to prevent further publication of the book and awarding damages. The Court of Appeal upheld the decision.³⁸

The court rejected (unsurprisingly, on the facts) all of the author’s arguments to justify publication of private material. The events recounted in the book were not “shared experiences” entitling the writer to tell her own story; rather, the story being told belonged, in reality, only to McKennitt,³⁹ and any Article 10 rights had to yield to the claimant’s Article 8 rights.⁴⁰ The author’s attempt to establish that McKennitt, by virtue of revealing information within a zone of her private life, had a greatly reduced expectation of privacy with respect to other information in that same zone also failed. This argument was particularly unpromising because McKennitt had given very limited disclosure about the deaths of her fiancé, his brother, and a friend in a tragic accident only as part of an effort to raise money for a charity to be set up in their memory. Unsurprisingly, especially when

considering a book full of information garnered when McKennitt confided in someone she thought was a close friend, the court accepted that she was entitled to decide what private information to disclose.⁴¹ The public interest arguments were dismissed without much trouble.⁴²

Significantly, the court recognized that a claimant’s rights in a privacy case are not limited to true private facts; these rights can also cover “false private information.”⁴³ A defendant cannot deprive the claimant of a privacy remedy by showing that the information in question was untrue. The old view that the publication of false information could only be the subject of a defamation claim (not a breach of confidence or privacy claim) was overthrown. An abuse of process argument might be raised only if the “nub” of the case was a complaint about false allegations and if it could be shown that a claim had been brought in confidence, rather than libel, in order to avoid the rules of the tort of defamation (in particular, the rule in *Bonnard v. Perryman*, which effectively prevents the grant of an interim injunction to prevent publication of a defamatory story that the publisher will defend as true).⁴⁴

The next misuse of private information case brought before the Court of Appeal was the claim by the Prince of Wales against the tabloid *Mail On Sunday*⁴⁵ after it published extracts from his private travel journals. Prince Charles had distributed the journals on a limited and confidential basis only to his friends. However, they were leaked to the newspaper by a former employee, who was bound by a contractual duty of confidence. The Prince of Wales received summary judgment in his favor (again, an indication that the relevant law is now clear), and this time it was upheld by the Court of Appeal.

Although the court treated this as a traditional breach of confidence case, it accepted that Prince Charles had rights of privacy and confidence with respect to his travel journals.⁴⁶ The court summarily rejected the newspaper’s attempts to argue that publication was in the public interest on a number of different grounds.⁴⁷ Considering the correct approach to the public interest, the court emphasized that it was not enough that the information was a “matter of public interest”; rather, where information has been received in confidence, the question is “whether, in all the

circumstances, it is in the public interest that the duty of confidence should be breached.”⁴⁸ The fact that there is a contractual obligation of confidence may be of significance; however, the extent to which a contract would add weight to a duty of confidence arising out of a “confidential relationship” would depend on the facts of the case.⁴⁹

Private Rights Versus Public Interest

In a misuse of private information case, the court will embark on a two-stage process of analysis:

1. It must identify whether there is a reasonable expectation of privacy such as to engage Article 8 at all.⁵⁰
2. If yes, the court must balance the competing Convention rights under Articles 8 and 10, applying the test of proportionality to each.

In performing this parallel analysis, neither Article 8 nor Article 10 “has as such 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.”⁵¹

This balancing exercise involves wider public interest issues. It includes an evaluation of the perceived merits of the public interest arguments based specifically on the facts and circumstances of the case (rather than general arguments of principle). In *Naomi Campbell*, the claimant conceded a public interest in exposing the truth and putting the record straight.⁵² More recently, in *X & Y v. Persons Unknown*,⁵³ Mr. Justice Eady accepted that the role of the press includes “putting the record straight” when a person has previously presented a false public picture. Toulson and Phipps make the following observations regarding hypocrisy:

If a person has not set out to present a false picture, it is not part of the watchdog role of the press to seek to obtain information about their private life and then put it to them in order to place them in the dilemma of admitting it (thereby giving voluntary disclosure), refusing to comment (thereby seeming to be evasive) or denying it (thereby risking publication in order to rebut denial).⁵⁴

The court will closely scrutinize a justification for publication of personal information advanced on the grounds not that the person concerned has made false factual statements but that he has

been guilty of hypocrisy in advocating a set of standards and behaving differently. In media cases, the court is likely to consider what the public is entitled or even ought to know.

In *Mosley*, Mr. Justice Eady had “little difficulty” in concluding that there was no public interest in revealing video footage of the claimant, although he indicated that had the facts been different, there might have been a valid public interest argument.⁵⁵

... if it really were the case, as the newspaper alleged, that the Claimant had for entertainment and sexual gratification been “mocking the humiliating way the Jews were treated,” or “parodying Holocaust horrors,” there could be a public interest in that being revealed at least to those in the FIA to whom he is accountable. He has to deal with many people of all races and religions, and has spoken out against racism in the sport. If he really were behaving in the way I have just described, that would, for many people, call seriously into question his suitability for his FIA role. It would be information which people arguably should have the opportunity to know and evaluate. . . .⁵⁶

Unfortunately for *News of the World*, the evidence showed no such mocking behavior—only private sexual practices.

Prior Restraint

Applications for injunctions to prevent the publication of private information are regular occurrences. The application is often made in private, and any proceedings issued are listed anonymously with the claimant identified only as AAA or some similarly inventive initial. Some comfort to the media derives from the fact that claimants at the interim stage must establish that they are “likely” to succeed at trial.⁵⁷ The court must take into account (among other factors) the importance of freedom of expression as well as the extent to which publication would be in the public interest.⁵⁸

The perceived merits of the case, even at the early stage, are of crucial importance. In *CC v. AB*, Mr. Justice Eady granted an injunction to prevent an aggrieved husband from disclosing through the mass media details of the adulterous relationship between his wife and her married lover. There was, he held, a legitimate “expectation of privacy” in an adulterous relationship.

Having applied an “intense focus” to the facts of the case and competing rights (Articles 8 and 10) and applying the proportionality test, the judge held that it was necessary to impose an injunction to prevent disclosure to the media but that the defendant was entitled to discuss these matters with relatives, friends, doctors, or counselors.⁵⁹

In yet another case involving celebrities but not the public interest, the court granted an injunction to prevent disclosure of confidential details of the state of their marriage.⁶⁰ Celebrities in the public eye have a reasonable expectation of privacy even if they had been the subject of previous articles in the public domain.⁶¹ The court found that there is a real distinction between people who

Courts are likely to consider that the public is entitled or even ought to know.

are “publicity seekers” and people who, like the first claimant, are contractually bound to give interviews because they promote products or services.⁶² A media organization that wishes to argue that a celebrity has waived his or her privacy rights by virtue of being the subject of publicity will require strong evidence if it is to have any prospects of success.

The final and best example of the modern approach to the grant of an interim injunction in a privacy case comes from *Browne v. Associated Newspapers Ltd.*⁶³ The case was heard in private (both the original application and on appeal) with the claimant identified as “Z” (on the grounds that anonymity was required in the interests of justice). The identity of the claimant was revealed to be Lord Browne, chief executive of BP, with a spectacular burst of publicity after the delivery of the Court of Appeal decision. The fact that he had lied to the court in a witness statement made to support his injunction claim resulted in his public shame and resignation from his post. Had the story been published, he could scarcely have suffered more.

The claim arose after Lord Browne’s former partner, a younger and less financially secure man, sold a story to the *Mail on Sunday*, including details of private conversations involving leading political figures, the fact of the prior relationship

between them, as well as misuse of company property (a laptop computer). An injunction was initially granted with respect to some of the information, but a higher court found a sufficient degree of public interest in the story to refuse the injunction. Because the story would not have made sense without revealing the fact of Lord Browne's otherwise private former relationship, that fact, too, was permitted to be published.⁶⁴

Finally, How Much Is a Privacy Claim Worth?

The £60,000 awarded to Max Mosley is the first really substantial award of damages by a court to a claimant for a privacy claim. Previous awards by the court had been in the low thousands of pounds, although settlements in media cases had been much higher, particularly in cases of celebrity photographs. For example, in May 2008, it was reported that Elizabeth Hurley, her husband Arun Nayar, and Hugh Grant received an apology and a total of £58,000 in damages from photographic agencies BPL and Elliot Press SARL for photographs covertly taken of them holidaying in the Maldives in a private resort. The photographs had appeared in two Sunday newspapers (against which separate claims had been brought) and been offered to other publications.⁶⁵ In due course, a tariff for privacy damages may come to approximate that of general damages for libel (presently viewed as having a ceiling of around £215,000).

Traps for Young Players: Don't Try This at Home

Those publishing or broadcasting in the UK may also face complaints not to the court but instead to institutional or government regulators for breach of applicable codes, each of which is formulated to regulate the media's conduct while balancing the competing Convention rights under Article 8 and Article 10.

The Editors' Code of Practice sets out the standards to be applied in the newspaper and periodical industry. It is enforced by the Press Complaints Commission (PCC), the newspaper and periodical industry's self-regulator, which has a majority of lay members. Adjudication by PCC is without prejudice to a complainant's right to litigate.⁶⁶

The regulator for the broadcasting industry, Office of Communications (Ofcom),⁶⁷ supervises licensing conditions

and oversees broadcasters' compliance with various sections of the broadcasting code relating to fairness and privacy. These latter sections differ from other sections of Ofcom's code in that they regulate how broadcasters treat individuals and organizations directly affected by programs, rather than what the general public sees or hears as viewers or listeners. Ofcom's public duty is to ensure that broadcasters avoid any unwarranted infringement of privacy in connection with obtaining material included in programs.

It is difficult to discern bright lines of principled analysis in rulings of either PCC or Ofcom, although a library of precedents is rapidly developing in each office. PCC has manifested a greater lag in adopting or acknowledging common law developments, apparently holding out against the incoming tide of greater protection for privacy rights; on the other hand, the outcome of complaints to Ofcom suggests a consistent requirement for a real public interest justification for any incursion into privacy rights, no matter how slight. It remains to be seen what effect recent case law will have on decision makers' application and interpretation of the respective codes. In the meantime, each decision turns on its specific facts, apparently depending on which beach or street the complainant happened to be photographed or filmed and their level of celebrity or notoriety.

So, as English law moves down the road to Strasbourg and modifies, if not abandons, its mercantilist traditions in favor of respect for the private and personal realm, certain media interests will need to reconsider their day jobs. If neither public faces in private places nor private faces in public places are fair game, then perhaps the very beach that enchanted so many a long lens may provide a more viable career option. Ah, what further encouragement will the Brits need to take off their clothes at the first glimmer of sunlight? 

Endnotes

1. *Max Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 1777 (Q.B.).

2. *Id.*

3. *No Sex Please, We're British* was a farce written by Alistair Foot and Anthony Marriott, first staged in London's West End, involving a misdirected mail order to Scandinavia that deluged a happily married couple living in an uptight community with a flood of unwanted

pornography. It also alluded to Britain's second favorite pastime of moaning about one's mother-in-law, which was practically the only misconduct of which Mosley did not stand accused by *News of the World*.

4. Smut and discrimination abound, making the U.S. series *Hogan's Heroes* look positively politically correct. Mosley could be forgiven his lack of confidence in a jury's ability to discern the differences between Nazi role play and his SM games given that the entire nation had tuned in for a decade to view similar antics being performed by Herr Flick, the local Gestapo officer, and his "flexible" subordinate Private Helga Geerhart, attired in leather lingerie with attendant whip and cane while prancing about and shouting in fake German accents, language that even Mr. Justice Eady was prepared to concede (*Id.* para. 59) as having, to many English ears at least, a "harsh and guttural" sound, thus better disposing it to use in games of domination and punishment ("Apparently Russian might have also been suitable, but unfortunately none of the participants spoke Russian."). The sexual allure of the Russian language was famously celebrated in the British hit film *A Fish Called Wanda*.

5. *Kaye v. Robertson & Anor*, [1991] F.S.R. 62 (A.C.).

6. CALCUTT COMM., REPORT OF THE COMMITTEE ON PRIVACY AND RELATED MATTERS, 1990, Cm. 1102. As Mr. Justice Eady noted in his judgment in the *Browne v. Associated Newspapers Ltd.* case, [2007] EMLR 515, it was "ironic" that the committee had been warned by publisher Robert Maxwell, some eighteen months before his downfall, that "a law of privacy would lead to many a rogue going undetected."

7. The first-instance judge responsible for many of the decisions in this developing area of law is the Honorable Justice Eady, who, while in practice at the bar, had been a member of the Calcutt Committee. See *supra* note 6 and accompanying text.

8. *X & Y v. Netherlands*, (1985) 8 E.H.R.R. 235; *McKennit v. Ash*, [2008] Q.B. 73, [9] (A.C.).

9. *Peck v. UK*, [2003] EMLR 15. The ECtHR also found the UK to have violated Article 8 in *Wainwright v. UK*, (2007) 44 E.H.R.R. 40, after the House of Lords held, once again, that there was no right to privacy in English law; the case involved searches of visitors to prison. See *Wainwright v. Home Office*, [2004] 2 A.C. 406, [28]-[35] (H.L.)

10. *von Hannover v. Germany*, (2006) 43 E.H.R.R. 7.

11. *Id.*

12. *Id.* at [50].

13. *Id.* at [53].
14. *Id.* at [76].
15. *Id.* at [63]-[64].
16. *Id.* at [63].
17. *Id.* at [72].
18. The ECtHR has followed the *von Hannover* decision in a series of cases, including *Sciacca v. Italy*, (2006) 43 E.H.R.R. 20 (the release to the media by the prosecutor's office of an identity photograph violated Article 8). All decisions are available on www.echr.coe.int.
19. The Court of Appeal in *Douglas v. Hello! (No.3)*, [2006] Q.B. 125, [83], asked, "What is the nature of 'private' information?" and then gave its own answer, "It seems to us 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, or the form in which it is kept, may suffice to make it plain that the information satisfies these criteria." Although that case concerned the unauthorized publication of wedding photographs of Hollywood A-listers Michael Douglas and Catherine Zeta-Jones, the claim was not brought on the basis of any privacy rights; rather, because the right to publish the photographs had been sold to a magazine for a very large sum, the information was treated as commercially confidential information. This may explain why *von Hannover* was not considered on the appeal to the House of Lords, [2008] A.C. 1 (H.L.).
20. See *Naomi Campbell v. MGN Ltd.*, [2004] 2 A.C. 457 (H.L.); *Douglas (No. 3)*, [2006] Q.B. 125, [53].
21. *McKennitt v. Ash*, [2008] Q.B. 73, [11] (A.C.).
22. [2004] 2 A.C. 457.
23. *Id.* at [21], [51], [134]; see *McKennitt*, [2008] Q.B. at [11].
24. *Id.* at [30]-[31].
25. *Id.* at [74]-[75].
26. *Id.* at [122]-[124].
27. *Id.* at [154]-[155].
28. *Id.*
29. *Elton John v. Associated Newspapers*, [2006] EMLR 772.
30. New Zealand has taken a robust approach to street photography. *Hosking v. Runting*, [2004] N.Z.C.A. 34; see *Andrews v. Television N.Z.*, CIV 2004-404-3536 (N.Z.H.C. Dec. 15, 2006) (Allan, J.). Compare *Aubry v. Éditions Vice-Versa Inc.*, [1998] 1 S.C.R. 591 (the high degree of protection for the individual in Canada).
31. *McKennitt v. Ash*, [2008] Q.B. 73, [39] (A.C.).
32. *Theakston v. MGN*, [2002] EMLR 22.
33. *Douglas v. Hello! (No. 3)*, [2006] Q.B. 125, [105] (A.C.).
34. *Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 687 (Q.B.).
35. [2008] EMLR 12. In October 2008, the House of Lords refused to give Big Pictures (UK) Limited permission to pursue an appeal from that Court of Appeal decision.
36. *Id.*
37. *Id.* at [59].
38. *McKennitt v. Ash*, [2008] Q.B. 73 (A.C.). *McKennitt* was awarded "modest" damages of £5,000.
39. *Id.* at [28]-[32].
40. *Id.* at [50]-[52].
41. *Id.* at [53]-[55].
42. The court was skeptical of the argument that public figures were "role models" warranting a general interest in their conduct; it made clear that insofar as there is a conflict between the approaches in *von Hannover* and in *A v. B Plc*, [2003] Q.B. 195 (where the court refused to grant Gary Flitcroft an injunction to prevent publication of stories about his private life on the grounds that as a professional footballer, he was a role model), it is *von Hannover* that represents the correct approach to the balance between Articles 8 and 10. *Id.* at [56]-[66].
43. *McKennitt*, [2008] Q.B. at [78]-[80].
44. That rule may require further consideration where the defamation consists of purely private facts (with no public interest issues). See *Greene v. Associated Newspapers Ltd.*, [2005] Q.B. 972 (A.C.).
45. *HRH Prince of Wales v. Associated Newspapers Ltd.*, [2008] Ch. 57.
46. *Id.* at [24]-[28], [33]-[46].
47. *Id.* at [72], [74].
48. *Id.* at [67]-[69].
49. *Id.*
50. A person can have a reasonable expectation of privacy in relation to information that is purported to be private but is, in fact, invented. See *McKennitt v. Ash*, [2008] Q.B. 73, [80], [86] (A.C.); *P v. Quigley*, [2008] EWHC 1051 (Q.B.) (summary judgment for infringement of privacy with respect to the threatened publication of a novella in which plaintiffs would appear, thinly disguised, as partaking in various unsavory and fictitious sexual activities). Whether there is a reasonable expectation of privacy in any case depends upon an assessment of all the facts and circumstances.
51. *In re S (A Child)*, [2005] 1 A.C. 593, [17] (H.L.). In appropriate circumstances, this includes consideration of the Article 10 rights of anyone, party or not, who would be restrained from publishing the specified category of information. See *X & Y v. Persons Unknown*, [2007] 1 F.L.R. 1567, [6], [22].
52. See *Campbell v. MGN*, [2004] 2 A.C. 457, [24], [58], [151].
53. [2007] 1 F.L.R. 1567, [42]-[49].
54. ROGER TOULSON & CHARLES PHIPPS, CONFIDENTIALITY [7-068], [7-069] (2d ed. 2006).
55. [2008] EWHC 1777 (Q.B.).
56. *Id.* at [122].
57. Human Rights Act § 12(3) (1998). In *Cream Holdings v. Bannerjee*, [2005] 1 A.C. 253, the House of Lords considered what *likely* meant in this context, concluding that it was "flexible" in its meaning.
58. Human Rights Act § 12(4).
59. [2007] 2 F.L.R. 301, [36]-[37]. In assessing the balance, the rights of the vulnerable wife (and children) contrasted markedly with defendant's unpleasant and insulting behavior, including his threat to "put [his wife] in the shit no matter wat [sic]!" and his desire to have revenge upon the adulterers, as well as make a great deal of money by selling the story to the press.
60. *X v. Y*, [2007] 1 F.L.R. 1567.
61. *Id.* at [22]-[39], [42]-[43], [46].
62. *Id.* at [28]-[29]. The case is of some interest on procedural grounds, i.e., the availability of an injunction against "persons unknown" and the information that should be given to the media.
63. [2008] Q.B. 103.
64. *Id.*
65. See www.guardian.co.uk/media/2008/may/15/privacy.pressandpublishing.
66. See www.pcc.org.uk,
67. See www.ofcom.org.uk.