1.6 Chapter 1

Confidentiality and Privacy

Chapter Contents

1. **Confidentiality and Privacy**
	1. Overview
	2. Confidentiality: legal conventions and common law remedies
	3. Privacy: developments since the Human Rights Act 1998
	4. The public interest test and the read carpet rule
	5. A child’s right to privacy
	6. Superinjunctions
	7. A tort of privacy
	8. Further reading

**Key Points**

This chapter will cover the following questions:

* What is the difference between confidentiality and privacy in common law?
* How does privacy law differ before and after Human Rights Act 1998?
* Does a child have its own right to privacy – independent of that of his parents?
* What is the meaning of the ‘public interest test’?
* Is there one privacy law for the rich and famous and another for the ‘commoner’?
* Has judge-made law created a tort of privacy since the HRA?

1.1 Overview

Max Mosley, Naomi Campbell, Michael Douglas and his wife Catherine Zeta-Jones, Princess Caroline of Monaco, Elton John’s husband David Furnish, Jeremy Clarkson and Andrew Marr, and footballers Ryan Giggs, Rio Ferdinand and John Terry - are just some of the celebrities who have asked the courts, with varying degrees of success, to protect their privacy by way of (super)injunctions. Whilst France and Germany have strict privacy laws, the UK stands out as not providing an actionable right to privacy – that is, the ability to sue someone who has seriously invaded the secrets of your private life.[[1]](#footnote-1)

 To this day, there is no UK statute which covers expressly an individual’s right to privacy, as the court in Kaye v Robertson (1991)[[2]](#footnote-2) famously and uncompromisingly pointed out: there is no tort of privacy known to English law. This can often be to the detriment of the claimant as they have to fit their privacy claim into existing tortious actions. Some newspaper editors, such as Paul Dacre of the Daily Mail, would argue that common law judge-made development has created a privacy law ‘via the back door’, a view he gave in a lecture to the Society of Editors in November 2008, referring inter alia to Eady J’s ruling in the Max Mosley case.[[3]](#footnote-3)

 This chapter deals with the concepts of confidentiality and privacy at common law and how the notion of privacy was further developed by the courts since the coming into force of the *Human Rights Act 1998* (i.e. 1 October 2000 and in Scotland in 1998[[4]](#footnote-4)). Chapter two then looks at concepts of free speech (dating back to the *Bill of Rights 1689*) and freedom of expression (Article 10 ECHR). The aim of this chapter is to clarify and distinguish the terms ‘confidentiality’ and ‘privacy’ in English common law and European Court of Human Rights (ECtHR) jurisprudence.

 The concept of ‘privacy’ was first mentioned during the late 1880s by two American lawyers and partners in a Boston law firm, Samuel D. Warren (1852–1910) and Louis D. Brandeis (1856–1941) In their seminal 1890 article, ‘The Right to Privacy’ in the Harvard Law Review.[[5]](#footnote-5) Their privacy theory was based on natural rights, responding to privacy threats from new such as the telephone and paparazzi photography and sensationalist journalism, the ‘yellow press’.[[6]](#footnote-6) (see: Midler (Bette) v Ford Motor Co and Young & Rubicam (1988)[[7]](#footnote-7)).

 Raymond picks up Warren and Brandeis’s argument almost one hundred years later, when he argued that the emergence of newspapers and the mass media brought freedom of expression into the public domain but to the detriment of a person’s privacy.[[8]](#footnote-8)

 The concept of ‘private and public spheres’ was further developed during the 1960s by German Philosopher Jürgen Habermas.[[9]](#footnote-9) His definition of the ‘public sphere’ later had a great impact on privacy applications by German celebrities, such as Caroline von Hannover (see: ***von Hannover v Germany*** (No 1) (2005)[[10]](#footnote-10)).

 Once the concepts of confidentiality and privacy have been explained this chapter focuses on superinjunctions and how the courts have made use of these ‘double gagging’ orders to restrain publication in the media in order to grant certain celebrities anonymity with a view to keeping confidential information, such as an illicit affair, from the public eye via the media.

* 1. **Confidentiality: legal conventions and common law remedies**

As English common law developed, before the *Human Rights Act 1998* (HRA) came into force, the law concerned itself mainly with constitutional convention rights (such as collective cabinet confidentiality) and the obligation of confidence to control confidential information. Whereas a privacy right serves to protect a personal and private state of affairs, preventing information that the individual has chosen not to convey from being disclosed. This explanation was first given by John Stuart Mill in his writings ‘On Liberty’, where he argued that privacy allows people to engage in ‘experiments in living’.[[11]](#footnote-11)

1.2.1 Conventions and breach of confidence

One of the first legal cases involving a breach of confidential information and the Royal household was that of Prince Albert v Strange (1849).[[12]](#footnote-12) His Royal Highness, the Prince Consort, Prince Albert, had to ask the courts for an order to restrain the printer William Strange and his publishers Jasper Tomsett Judge and Son from reproducing private royal family drawings and etchings for ‘mass’ publication and to exhibit these ‘sketches’ in public.

 Her Majesty Queen Victoria and her husband Prince Albert had occasionally, for their amusement, made drawings and etchings principally of subjects of the royal household at Windsor and Osborne House on the Isle of Wight. These were not meant for publication but limited copies had been made by a private press (Strange) and the plates were kept by Her Majesty under lock and key at her private apartments at Windsor. The defendants Strange, Judge, and J. A. F. Judge had in some manner obtained some of these impressions, which had been surreptitiously taken from some of such plates. Copies of these etchings had then been exhibited in form of a gallery collection which were then intended for a public exhibition without the permission of Her Majesty and Prince Albert and against their will. The defendants had also compiled and printed a catalogue entitled,

“A Descriptive Catalogue of the Royal Victoria and Albert Gallery of Etchings (then followed a quotation from Shakespeare). London. Price Sixpence.”[[13]](#footnote-13)

 The catalogue comprised a list of 63 etchings. On 8 February 1849Lord Chancellor (Cottenham) granted a permanent injunction restraining the defendants from publishing any “work being or pretending to be a catalogue of the etchings”. The defendants were also asked to ‘deliver up’ all the etchings and prints which had been made for the catalogue and large costs were awarded against the defendants which subsequently bankrupted the publishers.

 The **Prince Albert** case set the precedent for confidentiality in relation to private material, kept under lock and key, for His Majesty’s private use or pleasure and that such information should be kept from public knowledge.

 Some 157 years later HRH Prince Charles found himself in the same predicament as his royal ancestor when his private travel journals had fallen into the wrong hands, namely the *Mail on Sunday*, and some extracts of his journals were published. In HRH Prince of Wales v Associated Newspapers,[[14]](#footnote-14) Prince Charles asked the courts to restrain ‘mass’ publication of his private thoughts in his diaries which had fallen into the hands of a journalist. The Prince of Wales successfully gained a court order (by way of an injunction), restraining any further publications of the other seven journals, citing breach of confidence and copyright as well as his right to privacy under Article 8 ECHR. The Mail had used the ‘public interest test’ defence which later became prominent in the ‘Prince Charles spider letter’ case (see: ***R (on the application of Evans) v Attorney General*** (2015)[[15]](#footnote-15)

**See Chapter 4.6**

 One thing is clear in both the *Prince Albert* and *Prince Charles* cases: the courts will interfere by way of an injunction with any party who avails themselves of unauthorized material in violation of any right or breach of confidence which is of contractual nature (see: Ashdown v Telegraph Group Ltd (2001)[[16]](#footnote-16)).

**1.2.2 Official secrets and collective cabinet confidentiality**

There have been three famous cases in UK legal history which have tested the notion of state secrecy and the doctrine of cabinet confidentiality; two were decided prior to the Human Rights Act 1998, namely the Crossman Diaries[[17]](#footnote-17) and Spycatcher [[18]](#footnote-18) cases, with the David Shayler*[[19]](#footnote-19)* case decided post the Convention’s incorporation into UK law involving, inter alia, criminal action. In Crossman Diaries and Spycatcher, prior restraint orders to stop publication were applied for by the Attorney General on behalf of the respective governments at the time, citing breach of confidence.

 The ***Crossman Diaries*** case presented the first court action that tested the Convention of Collective Cabinet Confidentiality, a paradigm of restraining government ministers from any publication of Cabinet ‘secrets’. In this case, the government had applied via the Attorney General to injunct the publication of Cabinet Minister Richard Crossman’s posthumous diaries covering the period of Harold Wilson’s government between 1964 and 1970. Following Crossman’s death in April 1974, volume one of the book, *Diaries* *of* *a* *Cabinet* *Minister,* which covered the years 1964-66, had been sent to the Secretary of the Cabinet for his approval but was rejected on the ground that publication was against the public interest in that the doctrine of Collective Cabinet Responsibility would be harmed by the disclosure of details of Cabinet discussions. In July 1974 Crossman’s literary executors gave an undertaking not to publish the book without giving prior notice to the Treasury Solicitor but, in January 1975, the first extracts from the book were published in the *Sunday Times* without the consent of the Cabinet Secretary.

 On 18 June 1975, the Attorney-General issued a writ against the first defendants, the publishers Jonathan Cape Ltd. and Hamish Hamilton Ltd. and against the second group of defendants, Crossman’s literary estate, namely his wife Anne Patricia Crossman, writer Graham Greene and Labour Party Leader Michael Foot, seeking an injunction to restrain the defendants from printing, publishing, distributing, selling or otherwise disclosing in any manner, or causing to be printed, published, distributed, sold or otherwise disclosed, the contents of the book *Diaries* *of* *a* *Cabinet* *Minister* or any extracts from it. The Attorney-General also applied for an injunction against the *Sunday Times* to restrain publication of any extracts of the three volumes of the book.

 The Court of Appeal dismissed the actions and lifted all injunctions on the grounds of public interest. The court ruled that volume one of the *Diaries* could be published immediately since it was dealing with events ten years previously and that Cabinet discussions should no longer remain confidential.[[20]](#footnote-20) Lord Widgery CJ made it abundantly clear that the convention of Joint Cabinet Responsibility was in the public interest:

. . . it is unacceptable in our democratic society that there should be a restraint on the publication of information relating to Government when the only vice of that information is that it enables the public to discuss, review and criticise Government action. Accordingly, the court will determine the Government’s claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.[[21]](#footnote-21)

 The British secret services, particularly MI5, have always been the object of conspiracy theories, according to Cambridge professor Christopher Andrew, author of the first official history of MI5.[[22]](#footnote-22) Layers of official secrecy were exposed by Peter Wright’s sensational publication of Spycatcher: the Candid Autobiography of a Senior Intelligence Officer which had come into the Australian market. The former MI5 officer - by now retired in Tasmania - described in detail how ‘we bugged and burgled our way across London at the State’s behest, while pompous, bowler-hatted civil servants in Whitehall pretended to look the other way’.[[23]](#footnote-23)

**See Chapter 4.2**

 The Spycatcher (No 1)[[24]](#footnote-24) and (No 2)[[25]](#footnote-25) actions are best known for their numerous injunctions. The Attorney General, on behalf of the British Government, attempted to restrain prior publication of the Wright’s memoirs in order to preserve the confidentiality government and secret service material. Wright had, of course, signed the Official Secrets Act 1911 and was bound by this beyond his employment.[[26]](#footnote-26) The question arose whether the UK High Court and the Crown could injunct a publication outside the United Kingdom?[[27]](#footnote-27) The short answer was ‘no’. And the book was published outside the UK and serialized in the Sunday Times. The restraining order was directed at the Guardian and the Sunday Times (and thereby contra mundum) and editor Sunday Times editor at the time, Andrew Neil, was severely criticized by Lord Keith of Kinkel, referred in his judgment in Spycatcher No 2 to Mr Neil’s blatantly ignoring the interim injunction as employing ‘peculiarly sneaky methods’.[[28]](#footnote-28)

 Had Peter Wright returned to the UK he would, no doubt, have been arrested and charged with offences contrary to the Official Secrets Act 1911. Such was the case involving another MI5 whistleblower, David Shayler.[[29]](#footnote-29) He too had disclosed official secrets to the press, the Mail on Sunday. The paper ran a front-page story on 24 August 1997, headlined ‘MI5 Bugged Mandelson’, with the claim that Tony Blair’s favourite Cabinet Minister at the time had his phone tapped for three years during the late 1970s. Among his claims were that the intelligence service was paranoid about ‘reds under the bed’ and that it had investigated other Labour ministers such as Jack Straw and Harriet Harman.On 19 July 1998 Mr Shayler published further revelations on his own website www.shayler.com, such as an MI5 plot to kill the Libyan leader, Colonel Gaddafi.

 Shayler was arrested in a Paris hotel by French police and extradited to the UK where he was convicted for unlawfully disclosing official documents to the media, thereby breaching the Official Secrets Act 1989.[[30]](#footnote-30) He unsuccessfully used freedom of expression as a defence. Shayler was sentenced to six months in prison.

**1.2.3 What is a breach of confidence?**

The common law or, more precisely, the courts of equity, have long afforded protection to the wrongful use of private information by means of the cause of action which became known as breach of confidence. A breach of confidence has been defined in equity as a form of unconscionable conduct, akin to a breach of trust. A breach of confidence goes back to the time when the cause of action was based on improper use of information disclosed by one person to another in confidence. To attract protection the information had to be of a confidential nature (**see above 1.2.1**). The cause of action in confidence then is that information of this nature has been disclosed by one person to another in circumstances ‘importing an obligation of confidence’

 The Coco case[[31]](#footnote-31) is important here, concerned with the protection of trade secrets (namely the ‘Coco Moped’ with an Italian designed two-stroke engine). Mr Coco sought a court order by way of an interlocutory injunction to stop Mr Clark of the UK firm A. N. Clark (Engineers) Ltd. manufacturing a copy, named the ‘Scamp Moped’. The defendant engineering company had given an oral undertaking to pay a royalty of five shillings per engine. But since there was no written contract, Mr Coco could only rely on the duty of confidentiality, which he argued, had arisen between himself and Mr Clark. Unfortunately, Mr Coco had already imparted his knowledge and trade secrets to the British company arguing at the first hearing that such information had to be kept ‘strictly confidential’.

 In the end the trial never took place since British intellectual property laws were weak at the time. The ‘Coco engine’ was subsequently discontinued after a short production run estimated at 3,000 and A N Clark (Engineers) Ltd went into administration.[[32]](#footnote-32)

**See Chapter 9.9**

This meant that inventions and trade secrets could easily be stolen or copied and the inventor would not have any regress.

The ‘Coco Engineers’ case is important however because it established fundamental principles of law in the area of breach of confidence. Mr Justice Megarry in the High Court Chancery Division had to decide what amounted to a breach of confidence and secondly whether the case was one where an injunction could be granted. He noted that the equitable jurisdiction in cases of breach of confidence was ‘ancient’ (referring to **Prince Albert v. Strange**). Megarry J said that there was no breach of contract in the **Coco** case for no contract had ever come into existence. Accordingly he could only consider the pure equitable doctrine of confidence in the realms of commerce (referring to ***Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd***. (1948)[[33]](#footnote-33)). [[34]](#footnote-34)

 Megarry J named three elements which set the precedent for a breach of confidence action to succeed:

1. The information itself must have the necessary quality of confidence about it;

2. The claimant must have disclosed the information to the defendant in circumstances which created an obligation of confidence; and

3. The information must have been used to the detriment of the claimant without authorization.[[35]](#footnote-35)

 The ruling in Coco is still valid in common law today: the definition of a ‘breach of confidence’ needs to be made up of all three essential elements

**1.2.4 Remedies for breach of confidence before the Human Rights Act 1998**

Once a breach of confidence has been established, equitable remedy for such a breach comes into existence, including:

1. injunctions[[36]](#footnote-36);

2. compensatory damages;

3. exemplary damages;

4. account of profits;

5. delivery-up;

6. proportion of costs.

 How then are damages awarded by the courts for breach of confidence? Ten years after the leading judgment in ***Coco,*** Sir Robert Megarry VC commented in Malone on the unsatisfactory state in the law of equity in that:

. . . the right of confidentiality is an equitable right which is still in the course of development, and is usually protected by the grant of an injunction to prevent disclosure of the confidence. … In such a case, where there is no breach of contract or other orthodox foundation for damages at common law, it seems doubtful whether there is any right to damages, as distinct from an account of profits.[[37]](#footnote-37)

 With no relationship between confider and confidant, the obligation of confidence is not established and a claimant would not succeed in a confidentiality action.

**1.2.5 ‘Kiss and tell’ – tales: breach of confidence in the domestic setting**

From the 1960s onwards, we can observe two branches of ‘confidentiality’ developing in common law, one in relation to trade and business secrets (i.e. ***Coco*** or ***Campbell Engineering*** – type cases) and the second in relation to misuse of private information in form of ‘kiss and tell’ stories involving celebrities.

 When people kiss and later one of them tells, the person who does so is almost certainly breaking a confidential arrangement. Though this book advances the ‘open justice’ principle it is worth noting that private communication between couples should be free from distribution to the press (and this includes modern practices such as text messaging, emails etc.). This point was developed in the sensational divorce proceedings concerning the Duchess and Duke of Argyll[[38]](#footnote-38) (for confidentiality see also: Stephens v Avery (1988)[[39]](#footnote-39)). However, in another famous divorce case, Scott v Scott (1913),[[40]](#footnote-40) the courts gave a carte blanche approach to the disclosure of confidential information.

**See Chapter 8.2**

 The Argyll v Argyll (1967)[[41]](#footnote-41) case was the scandal that rocked the nation at the time. Central to the Duke and Duchess of Argyll’s divorce proceedings were the discourse of sexually explicit photos taken with a Polaroid camera in which the Duchess sought to invoke ‘confidentiality’. The photos shown in court were ‘headless’. We learnt of the subjects’ identities some 41 years later when, on 10 August 2000, a Channel 4 TV documentary named the two men (after their deaths): the actor Douglas Fairbanks Jr and Cabinet minister Duncan Sandys.

 A few individuals have been able to rely on the Argyll judgment in their confidentiality actions against former partners or lovers, but many have been unsuccessful. John Lennon of the Beatles (1940 – 1980) could *not* rely on Argyll.[[42]](#footnote-42) His divorced wife, Cynthia Lennon (1939 – 2015) had written her memoirs[[43]](#footnote-43) after her bitter divorce from John and had sold the story to the News of the World. John Lennon was unsuccessful in seeking to injunct the publications. The court ruled that he could *not* rely on Argyll for breaches of marital confidences on the grounds that:

1. He himself had publicized the most intimate details of their marriage; and

2. There was nothing left which was confidential; all the information was already in the public domain.

 Confidentiality injunctions were difficult to obtain where the couple was not married, particularly involving same-sex couples (this changed with the Civil Partnership Act 2004). The ruling in ***Barrymore***[[44]](#footnote-44) is therefore particularly significant.

On 17 March 1997 (just a year before the HRA 1998), The Sun outed TV personality Michael Barrymore as gay. He sought an ex parte injunction (not naming his lover Paul Wincott), claiming breach of confidence at common law in relation to ‘A Trust and Confidence Agreement’ made between him and his lover in 1995. The agreement – made by deed – included the obligation not to disclose or make use of any confidential business or personal information. The High Court granted the injunction to restrain any further publications, citing Lord Wheatley’s judgment in Argyll, and extending the principle of confidentiality in correspondence between married couples to that of ‘close relationships’. Mr Justice Jacob said:

…The fact is that when people kiss and later one of them tells, that second person is almost certainly breaking a confidential arrangement.[[45]](#footnote-45)

 However, it became near impossible for Michael Barrymore to sue the newspaper for compensatory and exemplary damages.

 In **Stephens v Avery**[[46]](#footnote-46) the court granted an equitable injunction restraining publication concerning a lesbian relationship. Sir Nicholas Browne-Wilkinson VC made clear that the law of confidence is capable of protecting relationships outside that of husband of wife, though possibly only where the confidence was ‘express’. Though the court stressed that gross sexual immorality might not be protected from disclosure, information about sexual activites could be protected under a legally enforceable duty of confidence, where it would be unconscionable for someone who had received information on an expressly confidential basis to disclose it.

The media will always oppose injunctions since the publication of a juicy ‘kiss and tell’ story will increase revenue. In the ***Jamie Theakston*** case,[[47]](#footnote-47) the popular broadcaster tried unsuccessfully to ‘injunct’ a story which had been leaked by a prostitute to the Sunday People and News of the World. Theakston (now presenting on Heart FM) was best known at the time as a presenter on BBC Radio 1 and hosted the BBC’s Top of the Pops and Live and Kicking – i.e. he was seen as a youngsters’ role model. The headlined articles showed Theakston coming out of a Mayfair brothel. Mr Justice Ouseley granted an interim injunction in January 2002, banning the newspapers from using any photographs of the young presenter taken inside the brothel because the prostitute had used threatening text messages, demanding ‘ransom’ money from Theakston.[[48]](#footnote-48)

 The order was subsequently discharged because the story was seen as having a ‘public interest’ element which the law of confidence should not protect. The fact that the popular presenter had behaved in the manner he did was in the public interest, given his public role as perceived by young people as a role model and respectable figure. However, the photos were permanently injuncted because they had been taken by the prostitute without Theakston’s consent. Ouseley J granted Articles 8 ECHR (‘privacy’) rights in the photos. Phillipson argues that Mr Justice Ouseley appreciated the need for proportionality in his decision in that the photographs taken of the claimant at the brothel had a lower level of public interest than the disclosure of the actual brothel visit.[[49]](#footnote-49)

 This leaves the concept of breach of confidentiality rather open-ended and perhaps too flexible. In ‘privacy’ cases before the HRA 1998 came into force those individual seeking injunctions had to exhaust the UK courts’ hierarchy first before they could seek regress at the Strasbourg Human Rights Court (ECtHR). This made for a rather uneasy relationship as demonstrated in the Earl Spencer case.[[50]](#footnote-50) In his privacy action before the Strasbourg court, the ninth Earl Spencer, brother of the late Diana, Princess of Wales, submitted that the United Kingdom had failed to comply with its obligations to protect his and his wife’s right to respect for his private life under Article 8 ECHR.

 The Earl claimed that the state had failed to prohibit the publication and dissemination of information relating to Countess Spencer’s private affairs and therein failed to provide a legal remedy. He argued that the UK ought to have prevented the release of private and confidential information concerning the Spencers’ private affairs by restraining the newspaper from publishing their stories and photographs, and that the UK courts ought to have provided damages for his wife’s distress and the family’s harassment by the media. Reasons for the media frenzy were that both Earl Spencer’s wife Victoria[[51]](#footnote-51) and his sister, Diana, had been suffering from an eating disorder.

**❖KEY CASE** Earl Spencer and Countess Spencer v United Kingdom **(1998) 25 EHRR CD 105 (ECtHR)**

Precedent

❖ There are adequate remedies available in the UK courts for breach of confidence.

❖ Before an application can be made to the European Court of Human Rights (ECtHR) in Strasbourg the applicant has to exhaust the domestic courts’ remedies to the full; otherwise he will not be heard.

Facts

The News of the World (NOW) published an article on 2 April 1995, entitled ‘Di’s sister-in-law in booze and bulimia clinic’. This detailed some of the personal problems of Countess Spencer and included a photograph taken with a telephoto lens while she walked in the grounds of a private clinic. Earl Spencer complained to the Press Complaints Commission, which concluded there was a clear breach of Code 3 (‘privacy’) vis-à-vis his wife. The second publication was an article in the People on the same day, referring to the Countess’s admission to a private clinic for an eating disorder. The third article was published in the Sunday Mirror, on the same day, alleging that the Countess had a drink problem.

Instead of suing the newspapers, the Earl and Countess applied to the European Commission on Human Rights (and therein to the Strasbourg court), complaining that English law had failed to provide adequate respect for their privacy and so violated Article 8. Apart from arguing the breach of confidence action, the Spencers complained that the UK had no effective remedy in common law for the invasion of their privacy by the media.

Decision

The ECtHR declared inadmissible an application by Earl and Lady Spencer on the basis that they had not exhausted their domestic remedies, rejecting the Spencers’ complaints under Article 8 on the basis that the couple had not completely exhausted the domestic remedies available to them for breach of confidence as outlined in Spycatcher No 2 and Barrymore. The Commission also found their complaint under Article 13 ill-­founded within the meaning of Article 27(2) of the Convention.

Analysis

The Strasbourg court found in the Earl Spencer case that the UK’s common law provisions in the law of confidence were adequate and reasonable to remedy the Spencers’ complaint. However, since the Spencers had chosen not to avail themselves of any domestic court action in ‘privacy’ (not following the hierarchy of the courts) they were not entitled to seek redress in the Human Rights Court.

But the watershed was yet to come with case law building up following the introduction of the Human Rights Act 1998 in the United Kingdom.

** FOR THOUGHT**

Discuss the remedies available in the UK courts for breach of confidence for an unauthorized disclosure of personal information, accompanied by unsolicited photographs of a famous claimant.

* 1. **Privacy: developments since the Human Rights Act 1998**

The protection of someone’s privacy is frequently seen as a way of drawing the line as to how far society can intrude into an individual’s private affairs. To define ‘privacy’ is perhaps most difficult, as the notion of privacy differs from country to country and from culture to culture. Individual states have defined their constitutional laws and substantive case law as the notion of privacy has developed.[[52]](#footnote-52) But privacy is not just about celebrities as the Leveson Inquiry showed. The inquiry into phone hacking by newspapers and unethical media standards and practices was told in May 2012 for example how the teenager Milly Dowler’s mobile phone was hacked into by News of the World reporters, and how the police knew about it. 13-year-old Milly disappeared in March 2002 and Levi Bellfield was convicted of her murder in June 2011, and sentenced to a whole life tariff.

**See Chapter 6.3**

 Article 8(1) of the European Convention on Human Rights and Fundamental Freedoms (ECHR – or ‘the Convention’) makes it clear that the concept of privacy is not limited to isolated individuals, but includes the general ‘zone’ of the family, the home, correspondence with others, telephone conversations and a person’s well-being. Article 8(1), ‘Right to respect for private and family life’, reads:

Everyone has the right to respect for his private and family life, his home and his correspondence.

However, Article 8 is not an absolute right and may be ‘qualified’ which means a Member State to the Convention may derogate under Article 8(2) ECHR:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

* + 1. **What is ‘privacy’**

Before we examine definitions in common law let us consider how some scholars have defined ‘privacy’ before we look at leading authorities. Barber argues that privacy prevents others from learning everything about our activities.[[53]](#footnote-53) American Sociologist Barrington Moore defines ‘privacy’ within the following categories:

● Information Privacy involves the establishment of rules governing the collection and handling of personal data such as credit information and medical records.

● Bodily privacy concerns the protection of people’s physical selves against invasive procedures such as drug testing.

● Privacy of communications covers the security and privacy of mail, telephones, email and other forms of communication.

● Territorial privacy concerns the setting of limits on intrusion into the domestic environment such as the workplace or public sphere; to control the channels through which one’s image is distributed.[[54]](#footnote-54)

 Rachels contends that privacy is valuable in that it allows us to limit the information that others know about us: that there are different sorts of social relationships that bring different levels of intimacy. Some information remains confidential to us.[[55]](#footnote-55)

 The by now famous dictum by Glidewell LJ in Kaye v Robertson[[56]](#footnote-56) stated expressly that there is no right to privacy in English law:

. . . it is well known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person’s privacy.[[57]](#footnote-57)

 In this case the editor and publishers of the Sunday Sport had published ‘lurid and sensational style’ photographs accompanied by an interview with the well-known actor Gorden Kaye, who was lying in hospital on life support. The actor, best known for his role as René in the popular TV series ’Allo ’Allo! had sustained severe head injuries on 25 January 1990 when, as he was driving in London during a gale, a piece of wood from an advertisement hoarding smashed through his windscreen and struck him on the head.

 This case established that ‘hospital beds’ are out of bounds for the media. It is worth noting that subsequent authorities demonstrate that Lord Glidewell’s dicta in Kaye v Robertson have been superseded, although courts continue to use and perhaps distort the action for breach of confidence instead of recognizing they have created a tort of ‘misuse of private information’ (**see below 1.7**).

 As Glidewell LJ opined that privacy legislation was urgently needed in the UK:

We do not need a First Amendment to preserve the freedom of the press, but the abuse of that freedom can be ensured only by the enforcement of a right to privacy. This right has so long been disregarded here that it can be recognised now only by the legislature.

 So far Parliament has not found it necessary to enact any privacy laws relying mainly on Art 8 ECHR which has not changed substantive law in this respect. As the law of confidence developed by way of common law jurisprudence in the UK courts, the notion of ‘privacy’ developed alongside arguably changing from the law of confidence to privacy with the inception of the Human Rights Act 1998 (HRA).

**1.3.2 Public interest defence and privacy claims**

As common law developed post-HRA 1998 we can observe that the public interest defence advanced by newspapers and media organisations can be successful. The case which specifically examined the distinction between the public interest and what the public is interested in, was undoubtedly that of ***Max Mosley***.[[58]](#footnote-58) (**see below 1.4.2**).

 Case law informs us that the public interest defence now tends to be limited to matters of genuine political, legal, constitutional, social or economic relevance and importance, and whether the publication is capable of contributing to a debate in a democratic society. The Strasbourg human rights court held in von ***Hannover No 1***[[59]](#footnote-59) that the individual claiming privacy and confidentiality (e.g. in photographs) must carry out public functions. (**see below 1.4.4**)

 The public interest defence was advanced by the publishers of the *Daily Mail*, Associated Newspapers, in the ***Carina Trimingham*** case[[60]](#footnote-60) (see below). The journalist and former press officer to and lover of Chris Huhne MP, applied for a privacy injunction under Article 8 ECHR in August 2010 against the *Daily Mail* and *Mail on Sunday* in respect of a series of articles and photographs published about her having an affair with the MP.[[61]](#footnote-61) At the time of the affair Mr Huhne was married to Vicky Pryce for almost 25 years; the couple had five children, three together, and two from Ms Pryce's first marriage.[[62]](#footnote-62) Until 20 June 2010, Ms Trimingham was living with her civil partner. The comments in the newspapers focused on her appearance, referring to her as ‘bisexual’ and a ‘lesbian’ and that she had previously lived in a civil partnership with another woman. Whilst Ms Trimingham did not action in defamation (because the allegations were substantially true) her legal complaint focused on repeated ‘pejorative’ references to her sexuality and appearance in eight articles. She actioned in harassment, privacy and breach of copyright in respect of the photographs.

**❖KEY CASE  *Trimingham v Associated Newspapers Ltd* [2012] EWHC 1296** (QB)

Precedent

* Claimants cannot rely on their Art 8 ECHR privacy rights if they are not a private individual; in the case of a public figure performing a public function the expectation of privacy is limited.
* The public interest defence (for the media) exists where the conduct and behaviour of the claimant in his or her personal life is likely to affect the business of Government.
* A reasonable person with the same characteristics as the claimant would not think it unreasonable to disclose matters of genuine public interest (here Ms T was a press officer and journalist and had the knowledge of media practices)
* It would be a serious interference with freedom of expression (Art 10 ECHR) to silence the views of the press by subjective claims of harassment
* There is no ‘privacy’ in photos if the claimant publishes personal photos on social media (e.g. Facebook).

Facts

Carina Trimingham (T) had worked as a press officer in three political campaigns and had been the campaign director for the Electoral Reform Society. She began to have an affair with married MP, Chris Huhn (Lib Dem) (H), in 2010, then a leading figure in the coalition Government and for whom Ms T had worked as a press officer. At the time Ms T was in a civil partnership with another woman and both her and Mr H's wife were unaware of the affair. Numerous articles appeared in the *Mail online* and the print editions of the *Daily Mail* and the *Mail on Sunday*, calling T ‘bisexual’ and ‘lesbian’ and making comments about her appearance, for example:

“Chris Huhne’s bisexual lover: Life and very different loves of the PR girl in Doc Martens” by Barbara Davies, *Daily Mai*l 21 June 2010.

“First picture of Chris Huhne’s lover and the lesbian civil partner she has left broken-hearted” by Barbara Davies, *Daily Mail* 22 June 2010.

“It’s Chris Huhne’s hypocrisy and lies that matter, not his sex life” by Richard Littlejohn, *Daily Mail* 22 June 2010.

Photographs which had been taken by a professional photographer and personal friend of T at her home prior to her going to her civil partnership ceremony and at the ceremony were published in the *Daily Mail* and the *Mail on Sunday* (eight articles in August 2011 and other newspapers such as *The People*). T submitted that the Mail had:

(1) pursued a course of conduct amounting to harassment under the s 1(3)(c) Protection from Harassment Act 1997;

(2) misused private information under Art 8 ECHR and breach of confidentiality; and

(3) breached copyright contrary to s 85 Copyright, Designs and Patents Act 1988 (CDPA) by publishing the photographs.

Ms T sought aggravated damages and a privacy injunction at trial.

Decision

The claim was dismissed with an order for costs against Ms Trimingham. Tugendhat J gave the following reasons:

**1. The harassment claim:**

The judge considered that repeated publication in the media of offensive or insulting words about a person’s appearance, sexuality, or any other characteristic *did not* amount to harassment.[[63]](#footnote-63)  Reasons advanced were:

(a)Ms Twas *not* a private figure and in her private capacity she had conducted a sexual relationship with H which she knew would be likely to lead to a political scandal.[[64]](#footnote-64) The scope of her protected private life was therefore limited (see: **Saaristo v Finland** (2010).[[65]](#footnote-65)

(b) T claimed that the defendant newspaper *ought* to have known that their conduct by publication amounted to harassment. Tugendhat J applied the ‘reasonable person’ test and pointed out: “she was tough, a woman of strong character, not likely to be upset by comments or offensive language, a woman who was known to give as good as she got.”[[66]](#footnote-66) (applying ***Banks v Ablex Ltd*** (2005)[[67]](#footnote-67)). The judge found that the newspaper’s hostility was directed towards her conduct, not her appearance. The words ‘bisexual’ and ‘lesbian’ were not normally understood to be pejorative and no reasonable reader of the words complained of would understand them in a pejorative sense[[68]](#footnote-68)   (applying ***Jeynes v News Magazines Ltd*** (2007)[[69]](#footnote-69)).

(c) The reasonableness of the course of conduct. The judge found that it is not unreasonable for a newspaper to refer to these facts and if a journalist is criticising a person for deceitful, unprofessional or immoral behaviour in a sexual and public context, it is not unreasonable to refer to that person as ‘lesbian’ or ‘homosexual’ given the newsworthiness of events.[[70]](#footnote-70)

**2. The** **Article 8 privacy and breach of confidentiality claims**

Tugendhat J aid these were rather limited Ms T was not a purely private figure. She had openly and publically declared her sexuality and previous sexual relationships.[[71]](#footnote-71) (applying: ***Murray v Express Newspapers Plc*** (2007)[[72]](#footnote-72)). The judge said it would be a serious interference with freedom of expression (Art 10 ECHR) if members of the media, wishing to express their own views, could be silenced by, or threatened with, claims for harassment based on subjective claims by individuals that they felt offended or insulted.

**3.** **The breach of copyright claim:** Section 85 CDPA affords rights to a person who ‘commissions’ the taking of a photograph. The photographs published in the newspapers had been commissioned by Ms T for her civil partnership ceremony; and Ms T had given these pictures to the *Evening Standard* in 2008and posted them on her Facebook page. She only removed them from the site after the ‘Huhne’ story had broken. Tugendhat J held that the publication of the ‘wedding’ photographs disclosed no significant information and that T had no reasonable expectation of privacy in respect of these photos.[[73]](#footnote-73) (applying: ***Ultraframe (UK) Ltd v Fielding*** (2005)[[74]](#footnote-74) ).

Analysis

This ***Carina Trimingham*** case touches on several areas of law: protection from harassment, copyright, privacy under Article 8 ECHR and confidentiality. Like ***Max Mosley***, Ms Trimingham decided not to sue in defamation. She chose the Protection from Harassment Act 1997 which obliges the state to prevent interference with an individual’s right to privacy and the protection of their private lives under Article 8 ECHR. Was Ms T a public or private figure? The judge determined that T was *not* a private individual because of her association with a politician. She also had a high-profile career as PA to Mr Huhne. She could not claim privacy in the photographs because she had herself disclosed photos and matters about her private life on Facebook.

The case is a good example where the courts are balancing ‘privacy’ and ‘freedom of expression’ – Tugendhat J decided in favour of the latter. He also dismissed Ms T’s harassment claim (s 1(3)(c) PHA 1997) because the conduct of the newspaper was held no so unreasonable in the particular circumstances and there was a ‘pressing social need’ to publish the story. This means that the privacy rights of the individual came second to the right of press freedom.

**1.4 The public interest test and the ‘red carpet’ rule**

British tabloid journalism is well known for its intrusion into the private lives of celebrities. Photographs are a record of a frozen moment in time and therefore have a permanence and presentational power which the human eye and words alone cannot capture. Paparazzi photographs taken on a public beach will not normally be considered private, while those taken in a private location will. Celebrities whose behaviour is seen as ‘discreditable’ and those who mislead the media about the truth are unlikely to have their secrets preserved.

 Witzleb expresses concern that the lack of a substantive privacy law has led to insufficient legal remedies for invasions of privacy in the UK.[[75]](#footnote-75) Though Bennett maintains that this may have been negated somewhat by the courts’ flexibility in interpreting the equitable action for breach of confidence and in how they assess breaches of privacy, and the fact that it is considered on a case-by-case basis.[[76]](#footnote-76) However, the flexible nature of privacy in English common law has meant that a person’s privacy right does not sit comfortably with press freedom, particularly when the opposing rights of confidential information and freedom of expression coincide (see: Spencer v UK (1998)[[77]](#footnote-77)).

 If not in statute, how can the term ‘public interest’ be defined? The *Independent Press Standards Organisation* (IPSO)[[78]](#footnote-78) definition probably comes closest to defining ‘public interest’ as:

1. The public interest includes, but is not confined to:

 i)  Detecting or exposing crime or serious impropriety.

 ii)  Protecting public health and safety.

iii)  Preventing the public from being misled by an action or statement of an individual or organisation.

1. There is a public interest in freedom of expression itself.
2. Whenever the public interest is invoked, the Regulator will require editors to demonstrate fully that they reasonably believed that publication, or journalistic activity undertaken with a view to publication, would be in the public interest and how, and with whom, that was established at the time.
3. The Regulator will consider the extent to which material is already in the public domain, or will become so.
4. In cases involving children under 16, editors must demonstrate an exceptional public interest to over-ride the normally paramount interest of the child.[[79]](#footnote-79)

The definition is deliberately loose, in order to allow the IPSO adjudicator to judge each complaint fully on its merits.

**See Chapter 6.4**

1.4.1 Privacy in public and private places

The first ‘red carpet’ case which tested the notion of privacy under Art 8 ECHR in the English courts was that of Douglas v Hello! Ltd.[[80]](#footnote-80) What mattered in this case was the question whether the celebrity couple Catherine Zeta-Jones and Michael Douglas (‘the Douglasses’) had a reasonable expectation of privacy at their wedding at the Plaza Hotel in New York in November 2000? And would this notion of privacy include the exclusivity of their wedding photographs which they had sold for £1million to *OK* magazine? Whilst the couple later recovered damages against *Hello!* magazine in the Chancery Division of the High Court[[81]](#footnote-81) – the main issue in the 2001 privacy action was their claim under Article 8 ECHR. On 8 January 2000, Lord Justice Sedley stated:

We have reached a point at which it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy.[[82]](#footnote-82)

 The judge gave two reasons for his comment. First, that equity and the common law had to respond to an increasingly invasive social environment. Secondly, that such recognition was now required by the HRA and in particular Article 8 ECHR (the HRA 1998 had only just come into force in October 2000). Sedley LJ went on to say that since Kaye v Robertson had been decided, ‘the legal landscape has altered’ and that the right of privacy was grounded in the equitable doctrine of breach of confidence. Lord Justice Sedley’s observations in the ***Douglas*** case in respect of balancing the Douglasses’ right to privacy and the media’s freedom of expression are highly relevant when he said:

. . . the Convention right, when one turns to it, is qualified in favour of the reputation and rights of others and the protection of information received in confidence. In other words you cannot have particular regard to Article 10 without having equally particular regard at the very least to Article 8.[[83]](#footnote-83)

 A day after their wedding at the Plaza Hotel in New York, on Monday 20 November, the Douglasses obtained an *ex parte* injunction restraining publication of *Hello!* Issue 639. This was discharged by the Court of Appeal on Thursday 23 November. Edition 639 of *Hello!* containing the six unauthorized photographs went on sale on the following day, Friday 24 November, on the same day as issue 241 of *OK* which included OK’s ‘exclusive’ coverage of the wedding. OK had hurriedly brought forward this publication. Hello’s sales figures for issue 639, about 523,000, were some 150,000 above average. The High Court ruled that a wedding has to be essentially a public affair and the Douglases private life was already in the public domain and they had sold their photographs for financial gain. Their article 8 right had not been breached and the court ruled in favour of freedom of expression.

 Photographs can have a special intrusive effect, as was held in the Beckham[[84]](#footnote-84) case conveying visual information which words alone could achieve. Compared with the Douglas case, where the claimants had set out to make a profit from their wedding the claimants, in Beckham did not have that commercial backdrop in that the photographs had been taken inside the Beckham’s private home.

 In this case, Mr Justice Eady reversed the decision of the duty judge that the Beckhams had given a cross-undertaking not to publish photographs of their house, holding that this would have prejudiced their basic rights of privacy and freedom of contract. Eady J then upheld the interim injunction in favour of the Beckhams, preventing the Sunday People from publishing photographs of their matrimonial home and protecting the claimants from unwarranted intrusions into their privacy under Article 8, ‘with regard to material which the law recognises as being confidential’.[[85]](#footnote-85) Although David and Victoria were themselves considering selling the rights to allow publication of certain photographs of their house, they were particularly concerned that the unauthorized photographs might reveal and thereby jeopardize some of the security measures taken to protect them and their home.

 In determining whether photographs taken in a public place are capable of protection the courts have taken account of the context in which the photographs were taken and published, and whether the person photographed had a reasonable expectation of privacy in relation to their subject matter, and whether the photographs were taken surreptitiously. Additionally, the information conveyed by photographs has to be judged by reference to the captions and surrounding text.

 The next case which touched on a similar privacy claim as the Douglasses’ was Naomi Campbell’s common law claim on the basis of breach of confidence in 2001.[[86]](#footnote-86) Her action was initially presented to the courts exclusively on the wrongful publication by the *Daily* Mirror of private information (in conjunction with an action in defamation).

 In the first Naomi Campbell action Campbell v MGN (2002) a cause of action arose in February 2001 upon the publication of surreptitiously taken photos when the Daily Mirror published an image of and extensive articles on the famous supermodel receiving drug rehabilitation treatment at a Narcotics Anonymous clinic in 2001. Miss Campbell sued the newspaper for damages for breach of confidentiality. The Mirror carried a number of stories at the time on the supermodel, with headlines such as ‘Naomi: I am a drug addict’ and ‘Pathetic – No hiding Naomi’. The articles in question contained the information that Campbell was a drug addict, and that she was receiving treatment at the Narcotics Anonymous rehabilitation clinic, as well as details of that treatment. The stories were supported by pictures of Miss Campbell leaving a drug therapy clinic. During the first proceedings Miss Campbell claimed damages for breach of confidence and compensation under the Data Protection Act 1998. Morland J did not grant Miss Campbell the right to privacy though he upheld a data protection claim, awarding her £2,500 plus £1,000 aggravated damages.[[87]](#footnote-87)

 The newspaper appealed and the CA, allowing the appeal, discharged the injunction. Miss Campbell appealed to the House of Lords on 23 February 2003. Their Lordships Lord Nicholls of Birkenhead, Lord Hoffmann, Lord Hope of Craighead, Baroness Hale of Richmond and Lord Carswell held that the law of confidence does not protect the trivial.[[88]](#footnote-88) Their Lordships stated that Miss Campbell could not complain of the exposure of her drug-taking, especially since she had previously denied that she was a drug addict, but the HL felt that the Court of Appeal had erred in holding that the details of the claimant’s treatment and attendance at the clinic plus the photographs were not private and confidential and that the article could not credibly have been written without the inclusion of that material.

 Allowing the appeal (Lord Nicholls of Birkenhead and Lord Hoffmann dissenting), the House of Lords set the threshold test as to whether information was private: whether a reasonable person of ordinary sensibilities, placed in the same situation as the subject of the disclosure (rather than its recipient), would find the disclosure offensive. Miss Campbell’s details of her drug therapy should have been afforded privacy related to her physical and mental health. The treatment she was receiving amounted to confidential information contained in her medical records and the publication clearly breached that confidentiality and her right to privacy. Their Lordships found the disclosure of the photographs highly offensive, stating that this had caused the claimant a setback in her recovery. The publication of that information went beyond disclosure which was necessary to add credibility to the legitimate story that the claimant had deceived the public and went beyond the journalistic margin of appreciation allowed to a free press. Though the photographs of Miss Campbell were taken in a public place, the context in which they were used and linked to the articles added to the overall intrusion into the claimant’s private life.

 In summary, when a public figure chooses to make untrue statements about their private life, as was the case with Naomi Campbell denying her drug addiction, is it not the press who should be entitled to set the record straight? Should disclosure not be justified when it serves to prevent members of the public from being misled? The Daily Mirror argued that the photos and details about Miss Campbell’s drug treatment exposed her lies, demonstrating that the newspaper had done an excellent piece of investigative journalism. The House of Lords argued that it depends how the information was obtained and by what means, such as by covert or surreptitious long-lens photography by paparazzi or phone-hacking, without the subject’s consent or in a private place (see also: Wainwright v Home Office (2004);[[89]](#footnote-89) Fressoz and Roire v France (1999);[[90]](#footnote-90) Jersild v Denmark (1994);[[91]](#footnote-91) Peck v UK (2003)[[92]](#footnote-92)).

 Their Lordships in ***Campbell*** took the Mirror’s publication as a whole andexamined all the circumstances including her going through drug rehabilitative treatment. They ruled that Ms Campbell’s Article 8 right to privacy outweighed the newspaper’s right to freedom of expression. Accordingly, the publication of the articles and the accompanying photos in the Mirror constituted an unjustified infringement of Miss Campbell’s right to privacy whilst undergoing treatment; therefore she was entitled to damages.

 Mr Justice Patten argued in the ‘***J. K. Rowling*** (***David Murray***) case’[[93]](#footnote-93) that there is a clear difference between celebrities’ and private individuals’ private lives:

If a simple walk down the street qualifies for protection then it is difficult to see what would not. For most people who are not public figures in the sense of being politicians or the like, there will be virtually no aspect of their life which cannot be characterized as private. Similarly, even celebrities would be able to confine unauthorized photography to the occasions on which they were at a concert, film premiere or some similar occasion. . . . Even after von Hannover [No 1] there remains, I believe, an area of routine activity which when conducted in a public place carries no guarantee of privacy.[[94]](#footnote-94)

 In July 2012, the mother of actor Hugh Grant’s baby, Ms Ting Lang Hong, received a High Court ‘permanent undertaking’ from the picture agency *Splash News* not to pursue, doorstep or harass her or her child.[[95]](#footnote-95) The order was made under s 1(1)(a) of the Protection from Harassment Act 1997, a ruling by Mr Justice Tugendhat which has been used by celebrities in subsequent actions, providing enhanced measures of protection against paparazzi and media intrusion. Ms Hong claimed that on several occasions as many as ten journalists had camped outside her house, staying all night even in the rain, in the hope of getting a picture. An illustrated article appeared in the News of the World, dated 8 April 2011, headlined ‘Hugh’s Secret Girl’. At the time of the publication Ms Hong had no idea that she was being followed and photographed.[[96]](#footnote-96)

1.4.2 Social utility and the protection of private information: the **Max Mosley** case

As the line between public and private blurs on the internet, can the courts truly protect what they regard as ‘private’ and ‘confidential’ in an attempt to protect a person’s reputation, including personal image and photographs? In recent years, English law has adapted the action for breach of confidence to provide a remedy for the unauthorized disclosure of personal information such as in the *Naomi Campbell* case. This development has been mediated by the analogy of the right to privacy conferred by Article 8 ECHR and has required a balancing of that right against the right to freedom of expression conferred by Article 10 of the Convention. More recently, the Strasbourg court confirmed in the **Axel Springer** case[[97]](#footnote-97) that Articles 8 and 10 ECHR are of equal value, as long as the ‘balancing exercise’ is genuinely conducted by domestic courts, following the margin of appreciation.

 Their Lordships said in **Campbell** (2004) that the law of confidence does not protect useless information or trivia. In Mosley[[98]](#footnote-98), Eady J extended the confidentiality notion to what amounts to personal conduct and what would be regarded as ‘socially harmful’. He then applied the terms ‘social utility’ and ‘pressing social need’[[99]](#footnote-99), first coined in Francome[[100]](#footnote-100) by Sir John Donaldson MR, where he explained that:

. . . the ‘media’, to use a term which comprises not only the newspapers, but also television and radio, are an essential foundation of any democracy. In exposing crime, anti-social behaviour and hypocrisy and in campaigning for reform and propagating the view of minorities, they perform an invaluable function.[[101]](#footnote-101)

 Max Mosley sued the News of the World (News Group Newspapers Ltd), complaining about a number of articles.[[102]](#footnote-102) News of the World (NOW) journalist, Neville Thurlbeck, headlined the ‘exclusive’ on 30 March 2008: ‘F1 Boss Has Sick Nazi Orgy With 5 Hookers’, with the subheading: ‘Son of Hitler-loving fascist in sex shame’. Of ‘public interest’ – the newspaper argued – was that Mr Mosley, the youngest son of the right-wing fascist leader Sir Oswald Mosley[[103]](#footnote-103) and Diana Mitford, had engaged not only in an orgy with call girls, but in a ‘Nazi orgy’. Mr Mosley knew nothing of the article before publication nor of the clandestine video footage which had been taken by an undercover reporter posing as a prostitute. The first he knew of the scoop was on the very same Sunday that millions of people were reading the article and watching the accompanying footage on the *NOW* website.

 Mosley’s cause of action centred on both a breach of confidence (i.e. the unauthorized disclosure of personal information) and an infringement of Mr Mosley’s privacy under Article 8 ECHR. Eady J referred to the principle of ‘pressing social need, where revealing someone’s identity in court and therefore in the media was useful to society and ‘of social utility’, for the purpose of revealing criminal misconduct and antisocial behaviour (see: X v Persons Unknown (2006)[[104]](#footnote-104)). Clearly, it was not alleged that the Formula 1 boss had engaged in unlawful sexual activity. The sensational newspaper reports centred on his sexual activities between consenting adults in private. Eady J stressed that Mr Mosley’s conduct was in private and not socially harmful. He drew the analogy between the law on consumption of alcohol with that on other intoxicating substances: was such conduct in private and by consenting adults in the public interest and of social utility?

 Eady J ruled that that the photographs of and articles on the Formula 1 chief’s sado-masochistic activities with hired call girls were of *no social utility* at all. They rather amounted to ‘old-fashioned breach of confidence’ by way of conduct inconsistent with a pre-existing relationship, rather than simply of the ‘purloining of private information’. The judge stressed that the content of the published material was inherently private in nature, consisting of S & M sexual practices. Moreover, there had been a pre-existing relationship of confidentiality between the participants, who had all known each other for some time and took part in such activities on the understanding that they would be private and that none of them would reveal what had taken place. Clearly ‘Woman E’ had breached that trust by recording her fellow participants.[[105]](#footnote-105)

 Max Mosley had chosen not to sue the newspaper in defamation. Though he was successful in in privacy claim it still meant that the offending articles and video footage of the ‘Nazi Orgy’ available on the *NoW* website were already in the public domain and the damage to Mr Mosley’s reputation had been done.

 On 29 September 2008, Max Mosley filed an application before the European Court of Human Rights (ECtHR) heard on 11 January 2011 in Strasbourg. Mr Mosley had asked the court to rule in favour of ‘prior notification’, which would compel the British (and EU) press to notify the subject of a story before publication.[[106]](#footnote-106) He lost his claim. The ECtHR ruled against any pre-notification regimes concerning the media which would require powerful civil or criminal sanctions. The ruling stated that such measure would have an adverse impact on media freedom beyond the limits of ‘entertainment journalism’ and the trade in the private lives of celebrities. The Strasbourg court concluded:

‘The limited scope under Article 10 for restrictions on the freedom of the press to publish material which contributes to debate on matters of general public interest must be borne in mind. Thus, having regard to the chilling effect to which a pre-notification requirement risks giving rise, to the significant doubts as to the effectiveness of any pre-notification requirement and to the wide margin of appreciation in this area, the Court is of the view that Article 8 does not require a legally binding pre-notification requirement’.[[107]](#footnote-107)

 During his testimony at the ***Leveson Inquiry*** on 24 November 2011, Max Mosley disclosed that he was suing the Google search engine in France and Germany in a libel action, in an attempt to force the internet company to monitor and censor search results about his alleged sado-masochistic orgy and the NOW video.[[108]](#footnote-108) His action was superseded by the ***Google Spain*** (case C – 131/12) [[109]](#footnote-109) action in the CJEU, resulting in the ‘right to be forgotten’ ruling.

**See Chapter 3.6**

We have seen in Mosley (2008) that the courts protect the individual when the intrusion into a claimant’s life has been ‘highly offensive’ and when the objective ‘sober and reasonable man’ would agree that intrusion has been unacceptable.

** FOR THOUGHT**

Compare the rulings in Theakston [2002], Campbell [2004] and Mosley [2008]. In what circumstances will the courts grant privacy protection in the absence of ‘Max Mosley-style’ pre-­notification regulations to editors?

**1.4.3 Balancing the public interest with the individual’s right to privacy**

A factor which often dictates whether or not an individual’s privacy is protected is the consideration of ‘public interest’. Before the Human Rights Act 1998 came into force in October 2000, common law recognized that the public interest could justify the publication of information that was known to have been disclosed in breach of confidence. This was initially limited under the ‘iniquity rule’, whereby confidentiality could not be relied upon to conceal wrongdoing, upheld in Lion Laboratories v Evans (1985).[[110]](#footnote-110) The public interest consideration is the argument that intrusion into people’s private lives should be permitted where it is in the public’s interest for them to be made aware of the private information. This may be considered a defence to a breach of privacy (or confidence), now supported by Article 10 ECHR when the courts balance freedom of expression with that of the right to privacy (see: Francome v Mirror Group Newspapers Ltd[[111]](#footnote-111)).

 In **Jameel**,[[112]](#footnote-112) Lord Bingham made the following observations within the context of confidentiality and the public interest:

. . . the necessary precondition of reliance on qualified privilege in this context is that the matter published should be one of public interest. In the present case the subject matter of the article complained of was of undoubted public interest. But that is not always, perhaps not usually, so. It has been repeatedly and rightly said that what engages the interest of the public may not be material which engages the public interest.[[113]](#footnote-113)

 At a trial for a claim for misuse of private and confidential information, a claimant must first establish that he has a reasonable expectation of privacy in relation to the confidential information of which disclosure is threatened, as established in Murray v Express Newspapers (2008)[[114]](#footnote-114):

. . . whether a reasonable person of ordinary sensibilities would feel if he or she was placed in the same position as the claimant and faced the same publicity.[[115]](#footnote-115)

 That case concerned photographs of a young child (David, son of J. K. Rowling) in a public place taken covertly and published without the parents’ permission.

**See below 1.5**

The Max Mosley[[116]](#footnote-116) privacy ruling made it clear that matters concerning the ‘extramarital bed’, ‘death bed’ or ‘hospital bed’ are out of bounds as far as freedom of expression and media reporting are concerned.In ***AMP***[[117]](#footnote-117) a British university student used her mobile phone to take explicit naked photos of herself at her home; the mobile phone was subsequently stolen while she was on a tram in Nottingham in 2008. After the phone was found, her photos were uploaded to the BitTorrent network and circulated under the name ‘Sexy Rich Chick Mobile Phone Found By IRC Nerdz’. Her application for an interim (super) injunction to prevent transmission, storage and indexing of any part or parts of these photographic images was granted by Ramsey J in December 2011 to protect the claimant’s rights to privacy under Article 8 ECHR and to prevent harassment under s 3 Protection from Harassment Act 1997.

 Until von Hannover (No 1)[[118]](#footnote-118) there existed some confusion as to the meaning of ‘public’ and ‘private’ domain’ as to what would be regarded in the ‘public interest’ in relation to an individual’s right to privacy. This was perhaps better defined in Spycatcher (No 2),[[119]](#footnote-119) where the ECtHR ruled that the public interest test does not always amount to a justification for publication of confidential information. Since Spycatcher (No 2) the law imposes a ‘duty of confidence’ in common law whenever a person receives information which he knows or ought to know is fairly and reasonably to be regarded as confidential. Nevertheless, the law remains awkward and bewildering, caused partly by confusing case law relating to trade secrets with misuse of private personal information, which may require different parameters and treatment. This has given rise to ever greater legal actions. As common law has developed, ‘public interest’ is now the most common justification for publishing information which is either confidential or which has been challenged in the tort of defamation.

**See Chapter 7**

1.4.4 Genuine public interest or mere ‘tittle-tattle’? The **von Hannover Nos 1** - 3 and **Axel Springer** actions

The German weekly ‘gossip’ magazines such as *Bunte* or *7 Tage* have always been interested in the private lives of European royalty, focusing particularly on Princess Caroline of Monaco[[120]](#footnote-120) during her various marriages the last being to Ernst August von Hannover. The applicant, Princess Caroline von Hannover, is a Monegasque national who was born in 1957 and lives in Monaco. The German media interest has always been focused on the royal family in Monaco, starting with the marriage of Prince Rainier III (1923 – 2005) to the Hollywood and Oscar-winning actress Grace Kelly (1929 – 1982) in 1956 and their children Princess Caroline, Prince Albert II and Princess Stephanie.

 Princess Caroline has made repeated attempts to prevent the publication of photographs portraying her private life, often by taking legal action in the German courts. Two series of photographs, published in 1993 and 1997, were the subject of three sets of proceedings. Those proceedings were the subject of the judgment of 24 June 2004 in von ***Hannover v Germany (No 1)***[[121]](#footnote-121) in which the European Court of Human Rights (ECtHR) held that the court decisions in question had infringed the applicant’s right to respect for her private life under Article 8 ECHR.

 In a joint action, Caroline and her husband, Ernst August von Hannover[[122]](#footnote-122), subsequently brought several sets of proceedings seeking injunctions against the publication of further photographs published in German glossy and gossip magazines between 2002 and 2004. The German Federal Court of Justice dismissed their claims in part and the Federal Constitutional Court rejected a constitutional complaint by the applicants. Those proceedings were the subject of the Grand Chamber judgment of 7 February 2012 in the case of ***Von Hannover v Germany (no. 2)***, [[123]](#footnote-123) in which the Court held that the court decisions at issue had *not* infringed the right of Princess Caroline von Hannover and her husband to respect for their private life.

 Noteworthy in von ***Hannover No 1*** was the judgment by presiding Judge Zupani who made the distinctions between the different levels of ‘privacy’ which were rather confusing in German permitted exposure in German copyright and constitutional jurisprudence (Begriffsjurisprudenz). Zupani’s ruling set the precedent for the ‘balancing test’ in human rights legislation between the public’s right to know and freedom of the media to report under Article 10 ECHR and the celebrity’s right to privacy:

. . . he who willingly steps upon the public stage cannot claim to be a private person entitled to anonymity. Royalty, actors, academics, politicians etc. perform whatever they perform publicly. They may not seek publicity, yet, by definition, their image is to some extent public property.[[124]](#footnote-124)

 The ruling in von Hannover (No 1) significantly impacted on media practices throughout Europe at the time. Paparazzi had to make sure when taking a celebrity photo: was it taken in a clandestine and secret long-lense way by peeping over a fence into a private garden or was the celebrity individual undertaking an official duty in public? Von Hannover No 1 set the scene for the ‘public’ or ‘private sphere’. And if the picture was of public interest it could safely be published, irrespective of consent.

 The ruling in von Hannover No 2 was different. The ECtHR did not really reverse the ruling in the No 1 action but did not grant the Article 8 ‘privacy’ right to Princess Caroline von Hannover for different reasons. The action concerned the publication of photographs in the ‘gossip’ magazine Frau im Spiegel in 2002, showing the Princess and her husband, Prince Ernst August von Hannover (joint applicants), on a skiing holiday in St Mortiz. The accompanying article reported on the deteriorating health of the Princess’s father, Prince Rainier III of Monaco and that the Princess should have been at his bedside as he was dying. The ECtHR ruled that the publication of the said photo and the accompanying article did not breach the applicants’ privacy rights because the subject matter (the poor health of reigning Prince of Monaco) was of general public interest. The Strasbourg Court also confirmed that the link between the photographs and the subject matter of the accompanying article was sufficiently close so as to render their publication justifiable. The case was jointly heard with the ***Axel Springer*** case (see below).

**❖ KEY CASE**  Axel Springer v Germany **(2012) (Joint Application No 3995/08 with von Hannover No 2) Strasbourg judgment of 7 February 2012 (ECTHR)**

Precedents (in both actions: **Axel Springer** and **von Hannover No 2**)

❖ The domestic courts must strike a balance between Articles 8 and 10 ECHR, depending on the facts and circumstances.

❖ Contribution to a debate of general interest – this covers not only political issues or crimes but sporting issues or performing artists.[[125]](#footnote-125)

❖ How well known the person was and the subject of the report – a distinction has to be made between private individuals and persons acting in a public context, as political or public figures.[[126]](#footnote-126)

❖ Prior conduct of the person concerned: the conduct of the person prior to the publication is a relevant factor – although the mere fact of having cooperated with the press cannot be an argument for depriving a person of all protection.[[127]](#footnote-127)

❖ Method of obtaining the information and its veracity – these are important factors – the protection of Article 10 is subject to the proviso that journalists are acting in good faith, on an accurate factual basis, providing reliable and precise information in accordance with the ethics of journalism.[[128]](#footnote-128)

❖ Content, form and consequences of the publication – the way in which the photo or report is obtained and the way in which the individual is represented are factors to take into account.[[129]](#footnote-129)

❖ Severity of the sanction imposed.[[130]](#footnote-130)

❖ Courts have to balance Articles 8 and 10 ECHR equally.

❖ Article 8 does not create an ‘image right’, nor does it create a ‘right to reputation’.

❖ Individuals who seek the public limelight have their Article 8 right to privacy severely curtailed.

Facts:

The applicant, Axel-Springer-Verlag, is the publisher of the daily German tabloid Bild-Zeitung (‘Bild’), registered in Hamburg since 1952, with a circulation of about 2.6 million per day (in 2004). Bild is famous for its salacious gossip and sensational journalistic headlines.

The case concerned two articles about X, a well-known TV actor.[[131]](#footnote-131) X had been the subject of two stories and photos in Bild in 2004 and 2005, after he was arrested in a beer tent at the Munich Oktoberfest for possessing cocaine. The story made the headlines: ‘Cocaine! Superintendent caught at Munich Beer Festival’, with a photo of X. The second article was published some ten months later and reported details of X pleading guilty to the drug possession offence and how he was sentenced to an e18,000 fine. Axel Springer claimed that prior to publication the journalist had confirmed the arrest with the police sergeant present at the scene; the public prosecutor had also verified the charges.

Whilst the Hamburg regional court had granted X an injunction, restraining Bild (and other publications) from publishing the story, Bild went ahead and published the story and photos. The Hamburg court found Axel Springer guilty of contempt by disobeying the existing court order. The applicant publishers petitioned the ECtHR relying on their Article 10 right.

Decision: **Axel Springer**

The Grand Chamber (of the ECtHR) disagreed with the German courts’ reasoning for granting the injunction to the actor. Judges of the Grand Chamber opined that X’s arrest and conviction was of general public interest, particularly since the public prosecutor had confirmed the criminal charges of possession of class A drugs. It was also in the public interest and therefore of importance to uphold the law, since X had been a role model for young people, playing the character of a police superintendent (der Kommissar) whose job it was to combat crime. The Court noted that X had regularly contacted the press himself or via his PR company and that he had previously revealed detailed information about his private life in a number of media interviews. The Court reasoned that X’s ‘legitimate expectation’ of protection for his private life was reduced by virtue of the fact that he had ‘actively sought the limelight’. Because ‘TV cop’ X was a well-­known actor, known particularly as a law enforcement officer on screen, the ECtHR held:

. . . he was sufficiently well known to qualify as a public figure. That consideration . . . reinforces the public’s interest in being informed of X’s arrest and of the criminal proceedings against him.[[132]](#footnote-132)

The Grand Chamber found by 12 votes to 5 that the German courts had violated the publishers’ Article 10 rights by their overzealous injunctive sanctions imposed on the tabloid newspaper. The restraining order had been too severe and accordingly there had been a violation of the publishers’ Article 10 right. The newspaper publishers were awarded damages and costs in the domestic proceedings and in the Strasbourg action.

Analysis of **Axel Springer** and **von Hannover No 2**

The difficulty with both the conjoined cases was compounded by a series of appeals and cross-­appeals by the applicants and various publishers, including complaints in respect of publications and photographs elsewhere. Nevertheless, the ECtHR’s decision in both cases is an important win for the media, particularly as media practices were severely criticized at the Leveson Inquiry in London’s High Court of Justice. The Axel Springer – von Hannover No 2 judgments remind us of the important role played by a free and uncensored press in a pluralistic democracy where the human rights court undertook a careful balancing exercise between freedom of expression and the individuals’ privacy rights. In both cases the Grand Chamber of the ECtHR explained the criteria, based on existing human rights law, which are to be applied when balancing the competing Article 8 and 10 rights in the public interest. Both the ECtHR decisions in Axel Springer and von Hannover No 2 can be seen as important victories for the media and for press freedom in general. With the Leveson Inquiry into media ethics and phone-hacking dominating the headlines at the same time as the Grand Chamber judgment in 2012, the judgment provides suitable encouragement and support for the media across Europe in relation to the publication of stories and photographs about the private lives of celebrities.[[133]](#footnote-133)

 The ***von Hannover No 3*** (2013)[[134]](#footnote-134) action concerned a complaint lodged by Princess Caroline von Hannover relating to the refusal of the German courts to grant an injunction prohibiting any further publication of a photograph of her and her husband Ernst August taken without their knowledge while on holiday in their villa on an island off the Kenyan cost. In its judgments in ***Axel Springer AG and von Hannover (no. 2)*** (see above) the ECtHR had set out the relevant criteria for balancing the right to respect for private life against the right to freedom of expression. These were: contribution to a debate of general interest, how well known the person concerned was, the subject of the report, the prior conduct of the person concerned, the content, form and consequences of the publication and, in the case of photographs, the circumstances in which they were taken.

 In ***von Hannover No 3***, the Strasbourg Court noted that the German Federal Constitutional Court had taken the view that, while the photograph in question had not contributed to a debate of general interest, the same was not true of the article accompanying it, which reported on the current trend among celebrities towards letting out their holiday homes. The Federal Constitutional Court and, subsequently, the Federal Court of Justice had observed that the article was designed to report on that trend and that this conduct was apt to contribute to a debate of general interest. The Court also noted that the article itself did not contain information concerning the private life of the applicant or her husband, but focused on practical aspects relating to the villa and its letting. It could not therefore be asserted that the article had merely been a pretext for publishing the photograph in question or that the connection between the article and the photograph had been purely contrived. The characterisation of the subject of the article as an event of general interest, first by the Federal Constitutional Court and then by the Federal Court of Justice, could not be considered unreasonable. The human rights court could therefore accept that the photograph in question had made a contribution to a debate of general interest.

 The Strasbourg court reiterated that on several occasions the applicant and her husband were to be regarded as public figures who could not claim protection of their private lives in the same way as individuals unknown to the public. Noting that the German courts had taken into consideration the essential criteria and Strasbourg jurisprudence in balancing the various interests at stake, the court concluded that they had not failed to comply with their positive obligations and that there had been no violation of Article 8 of the Convention.

 The Strasbourg human rights court messages sent out in von Hannover No 2 and Axel Springer (2012) and ***von Hannover No 3*** are helpful, making a distinction of what is of genuine public interest and what is not. In von Hannover No 2, the article did not centre on Princess Caroline. Instead, its main focus was her father, Prince Rainier of Monaco, and his deteriorating health, which was a matter of public interest given his official role as reigning head of state. In von Hannover No 1 the photographs at issue depicted Princess Caroline’s personal relationships and day-to-day life and activities, such as horse riding, skiing and playing tennis, which the ECtHR decided were purely private. What is clear from the three ***von*** ***Hannover*** judgments is that where an article and accompanying photo can be shown to contribute to a debate of genuine public interest, it can be justified and be published. Let us call this the ‘red carpet’ rule, where the ECtHR defined what is meant by ‘public’ and ‘private sphere’ more clearly in relation to celebrities and public figures.

** FOR THOUGHT**

Should the UK Parliament legislate for a right of privacy, building on existing common law of breach of confidence? Discuss with reference to leading authorities.

**1.5 A child’s right to privacy**

A child’s welfare is of paramount importance, a principle enshrined in the United Nations Convention on the Rights of the Child 1989 which provides in Article 3:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

and Article 16:

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour or reputation.

2. The child has the right to the protection of the law against such interference or attacks.

Article 24 of the Charter of Fundamental Rights of the European Union 2000 provides:

(2) In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

 In English law the Children and Young Persons Act 1933[[135]](#footnote-135) and the Children Act 1989 protect the upbringing and – if necessary – anonymity of a child going through care and court proceedings until the age of 18. The Victims and Witnesses (Scotland) Act 2014 introduced the same reporting restrictions as England and Wales in September 2015.[[136]](#footnote-136) These principles ensure that all decisions made in respect of children must be in their best interest and must be respected by all persons, including a child’s parents or guardian and all private and public bodies. Any interference with a child’s right to privacy will ultimately be decided by the courts who have the welfare of the child in mind.

**See Chapter 8.3**

 There have been decisions made by the courts which conflict with the parents’ interest and that of the child. Where there exists such conflict with the parents’ interests, the courts tend to rule in the child’s best interest and welfare though relief will not always be granted under Art 8 ECHR according to the ruling in the ***AAA***[[137]](#footnote-137) case (see below). Increasingly we see children participate in reality TV shows where parents have clearly waved the child’s privacy right – some for financial gain. While reality shows featuring children may cause television ratings to go up, children participating in these shows face immense pressure.

 The court ruling in the ***David Murray*** case (see below) made it clear that a child’s right to privacy is not entirely separate from that of his parents. Rather the court posed the question as to whether the child’s right to privacy is engaged should not be determined by reference to the parents’ own interest and actions. The court made reference to parental conduct and motive when assessing whether an interference with the child’s privacy is justifiable. The court recognized that parents can, in limited circumstances, waive a child’s right to privacy – which many celebrities have done, such as the Beckhams with their children – but for financial gain.

**1.5.1 A child’s right to privacy is distinct from that of each of its parents**

The leading case in this respect is the David Murray action[[138]](#footnote-138) concerning the then 19 months-old son David Murray whose mother is the famous Harry Potter author. The child, was photographed covertly with a long lens by paparazzi from the Big Pictures agency in a buggy as the author was strolling in a public street in Edinburgh in November 2004. Big Pictures is a well-known celebrity photo agency which licenses its photos in the UK and internationally. The child’s photograph was published in April 2005 (without the parents’ permission) in the Sunday Express magazine, accompanying an article on Joanne Rowling’s attitude to motherhood. Rowling and her husband Dr Murray sought an injunction to stop publication on behalf of their son David.

 The question before the Court of Appeal was whether a small child being pushed in a buggy down the high street was ‘private’? The CA found that it depends on the circumstances in which the photograph was taken which would determine determining if Art.8 ECHR can be engaged. The David Murray photograph was taken in a clandestine way and the photo was subsequently published for the purpose of sale and publication which was sufficient to establish an interference with the child’s privacy. Furthermore the court ruled that a child’s right to privacy is distinct from that of each of its parents owing to its vulnerability and youth.[[139]](#footnote-139)

 The CA stated that the circumstances in which a child has a legitimate expectation of privacy are wider than those in which an adult has such expectations: adults can expect a greater degree of intrusion as part of their daily lives whilst a little child may be unaware of media hype. Citing the ‘legitimate expectation’ test in Campbell, Lord Hope asked:

. . . what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity?[[140]](#footnote-140)

 At the same time the CA pointed out that children, unlike adults, are very unlikely to derive any benefit from publication of information. This does not mean that children should never be photographed in public, as long as it is not detrimental to the child at the time of publication or in the future. In any case this should be in line with normal parental responsibility and the statutory duty to protect the child’s well-being.

 In ***Re* *Z****.[[141]](#footnote-141)* the CA granted an injunction to prevent publicity and identification of a child who attended a special school. The mother had consented to a TV company filming the child’s particular treatment and the TV programme was to show the results of the child’s institutional care as well as the child's treatment in which the child and mother would play active roles. The CA held that the parent's right to waive a child's privacy rights is strictly limited reiterating Lord Oliver's judgment in *Re* *KD* *(A* *Minor)* *(Ward:* *Termination* *of* *Access).*[[142]](#footnote-142)

 Since the ‘J. K. Rowling case’ there has been a tendency by celebrities to include their children in lifestyle magazines or reality programmes which enhance their celebrity status as ‘yummy mummy’ or ‘superdad’. When we see the Beckhams’ children Brooklyn, Romeo, Cruz and Harper Seven or Kim Kardashian and Kanye West’s daughter ‘North’ or Tamara Ecclestone breast feeding baby Sophia in glamour magazines, we can be sure that the celebrities will have allowed publication of the images for financial gain. Otherwise we would see celebrity children’s photographs pixelated.

 Between 2010 and 2011 the *Daily Mail* published eight articles about the then Conservative Mayor of London Boris Johnson and his ‘philandering’ past. The ‘siege’ by newspaper journalists and paparazzi had taken place during a 12-day period in the summer of 2010.  According to the claimant baby AAA, the journalists and photographers had laid siege to her family home in London, eventually forcing the claimant to stay at her grandparents’ house in Kent. The newspaper (and its online edition) had openly reported on the married Mayor’s affair with Helen Macintyre who subsequently gave birth to her daughter Stephanie. The paper ran eight stories, speculating over the paternity of Stephanie, showing a photo of the one-year-old child born in November 2009 with a wild mop of flaxen hair and instantly recognisable features similar to those of Mr Johnson. As soon as the scandal broke – the child only known as AAA at the time – sought damages against Associated Newspapers and a ‘superinjunction’ for lifelong anonymity because the mother had chosen not to reveal the identity of the father and had not named the father on the child’s birth certificate.

 ***AAA v Associated Newspapers*** (2012)[[143]](#footnote-143) was a six-day private hearing in London where High Court judge Mrs Justice Nicola Davies ruled that AAA’s (the claimant baby) mother had compromised the child’s right to privacy by hinting at the identity of the father at a party. The claimant served proceedings on the defendant in June 2011. Solicitors acting for the claimant alleged breaches of the baby’s privacy rights under Article 8 ECHR and under the Protection from Harassment Act 1997. Associated Newspapers disputed the claim, but promised to remove the photograph from the Daily Mail’s website and to adhere to the PCC Code.  But more articles followed and the baby’s photograph was re-published despite the assurance given. At the end of the trial the judge ordered the Mail’s publishers, Associated Newspapers, to pay £15,000 in privacy damages for publishing photographs of Stephanie but ordered the legal representatives of the baby to pay 80 per cent of the Mail’s legal costs, an estimated £200,000.

 Miss Macintyre (the child’s mother) appealed against the decision not to award her damages for details about the affair and resulting child being published, and the refusal to grant an injunction preventing the Mail from reprinting the information. But the Court of Appeal rejected her application.[[144]](#footnote-144) Master of the Rolls Lord Justice Dyson said: ‘It is not in dispute that the legitimate public interest in the father’s character is an important factor to be weighed in the balance against the child’s expectation of privacy’. The court also rejected any further privacy injunction since much information had already been put in the public domain by the child’s mother that an injunction to prevent any further publication upon this topic would have served no real purpose. The court had evidence of the claimant’s mother’s numerous conversations with friends and that she had told a senior magazine executive at a party that Boris Johnson was the father of Stephanie (***AAA)***. These facts had clearly compromized the claimant child’s reasonable expectation of privacy.

 Davies J in the High Court action referred to ***Murray*** in assessing AAA’s reasonable expectation of her private life, her welfare and upbringing. But different to the David Murray (the infant child of J K Rowling) case, the court found that the conduct of AAA’s mother as identified in the above paragraph demonstrated ambivalence towards, and an inconsistent approach, with her stated aim in these proceedings. The court further ruled that the matter was in the public interest which the electorate was entitled to know when considering his fitness for high public office. The core information being that AAA’s father (Boris Johnson) had an adulterous affair with the mother (Miss Macintyre), deceiving both his wife and the mother’s partner, and that the child, born about nine months later, was likely to be the father’s child.

 The photograph of the claimant ***AAA*** had been taken in a public place, when she was less than one year old and her mother was unaware of it being taken. Mrs Justice Davies said that there was no suggestion that the taking of the photograph caused distress to the claimant. The same photograph accompanied the first, second and eighth articles published by the defendant’s newspaper (though no consent had been obtained from the claimant's mother). The *Daily Mail* argued that the publication photo was necessary in order to permit readers to see whether or not there was any family resemblance as between the baby and her supposed father.[[145]](#footnote-145) The judge found that the claimant’s mother and nanny were not reliable witnesses, pointing out discrepancies and inaccuracies in their evidence.  Davies J further pointed out that much of the information was already in the public domain, citing the CA in ***Douglas v Hello***(2006):

Once intimate personal information about a celebrity's private life has been widely published it may serve no useful purpose to prohibit further publication.[[146]](#footnote-146)

 Mrs Justice Davies also noted that the claimant in ***Murray v Express Newspapers*** had sued the photographic agency (*Big Pictures*) as well as the newspaper’s publisher.  This course of action had been open to the claimant in the ***AAA*** case, but had not been taken: at most, the photographic agency would have known that the defendant may have been interested in obtaining the photograph.

 The claimant child had relied on the privacy aspect in ***Reklos and Davourlis v Greece***[[147]](#footnote-147) (2009). But Mr Justice Davies pointed out that in this case the Strasbourg human rights court (ECtHR) had stated that neither the child's lack of awareness of the taking or the existence of photographs, nor the fact that they revealed no private information (other than what the baby looked like), nor anything potentially embarrassing, had prevented there being an infringement of the child's Article 8 right of privacy.

 At the appeal hearing the CA balanced the defendant newspaper’s Article 10 rights with the claimant's Article 8 rights and justified publication as a high one of “exceptional public interest".[[148]](#footnote-148) Because of the father’s professional and private life, as a high profile politician and a married man, father of four children and his notoriety as result of extramarital adulterous liaisons. The claimant baby AAA was alleged to be the second such child conceived as a result of an extramarital affair of the supposed father. The CA said that such information went to the issue of recklessness on the part of the supposed father, relevant both to his private and professional character, in particular his fitness for public office.[[149]](#footnote-149) For these reasons the CA held that the claimant’s reasonable expectation of privacy under Article 8 was to be given less weight than would have been the position had the claimant's mother said or done nothing (as was the case with ***David Murray*** and his mother J K Rowling).

 In balancing the claimant's expectation of privacy against the public interest in AAA’s supposed father and in particular the recklessness, relevant to his character and fitness for public office, the CA found that the publication of the fact of the claimant's birth in the circumstances alleged was justified.[[150]](#footnote-150) So much of AAA’s birth and supposed paternity had already been in public domain, that an injunction to prevent any further publication upon the topic would have served no real purpose. As Mrs Justice Davies had concluded: “This was a story which was going to be published. If the defendant had not done it, another newspaper would.”[[151]](#footnote-151)

1.5.2 Protecting the right to life: anonymity orders for child killers

The HRA and European Convention have enabled the law of confidence to develop to protect a citizen’s right to life (under Article 2 ECHR) and right not to be subjected to torture or to inhuman or degrading treatment or punishment (under Article 3 ECHR).

 The issue of lifelong anonymity orders in respect of children who kill was first raised in the case of Mary Bell when, in 1968, 10-year-old Mary was convicted at Newcastle Crown Court of the murder of two little boys, aged three and four, by strangulation. After conviction Mary Bell spent 12 years at Red Bank Approved School near Newton-le-Willows in Lancashire and was released on licence in 1980 with a new identity. There followed a number of applications to the courts for the anonymity order to continue beyond her coming of age. The first application on 25 May 1984 concerned an injunction to conceal the identity of her baby daughter (Y) and the baby’s father after the News of the World had tracked down Mary Bell and her child (Re X (1985)[[152]](#footnote-152)). Mr Justice Balcombe granted a restraining order on Y’s eighteenth birthday, preventing identification of Mary’s daughter as well as the child’s father, and continuing the order on Mary (X) indefinitely. A further injunction was granted in 1988 when the identities of X and Y (then aged four) had been revealed to the press by villagers where the mother and daughter lived at the time.

 The third period was in 1998 after the publication of Gitta Sereny’s book on the story of Mary Bell, Cries Unheard, whereby Sereny had paid Mary a ‘substantial sum of money’ to co-author the book.[[153]](#footnote-153) Home Secretary Jack Straw did not succeed in injuncting the publication of the book and condemned the payment to Bell in an open letter to the Sun, stating that by collaboration on the book, Mary Bell should forfeit her right to anonymity. Prime Minister Tony Blair criticized the payments to the former child killer as ‘inherently repugnant’.

 The fourth period began in December 2002 when Mary’s acquitted co-accused ‘Norma’ demanded in the Sunday Sun on 15 December that it was ‘time to unmask Mary Bell’. The Newcastle Evening Chronicle published a lead article on 11 April 2003, ‘Still Haunted’, in which family members of the two killed boys demanded that Mary Bell’s identity be disclosed.[[154]](#footnote-154)

 The waiver of a child’s privacy may not be permanent, though the (family) court can reimpose privacy at any time even if it has previously been waived. One of the most notorious cases involved two 10-year-old child murderers, Jon(athan) Venables and Robert Thompson, who killed 18-month-old James (Jamie) Bulger in February 1993. In Venables and Thompson v News Group Newspapers Ltd[[155]](#footnote-155) the 18-year old claimants applied for injunctions preventing disclosure of their new identities, current physical appearance and their time spent in secure units since their conviction at the adult Preston Crown Court in November 1993. The murder of little James Bulger had shocked the nation and Venables and Thompson continued to be the object of death threats. They were given new identities to assist in their reintegration into the community.

 Butler-Sloss P held that, as the court was a public authority under s 6(3) of the HRA, she had to act compatibly with the Convention rights and have regard to Strasbourg jurisprudence. She recognized that any restriction on freedom of the press had to fall within one of the exceptions in Article 10(2), which should be construed narrowly and the onus of which was on the claimants.[[156]](#footnote-156) Dame Elizabeth Butler-Sloss, when grating a lifelong anonymity order contra mundum on the – by now – 18-year-old Venables and Thompson, cited Article 2 ECHR, ‘right to life’ as a reason for granting the order.

 She referred to the fact that the evolution of the common law, and in particular the law of confidence, had been given considerable impetus by the HRA. Taking into account Articles 2, 3 and 8 ECHR, and the real possibility that the claimants may be the objects of revenge attacks, she stated that:

…the court does have the jurisdiction, in exceptional cases, to extend the protection of confidentiality of information, even to impose restrictions on the press, where not to do so would be likely to lead to serious physical injury, and there is no other way to protect the applicants.[[157]](#footnote-157)

Butler-Sloss P granted the injunctions as they satisfied the requirements of Article 10 (2), namely:[[158]](#footnote-158)

1. They were in accordance with the law, namely the law of confidence;

2. They would be imposed to prevent the disclosure of information received in confidence;

3. There was a very strong possibility, if not probability, that on the release of the claimants there would be serious efforts to find them and if that information became public they would be pursued by those intent on revenge. Their rights under Articles 2 and 3 gave a strong and pressing social need in a democratic society for their confidentiality to be protected; and

4. The injunctions were proportionate to the legitimate aim pursued, namely protecting the claimants from the real and serious risk of death or physical harm.

 The defendant newspapers had argued that the young killers’ rehabilitation process and education whilst in youth custody were matters of genuine public interest and for that reason Venables and Thompson’s identities should be revealed, citing – inter alia – freedom of expression. Butler-Sloss P granted the injunctions against the whole world (contra mundum), stating that:

…in the light of the implementation of the Human Rights Act, we are entering a new era, and the requirement that the courts act in a way compatible with the Convention, and have regard to European jurisprudence, adds a new dimension to those principles.[[159]](#footnote-159)

 For these reasons the court had a duty of care to grant lifelong anonymity orders on the young men (see also: Davies v Taylor (1974);[[160]](#footnote-160) Re H (Minors) (Sexual Abuse: Standard of Proof) (1996)[[161]](#footnote-161)).

 In March 2010, the by now 27-year-old Jon Venables – now on life licence – disclosed his identity to prison and probation staff. On 8 March the Daily Mirror broke the news that the ‘Jamie Bulger killer’ was back in prison on suspicion of a ‘serious sexual offence’. Justice Minister Jack Straw released a press statement which confirmed the identity of the ‘Bulger-killer’ in preventive custody, though stating that Venables had not been charged with any sexual offence. This angered the press and the blogosphere was wild with speculation about Venables’ identity and the alleged crime. The Daily Mirror and the Sun demanded that the lifelong anonymity order on Venables and his accomplice Thompson be lifted. On 9 March 2010, Baroness Butler-Sloss addressed the House of Lords, giving reasons why the contra mundum anonymity order must never be lifted, repeating her reasons at the time based on Article 2 ECHR and the state’s duty to protect the Bulger killers’ individual lives in spite of the heinous crime they committed in 1993. She opined that the risk of harm to Jon Venables in the present case would be too great and the court had a duty of care to protect even the most dangerous offenders (see also: Osman v UK (1998)[[162]](#footnote-162)).

**See Chapter 8.3**

** FOR THOUGHT**

Is it right for media companies to rely on parental consent where it is clear that publication is not in the interests of the child’s welfare? Discuss with reference to legal rights of a child.

1.6 Superinjunctions

There has been a steady rise in superinjunctions to stop reporting of potentially embarrassing revelations of celebrities and the royals since 2009. Superinjunctions that were sought – but not granted or subsequently lifted – involved, for instance, the then Chelsea football captain John Terry, England striker Wayne Rooney and Manchester United and Wales footballer Ryan Giggs, all of whom had had extra marital affairs and had the financial means to use expensive lawyers to exercise legal rights denied to ordinary members of the public. Some TV personalities such as former ‘Top Gear’ presenter Jeremy Clarkson or TV personality Andrew Marr, would argue that superinjunctions are a waste of time and money, spoilt largely by the ‘Twitterati’. Andrew Marr – like Jeremy Clarkson – also decided to speak out about his own superinjunction, thereby technically breaking his own injunction and being in contempt of court. Mr Marr told the Daily Mail in April 2011: ‘I did not come into journalism to go around gagging journalists. Am I embarrassed by it? Yes. Am I uneasy about it? Yes.’[[163]](#footnote-163)

 Greater protection is usually extended to privacy rights than to rights in relation to confidential material (see: ***OBG Ltd v Allan*** (2007)[[164]](#footnote-164); ***K v News Group Newspapers Ltd*** (2011)[[165]](#footnote-165)). A claim for misuse of private information may well survive when information is already in the public domain, depending on how widely known the facts are, but it is diminished because many readers already know what the defendant newspaper has already published. The claimant may still have a damages claim, but the inunction is clearly weakened. Looking at recent case law it has become clear that the claimant’s Article 8 rights to privacy weigh less when the courts have carried out the balancing exercise (of Articles 8 and 10 ECHR) when the facts are already generally known about the celebrity’s indiscretions.

In January 2016, a celebrity only named as ***PJS*** applied to the London High Court for an interim injunction[[166]](#footnote-166) to prevent the *Sun on Sunday* publishing a story on a ‘celebrity threesome’, and further preventing *The Sun* (and other newspapers) from printing details of PJS’s extramarital affairs. Interestingly, this was not a superinjunctions (since the newspaper was known). This resulted in the fact that - by March 2016 - every British editor knew the true identity of *PSJ* and YMA, and everyone who really wanted to find out about the marital commitment of the two men and their two small children could either find their names via social media or *Scottish Mail on Sunday* which released the names and photos of the ‘celebrity couple’ on 10 April 2016 in their print edition (on the front page and page 6). Lawyers for PJS later regretted not taking out a ‘double gagging’ order; nor had they sought an *interdict* in the Scottish courts. American and Canadian newspapers (and their online editions) also reported about the case and that the ‘betrayal by a cheating husband’ would result in a ‘$450m Divorce’.

 *The Sun* and *Guardian* newspapers appealed the injunction, arguing that such ‘gagging order’ had become meaningless in the internet and social media age. The Court of Appeal duly dismissed the interim injunction with the proviso that PJS had a couple of days in which to appeal to the Supreme Court.[[167]](#footnote-167) This meant that the ‘well-known’ celebrity who reportedly had a ‘three-way sexual encounter’ between 2009 – 2011 and his husband were still to be kept anonymized.

A new ground for the application of a n interim injunction had been sought, namely, ‘in the interest of children’. Lord Jackson stressed, however, that children should not be used ‘as a trump card’. He also said that the two children would, in due course, learn about these matters from their mates in the playground and via social media. Clearly reasons for privacy injunctions had shifted: there were no longer claims of blackmail or threats to PJS’ other family members, as had been the reason given in the ***John Terry*** [[168]](#footnote-168) or ***Jeremy Clarkson[[169]](#footnote-169)*** superinjunctions.

The UK Supreme Court gave one if its speediest rulings in legal history (within one month), in May 2016 in ***PJS***,[[170]](#footnote-170) upholding the interim injunction by a majority in the light of extensive media interest. The judgement was streamed on live TV and is available via YouTube. The grounds cited by the Supreme Court Justices centred on the privacy interests of the appellant (PJS), his partner (YMA) and their two young children (pending a trial). Their Lordships commented that the forthcoming trial against the newspapers was likely to involve further tortious invasion of privacy of the appellant and his partner as well as of their children, who had of course no conceivable involvement in the conduct in question.

The court observed that those interested in a prurient story could, if they so wished, easily read about the identities of those involved in the Scottish and American media and find in great detail all the unpleasant details about PJS’ conduct with another couple.

The UKSC found no evidence of ‘public interest’ in any legal sense in the story involving PJS, though the respondent newspaper (mainly *The Sun*) hoped during the interim injunction that further evidence would emerge at trial. The court ruled that the media storm which would ensue had their Lordships discharged the injunction would have unleashed more enduring media and social networking attention with an even more damaging and ever-lasting invasion of privacy particularly of the children.[[171]](#footnote-171)

The ***PJS*** injunction attracted much attention not only from the media but also from legal scholars regarding the debate on the value of such (super)injunctions in the internet age. There is no doubt, however, that without such injunctions there would be further unrestricted and extensive coverage in hard copy as well as other media and the purpose of any trial (in this case the celebrity versus the newspaper) would be largely undermined.

Louise Berg and Michael Skrein of the Media Law firm Reed Smith commented on the company’s website that PJS “will have fought tooth and nail to preserve the injunction” and that “maybe he just didn’t like to lose”.[[172]](#footnote-172) The lawyers accused the UKSC however of failing to acknowledge the realities of a connected and globalized media landscape, echoing the dissenting judge, Lord Toulson, who warned, “the court must live in the world as it is and not as it would like it to be.”[[173]](#footnote-173)

**1.6.1 What are superinjunctions?**

A superinjunction (referred to by the media as a ‘double gagging order’) is a term commonly given to an order restraining disclosure and publication of the claimant’s identity and the fact the claim has been brought. These are usually interim court orders which prevent news organizations from revealing the identities of those involved in legal disputes, or even reporting the existence of the injunction at all. They were originally used exclusively in the family courts as a result of privacy and in camera proceedings, mostly concerning the protection of juveniles and children in care, adoption or divorce proceedings. In their simplest form, superinjunctions prevent the media from reporting what happens in court, usually on the basis that doing so could prejudice a trial or someone’s right to privacy. Superinjunctions in their strictest form mean derogation from the open justice principle in that they seek:

1. a private hearing (*in camera*);

2. anonymity for the applicant (and other persons involved in the ‘relationship’);

3. that the entire court file should be sealed;[[174]](#footnote-174) and

4. that the court order should prohibit publication of the existence of the proceedings, usually until after the conclusion of any trial.[[175]](#footnote-175)

If such an order is disclosed, say by a newspaper, this can amount to contempt of court – but only if the publication is in breach of an express prohibition: for example, where the court order expressly prohibits the publication of certain information relating to the hearing or the proceedings, to third parties with knowledge of such an order.

**See Chapter 2.4**

1.6.2 Superinjunctions and children

Lady Hale’s judgment in ***PJS*** is worth noting regarding the interests of the two children whom PJS has with YMA. She said:

It is simply not good enough to dismiss the interests of any children who are likely to be affected by the publication of private information about their parents with the bland statement that “these cannot be a trump card”. Of course they cannot always rule the day. But they deserve closer attention than they have so far received in this case, for two main reasons. … Not only are the children’s interests likely to be affected by a breach of the privacy interests of their parents, but the children have independent privacy interests of their own. They also have a right to respect for their family life with their parents.[[176]](#footnote-176)

She cited the *IPSO Code* (which came into force in January 2016) which provides that:

Editors must demonstrate an exceptional public interest to over-ride the normally paramount interests of [children under 16].

**See Chapter 6.4**

This means that courts will have to consider carefully the nature and extent of the likely harm to children’s interests which will result in the short, medium and longer terms from the publication of this kind of information about their parents. Lady Hale hoped that superinjunctions would make it possible that children could be protected from any such risk, by a combination of the efforts of their parents, teachers and others who look after them and some voluntary restraint on the part of the media.

An earlier precedent that the rights of children not to have ‘distressing experiences in the playground’ was set in the case of ***ETK v News Group Newspapers*** (also known as ‘***K***’) [[177]](#footnote-177) in 2011, when the *News of the World* (NOW) was prevented from reporting that a woman had been sacked from her job after the colleague she had previously had an affair with told his bosses “he would prefer in an ideal world not to have to see her at all and that one or other should leave,” because the court ruled that his children might find it upsetting if they found out.

ETK, a married man working in the entertainment industry, had begun a sexual relationship with another woman ‘X,’ also married. The source of the *NOW’s*  information suggested that this relationship became obvious to those with whom ETK and X were working. Towards the end of April 2010 the appellant’s wife confronted him with her belief that he was having an affair. He admitted it. This was deeply distressing for the wife but she and her husband determined, not least for the sake of their two teenage children, to rebuild her trust and their marriage. To that end the appellant accepted that he would end his sexual relationship with X and he so informed her.

 Balancing Articles 8 and 10 ECHR, the CA held that that K’s right to privacy, that of his family and children, wholly outweighed the newspaper’s right to freedom of expression, since the harm that would be done to his family life would be detrimental. Ward LJ held that K and X’s sexual relationship was essentially a private matter and the knowledge of their work colleagues did not put the information into the public domain (citing Browne v Associated Newspapers Ltd (2007)[[178]](#footnote-178) and X v Persons Unknown (2006)[[179]](#footnote-179)). Weight had to be given not only to K’s Article 8 rights but also to those of his wife, children and X.

 The case of ***ETK*** (***Re. K***) has been widely used by celebrities and public figures, most notably by Andy Coulson and Rebekah Brooks (themselves former editors of NOW) in their attempts to prevent their own extramarital affair from being reported during the phone hacking trial.

**See Chapter 6.3**

 ***ETK*** was also cited in ***Edward Rocknroll v News Group Newspapers Ltd*** (2013),[[180]](#footnote-180) where actress Kate Winslet’s new husband had asked the High Court for an interim injunction prohibiting *The Sun* from printing semi-naked photographs of ‘Ed’ taken in 2010. Mr Justice Briggs granted the (interim) superinjunction under Art 8 ECHR, establishing that his right to respect for his family life – and that of Kate Winslet’s children should prevail over the newspaper’s Article 10 right to freedom of expression.

 In the leading case of ***Re S (A Child) (Identification: Restrictions on Publication)*** (2005),[[181]](#footnote-181) very careful consideration was given, first in the Court of Appeal and in the House of Lords, to balancing the public interest in publishing the name of a woman accused of murdering her child against the welfare interests of her surviving child who was living with his father. The public interest, in the legal sense, of publication was very strong. There was expert evidence of the welfare interests of the surviving child. This case was very different from that of ***PJS***, as Lord Mance demonstrated in his leading judgment, when he said that there was no public interest in the legal sense in the publication of any information relating to PJS and his partner.[[182]](#footnote-182)

1.6.3 Restraining publication: section 12 HRA

A claimant who applies for an interim restraining order (or superinjunction) against publishers (of newspapers or online editions for example) is obliged to give advance notice of the application under s 12 HRA, especially where the publisher or media organization relies on their Article 10 ECHR right to ‘freedom of expression’. In Scotland such an order would be called an interdict and would have to be applied for separately at the High Court in Edinburgh.

 The order is then binding on the party against whom injunctive relief is sort by application of the Spycatcher principle, unless:

1. The claimant has no reason to believe that the non-party has or may have an existing specific interest in the outcome of the application; or

2. The claimant is unable to notify the non-party having taken all practicable steps to do so; or

3. There are compelling reasons why the non-party should not be notified.

Section 12 HRA will only apply at any trial or at the application of a superinjunction or possible life-long anonymity order when the freedom of expression under Article 10 ECHR is challenged. Section 12 HRA reads:

1. This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

2. If the person against whom the application for relief is made (‘the respondent’) is neither present nor represented, no such relief is to be granted unless the court is satisfied:

(a) that the applicant has taken all practicable steps to notify the respondent; or

(b) that there are compelling reasons why the respondent should not be notified.

3. No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

4. The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to:

(a) the extent to which (i) the material has, or is about to, become available to the public; or (ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.[[183]](#footnote-183)

The problem in the John Terry superinjunction[[184]](#footnote-184) was that the famous Chelsea footballer claimed not to know the name of the newspaper that had a specific interest in his story. In Terry’scaseTugendhat J did not accept that explanation since it had become quite clear that the News of the World intended to publish on Sunday 24 January 2010 the story about Terry’s affair with the lingerie model, Vanessa Perroncel, then girlfriend of Terry’s best friend and fellow England defender Wayne Bridge. The public interest lay in the fact that Terry was England football captain at the time and had portrayed himself as a ‘clean-living’ family man.

**See below 1.6.6**

 The effect of s 12(3) HRA is that a court is not to make an interim restraint order unless satisfied that the applicant’s prospects of success at trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case and taking into account the relevant jurisprudence under Article 10 ECHR. Looking at the judgment by Tugendhat J in LNS, it appears that the general approach by the courts in the granting (or continuation) of superinjunctions tends to be ‘exceedingly slow’, by making an interim restraint order where the applicant has not satisfied the court that he would probably succeed at trial.[[185]](#footnote-185) However, where the potential adverse consequences of disclosure are particularly grave – say, in family cases, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending trial or any relevant appeal – the courts have granted such restraining orders under s 12 HRA with great expediency. (see: X (a woman formerly known as Mary Bell) and another v O’Brien and others (2003)[[186]](#footnote-186)).

**See also Chapter 8.4**

The Supreme Court in ***PJS*** specifically considered s 12(4) HRA and the effect of the social media and internet disclosures already in the public domain (Scotland and USA) and how these would – in future- impact on the children of the celebrity couple.[[187]](#footnote-187) The court said that there had been too much focus on those disclosures, and not enough emphasis on the “qualitative difference in intrusiveness and distress” that was likely to be involved if there was unrestricted publication by the English media in hard copy, as well as on their own internet sites.[[188]](#footnote-188) Lord Mance said:

…[t]here is little doubt that there would be a media storm. It would involve not merely disclosure of names and generalised description of the nature of the sexual activities involved, but the most intimate details. This would be likely to add greatly and on a potentially enduring basis to the intrusiveness and distress felt by the appellant, his partner and, by way of increased media attention now and/or in the future, their children.[[189]](#footnote-189)

The interpretation of ‘public interest’ then became an issue where the Supreme Court disagreed with the CA which had argued that there was only a ‘limited public interest’ in publishing the details of someone’s extra-marital sexual relations (e.g. ‘Gag couple alleged to have had a threesome’[[190]](#footnote-190)).

Courts then have to balance Articles 8 and 10 ECHR, whereby s 12(4) HRA provides particular regard and importance to the right of freedom of expression. Where the court proceedings relate to journalistic material (or conduct connected to such material) the courts must also have particular regard under section 12(4)(a) to two specific factors which point potentially in different directions:

(i) the extent to which the material has, or is about to, become available to the public and

(ii) the extent to which it is, or would be, in the public interest for the material to be published.

Under section 12(4)(b), the courts must also have particular regard to any relevant privacy code (such as IPSO).

Section 12(4)(a)(ii) provides guidance how the evidence available to the court must be approached and whether there is effectively (no) public interest in a legal sense in further disclosure or publication. As to the factor in section 12(4)(a)(i), the requirement to have particular regard to the extent to which journalistic material (or conduct connected with such material) “has, or is about to, become available to the public”. And the question whether material has, or is about to, become available to the public will then be considered by the court with reference to, inter alia, the medium and form in relation to which injunctive relief is sought.

 The effect of s 12(3) HRA is that a court is not to make an interim restraint order unless satisfied that the applicant’s prospects of success at trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case and taking into account the relevant jurisprudence under Article 10 ECHR. Looking at the judgment by Tugendhat J in LNS (‘***John Terry Superinjunction’***) it appears that the general approach by the courts in the granting (or continuation) of superinjunctions tends to be ‘exceedingly slow’, by making an interim restraint order where the applicant has not satisfied the court that he would probably succeed at trial.[[191]](#footnote-191)

If there is any public interest, Article 10 will triumph over the individuals’ right to privacy.

**1.6.4 Do superinjunctions interfere with the right to freedom of expression?**

The media’s defence of ‘public interest’ in privacy actions will be considered by the courts in respect of a ‘pressing social need’. This test is based on the ruling in ***Max Mosley.****[[192]](#footnote-192)* Where a litigant intends to serve a prohibitory injunction upon a publication, the courts rely on the Spycatcher principle, in that the individual author, journalist or publisher should be given a realistic opportunity to be heard on the appropriateness of granting the injunction and the scope of its terms, mirrored closely by the provisions contained in s 12 HRA 1998.

 As the Strasbourg Court observed in von Hannover (No 1):

. . . 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 ‘watchdog’ 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.[[193]](#footnote-193)

 What should be borne in mind is that if an individual is properly entitled to a privacy injunction, the whole purpose of that injunction may in some situations be undermined by disclosure of the fact that an injunction has been obtained by that individual. In such circumstances the alternative to justice being done behind closed doors is that justice will not be done at all.

 Where the potential adverse consequences of disclosure are particularly grave – say, in family cases - the courts have granted restraining orders under s 12 HRA with great expediency.

 A media organization may well be in contempt if they disclose the information that the court has ordered not to be disclosed. In Re H (a Healthcare Worker) (2002)[[194]](#footnote-194) the claimant was seeking to prevent the disclosure by N, a health authority, of confidential information that he was HIV positive. Kennedy LJ held that the court could properly make an order in the proceedings, restraining the publication of information made available in the course of the proceedings which, if disclosed, would pre-empt the decision of the court on the issues before it.

**See Chapter 8.5**

The UK courts increasingly regard personal information as ‘private’ and ‘confidential’ when a reasonable person of ordinary sensibilities who finds themselves in the same position as the claimant would have had a reasonable expectation of privacy in all the given circumstances. Such was the case in AMP,[[195]](#footnote-195) where the judge granted a superinjunction against ‘Persons Unknown’ to prevent the transmission of sensitive, personal photos belonging to the claimant who had lost her mobile phone. When some of her naked photos were uploaded on to Facebook, the court order not only protected her and the images (which were subsequently removed) but also stopped the threats which not only endangered her reputation but also that of her father’s business; her father had allegedly been blackmailed over some of his daughter’s images.

 There is now a basic framework within Articles 8 and 10 in Strasbourg jurisprudence that provides for a social equilibrium between individuals, the media and society. It is argued that superinjunctions have curtailed the extent to which a newspaper or media organization can report on individuals in the public interest (see also: Fressoz and Roire v France (1999)[[196]](#footnote-196)).

1.6.5 The *Trafigura* superinjunction

The United Nations ‘Minton Report’,[[197]](#footnote-197) commissioned in September 2006, based on ‘limited’ information, had exposed that a toxic waste-dumping incident had taken place at locations around Abidjan in Ivory Coast in August 2006, involving the multinational Dutch oil company Trafigura.[[198]](#footnote-198) The Minton Report revealed that truck- and shiploads of chemical toxic waste from a Trafigura cargo ship, the Probo Koala, had been illegally fly-tipping toxic waste. The Ivorian authorities claimed that tens of thousands of people in Abidjan had been affected by fumes, reporting serious breathing problems, sickness and diarrhoea, and that 15 people had died.

 On 12 October 2009, Labour MP Paul Farrelly tabled a question in the House of Commons (HC), for the then Justice Secretary, Jack Straw, to answer questions in relation to Trafigura’s alleged dumping of toxic oil and the UN Minton Report. The second part of Mr Farrelly’s question was of greater interest to freedom of speech in Parliament, as it concerned the superinjunction obtained by solicitors Carter-Ruck, acting on behalf of Trafigura at the time. Strictly speaking the ‘Trafigura’ contra mundum superinjunction of 11 September 2009 had prevented the Guardian (and therefore all other UK media outlets) from identifying the MP, what the question in Parliament was, which minister might answer it and where the question was to be found. All that could be reported was that the case involved the London libel lawyers Carter-Ruck.[[199]](#footnote-199)

 The Guardian had requested disclosure of the Minton Report under ‘freedom of information’ legislation (i.e. FOIA) in December 2009, but all matters concerning the report and the spilling of toxic waste off Ivory Coast had been ‘gagged’ under a superinjunction against the newspaper. The Twitterati revealed that Trafigura lawyers Carter-Ruck had attempted to prevent the issue being raised in Parliament, relying on the sub judice rule. Nevertheless, Mr Farrelly still referred to the ‘Trafigura’ superinjunction in Parliament, thereby breaching the sub judice rule of the injunction, relying on his defence of Parliamentary Privilege.

**See Chapter 4.3**

Thousands of tweets called into question the privilege which guarantees free speech in Parliament. The High Court privacy ‘Trafigura’ superinjunction was then lifted and senior managers at Trafigura and their lawyers admitted that their approach may have been a little ‘heavy-handed’, insisting it had not been their intention to try to silence Parliament. Trafigura agreed to pay out more than £30m to some 30,000 Abidjan inhabitants who had been affected by the toxic waste. But all was not over.

Trafigura subsequently sued the BBC’s Newsnight for libel after the company was criticized on the programme on 13 May 2009.[[200]](#footnote-200) Trafigura’s lawyers claimed that the oil traders had been wrongly accused of causing deaths and not just sickness in Ivory Coast. The BBC’s defence was that it had merely focused on the gasoline waste dumped by Trafigura in Abidjan in August 2006, with Newsnight reporting that Trafigura’s actions had caused deaths, miscarriages, serious injuries and sickness with long-­term chronic effects. After lengthy negotiations with Trafigura’s director, Eric de Turckheim, the BBC eventually agreed to settle on 17 December 2009, by apologizing for the investigatory programme and paying £25,000 to a charity. As part of the ‘offer of amends’ the public broadcaster had to withdraw any allegation that Trafigura’s toxic waste dumped in West Africa had caused deaths. The BBC still issued a separate combative statement, pointing out that the dumping of Trafigura’s hazardous waste had led to the British-based oil trader being forced to pay out £30m in compensation to victims. The BBC’s decision to settle caused dismay in journalistic circles because the public broadcaster was penalized for trying to report what had been factually raised in Parliament and by the United Nations.

**See Chapter 7**

1.6.6 Celebrity Superinjunctions: John Terry, Ryan Giggs, Jeremy Clarkson and others

Since the disclosure of the *Trafigura* oil scandal in 2009 by way of parliamentary privilege, MPs have repeatedly broken several superinjunctions by naming public figures such as Ryan Giggs or former Royal Bank of Scotland (RBS) chief, (the then Sir) Fred Goodwin[[201]](#footnote-201) in Parliament. All individuals, named initially in the law reports only by computer-generated acronyms (such as LNS or CTB), had used the courts and costly media lawyers to suppress information about their personal lives. The *Ryan Giggs* ‘gagging order’[[202]](#footnote-202) made sensational headlines in the Glasgow-based Sunday Herald featuring a picture of the England footballer with just a thin black band across his eyes and the word ‘censored’ in capital letters. The Scottish newspaper named the footballer in spite of the (English) court order.

 Let’s take the individual superinjunctions (or ‘gagging orders’ as the media call them) which followed each other in fairly rapid succession and ask the question: have court such privacy injunctions actually work and whether they have become meaningless in the digital age? Because of the limited reporting of such cases, frequently known only by acronyms and randomly selected letters of the alphabet, it is difficult to find such cases via Westlaw or Lexis, for example (see: G and G v Wikimedia Foundation Inc (2009)[[203]](#footnote-203)).

 On 22 January 2010, lawyers acting for the then England football captain, John Terry, asked the High Court for a prohibition in the form of an interim superinjunction on publishing details of a ‘specific personal relationship’ between their client and another person. This became known later as the ‘John Terry Superinjunction’ (LNS v Persons Unknown (2010)[[204]](#footnote-204)). Terry’s lawyers argued that the intended publication in the News of the World (NOW) would amount to a breach of confidence and misuse of private information in that £1 million had been promised to an informant to keep the story quiet. The newspaper was about to publish their scoop on the footballer’s adulterous affair with French underwear model Vanessa Perroncel, who happened to be the former girlfriend of Terry’s friend and team-mate Wayne Bridge. The story was to be the front-page headline on Sunday 24 January 2010.

 The ***John Terry*** (LNS) ‘double gagging order’ (where neither the individual nor the newspaper are named) sought complete privacy, stating that any publication of any information, including photographs, evidencing the extramarital relationship could lead to harming the private family life of the applicant. Opposing the injunction at the hearing on 29 January 2010, News Group Newspapers (NGN), made a strong submission before Mr Justice Tugendhat, supporting freedom of expression under Article 10 and the public’s ‘right to know’ in this case, i.e. that John Terry as England football captain was a role model to many young people and prided himself on being a family man. Tugendhat J considered Articles 6, 8 and 10 of the Convention in turn, giving additional consideration to the open justice principle. Balancing one right against the other, he considered the right to speak freely, the right to private life and reputation and the right to a fair hearing.

 In the ***John Terry*** application Mr Justice Tugendhat noted that there was no evidence before the court and no personal representation from the applicant of proof to convince him to apply the right to privacy under Article 8, nor was there proof that any confidentiality had been breached: no photographs were produced, nor was there any confidential or private information disclosed. For this reason the judge lifted the interim order granted initially a few days earlier, stating that privacy law was not there to protect someone’s reputation, which in this case also included the footballer’s commercial interests (e.g. sponsorship by Daddies Sauce, Umbro, Samsung and Nationwide).

 After ‘John Terry’ the press - particularly in Scotland - became increasingly daring and aggressive in their revelations about other infidelities and indiscretions of celebrities, often completely ignoring any superinjunctions which might have been in place at the time. One of these was the ‘***Ryan Giggs*** ***superinjunction***’.[[205]](#footnote-205) Despite the court anonymity order, the extramarital affair of the married Manchester United and Wales football star – referred to only as ‘***CTB***’ in the restraining order – with lingerie model Imogen Thomas was widely exposed on Twitter and other social networking sites in May 2011 and the Lord Chief Justice, Lord Judge, warned that ‘modern technology was totally out of control’, granting search orders in form of *Norwich Pharmacal* orders against the US-based microblogging site on Friday 20 May 2011 in an attempt to compel Twitter to identify those responsible for naming the footballer. Mr Giggs’ lawyers hoped that the High Court orders would force Twitter to hand over the names, email and IP addresses of those persons behind the Twitter accounts of UK individuals who had disclosed Giggs’ identity and that they would be prosecuted for breaches of a court order (i.e. contempt of court).

**See Chapter 8.5**

Richard Walker, editor of Glasgow’s *Sunday Herald*, then took the daring and unprecedented decision to name Ryan Giggs on the front page on Sunday 22 May 2011. The newspaper’s front page ‘splash’ featured the footballer with a thin black band across his eyes and the word ‘censored’ in capital letters. The player was easily recognizable and the caption below the photograph read:

“Everyone knows that this is the footballer accused of using the courts to keep allegations of a sexual affair secret. But we weren't supposed to tell you that ...”[[206]](#footnote-206)

In an accompanying editorial Richard Walker commented that he had taken the decision to identify the footballer just hours before the paper went to press (on Saturday), following legal advice from Paul McBride QC[[207]](#footnote-207) and media lawyer David McKie[[208]](#footnote-208) that the privacy injunction did not apply in Scotland because an *‘interdict’* ought to have been applied for by Giggs’ London lawyers at the High Court in Edinburgh at the same time as the superinjunction application in the English High Court.[[209]](#footnote-209) Or at the very least, the footballer’s lawyers (Schillings) should have informed all editors of the Scottish and Northern Irish press that an (English) injunction was in place. They had done no such thing. In an interview with the author, Richard Walker said:

Our piece, naming Ryan Giggs, was not so much about his sexual infidelities but about the principle of privacy and superinjunctions taken out by famous celebrities having been exposed on Twitter and that the internet was now exposing stories about Strauss-Kahn’s alleged past sexual behaviour and that of others, such as (Sir) Fred Goodwin and his superinjunction trying to suppress an affair with a senior colleague at Royal Bank of Scotland. Initially we were looking to portray Ryan Giggs as a pixelated front page photo but then it occurred to me that the injunction would not be in force in Scotland so I took legal advice and the advice was that that was indeed the case.[[210]](#footnote-210)

 Worth of note in this case was the difference between Scots and English law. The reason why the *Sunday Herald* was able to publish the full disclosure of the Ryan Giggs superinjunction was that,

1. There was no interdict from the Scottish High Court in Edinburgh which imposed a ‘gagging’ order on the Scottish media
2. The newspaper was not sold or distributed ‘South of the Border’ (in England and Wales)
3. There was no internet or online publication of the Ryan Giggs article.

 Two days after the Ryan Giggs front page ‘splash’ in the *Sunday Herald* the footballer was identified by the Liberal Democrat MP John Hemming in the House of Commons, using parliamentary privilege. By the time the High Court revisited the anonymized ‘Ryan Giggs’ injunction a year later in March 2012, it appeared to have blown up in Mr Gigg’s lawyers’ faces. Ultimately, the injunction was compromised between Mr Giggs and Ms Thomas. Because on 15 December 2011, supermodel Imogen Thomas had issued a public statement categorically denying that she was the source of the Sun article and that she had not blackmailed Giggs (as he had alleged when applying for the injunction on 14 April 2011).

 Eventually Tugendhat J struck out the injunction (‘Giggs No 2’), a full six months after the world had learnt of Mr Giggs’ identity. As Mr Justice Tugendhat noted in his March 2012 judgment:

There can be few people in England and Wales who have not heard of this litigation. The initials CTB have been chanted at football matches when Mr Giggs has been playing for Manchester United. And Mr Giggs has been named in Parliament, raising questions as to the proper relationship between Parliament and the judiciary.[[211]](#footnote-211)

 Clearly the ***Ryan Giggs No 1 and No 2*** privacy orders did not achieve their purpose. Had Mr Giggs known in April 2011, at the time the principal injunction was sought, that Imogen Thomas was not the source of the Sun article it may well be that the footballer would not have sought an order against News Group Newspapers (NGN) to gag the press. But Mr Giggs’ lawyers thought otherwise. In ***Giggs No 2*** (March 2012) his lawyers asked for aggravated damages seemingly only directed against Imogen Thomas. Mr Justice Tugendhat dismissed the application for damages, adding that there was ‘no purpose’ in allowing the superinjunction to continue.

 **On 26 April 2011** BBC journalist Andrew Marr revealed his own superinjunction - taken out in 2008 - which was intended to gag the press about his extra-marital affair, followed by Prime Minister David Cameron expressing his concern about the prolific use of these ‘gagging orders’, commenting that Parliament should determine privacy law and not judges.

 In October 2011, former BBC Top Gear presenter Jeremy Clarkson ‘outed’ his own superinjunction by stating that these ‘gagging orders’ are ‘pointless.’ Clarkson told the Daily Mail: ‘Superinjunctions don’t work. You take out an injunction against somebody or some organization and immediately news of that injunction and the people involved and the story behind the injunction is in a legal­free world on Twitter and the internet.’[[212]](#footnote-212)

 In the aptly named **AMM** (‘Aston Martin Man’) **v HXW** (‘His ex-wife’),[[213]](#footnote-213) Mr Clarkson had applied for a ‘gagging’ order in September 2010 to restrain his former wife, Alex Hall, from publishing a book about their extramarital affair, *after* the couple had divorced and Clarkson had remarried. Edwards-Stuart J granted the injunction after hearing that Ms Hall (HXW) had blackmailed Mr Clarkson by threatening to expose their relationship to the media unless he paid a ‘very substantial sum’ of hush money. As soon as the order was served on the Daily Mail (Associated Newspapers Ltd) on 30 September 2010, the ‘Jeremy Clarkson superinjunction’ story reached the ‘Twittersphere’, with the ‘red tops’ freely reporting on it.[[214]](#footnote-214)

 In May 2011 The Neuberger Report[[215]](#footnote-215) established the framework in which future applications for superinjunctions (‘anonymized injunction’) should be made. Master of the Rolls, Lord Neuberger’s Committee had been formed in April 2010 following a report of the Culture, Media and Sport House of Commons Select Committee, and in the light of growing public concerns about the use and effect of superinjunctions and the impact they were having on open justice. The Report stresses the fundamental principles of open justice and freedom of speech. And that ‘secrecy orders’ should only be made if they are ‘strictly necessary’ in the interests of justice; a fair balance should be struck by the courts in making such orders between the principles of freedom of expression and an individual’s right to privacy.

 As common law and ECtHR jurisprudence have developed the courts have stressed that the ‘necessity’ for any restriction on freedom of expression must be convincingly established as a matter of general principle. Mindell argues that there are two forms of privacy that are protected in English law: the torts of trespass (to the person and to land) and protection under the Human Rights Act 1998.[[216]](#footnote-216) The author further argues that there exist ‘secondary forms of privacy’, the first being ‘the informational realm’ and the other ‘territorial information’, depicted in Peck v UK[[217]](#footnote-217) (personal information).

 social media’s widespread dissemination of the protected information now rendered the former objective of the injunction unachievable.

** FOR THOUGHT**

 With social media’s widespread dissemination of protected information about celebrities’ private lives would you agree that the main objective of a superinjunction is now largely unachievable? Discuss.

social media’s widespread dissemination of the protected information now rendered the former objective of the injunction unachievable.1.7 A tort of privacy

The question which has arisen over the past decade or so with ever-developing case law whether a tort (or *delict*) of privacy exists such as in France or Germany? We know there is as yet no UK law that protects an individual’s privacy. One could argue that a ‘tort’ of privacy was created by Parliament when it introduced the HRA by way of Article 8 ECHR (‘right to privacy’). An ‘informal’ tort was first expressed by the House of Lords in the *Naomi Campbell* case (2004), that “protects the right to control the dissemination of information about one's private life.” [[218]](#footnote-218) In the same year, Lord Hoffmann was unequivocalin *Wainwright v Home Office* (2004) when he said that English law recognizes *no* common law tort of invasion or breach of privacy:

I would reject the invitation to declare that since at the latest 1950 there has been a previously unknown tort of invasion of privacy.[[219]](#footnote-219)

 As far back as 1973, the Younger Committee advised against enactment of any general tort of invasion of privacy, recommending that the then regulator the Press Council should deal with the continued regulation of the print press and that any breaches of privacy be dealt with on a case-by-case basis.[[220]](#footnote-220) In 1990, the *Calcutt Committee*[[221]](#footnote-221) recommended that a tort of infringement of privacy should not be introduced (**see Chapter 6.4**) This meant that the courts continued to iron out deficiencies in existing law with piecemeal common law jurisdiction. The facts of the Gordon Kaye[[222]](#footnote-222) and many subsequent cases suggested in this chapter remain a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals in English law.

 As common law continued to develop post the HRA 1998, we saw an increase in truth-telling-‘kiss and tell’ stories and an increase in media applications for free speech and the defence of the public interest test, advanced when newspapers had reported on a celebrity’s indiscretions. Following the ECtHR’s judgments in von Hannover (No 1)[[223]](#footnote-223) and von Hannover (No 2)[[224]](#footnote-224)), one could possibly begin to define ‘breach of confidence’ as the tort that protects private information. Though it is important to note that in von Hannover (No 1)[[225]](#footnote-225) the Human Rights Court ruled that a celebrity has a ‘public’ and a ‘private sphere’, the latter being strictly protected by privacy with no invasion by the paparazzi or the press. In the Beckham case[[226]](#footnote-226) the ruling was similar, in that famous couples like Victoria and David Beckham and their children have a right to privacy in the comfort and circumference of their own home.

 There now exists a wide interpretation by the UK courts of the concept of privacy and what amounts to ‘confidential information’. The argument advanced in Spycatcher was that the second Coco requirement, the need for a confidential relationship, would justify equity’s interference with freedom of speech, as it served as the link between the recipient’s conscience in not revealing the confidential information and the doctrine itself. This meant that the maintenance of confidential relationships was thereby sidelined. This standpoint was challenged by the press in the Rio Ferdinand [[227]](#footnote-227) superinjunction case, and subsequently clarified by the Strasbourg court in Princess Caroline’s second privacy action, i.e. von Hannover (No 2).[[228]](#footnote-228) Neither Rio Ferdinand nor Princess Caroline von Hannover in her second action were awarded Article 8 rights to privacy in their actions, because the court held that the matters in question were in the public interest. More recent jurisprudence has given greater weight to the public interest test, by allowing the media their Article 10 right.

 Legal uncertainly continued to exist, creating ambiguity for both the claimant in the level of ‘tortious’ protection in their privacy rights and for the media on the other hand, whose editors have to make decisions on such common law considerations. Some answers were however provided by the seminal case of ***Vidal-Hall v Google Inc*** (2015). [[229]](#footnote-229) Lord Justice McFarlane MR ruled in the Court of Appeal that misuse of private information is distinct from breach of confidence and should now be recognised as a tort. In this case, three claimants (respondents to this appeal) pursued Google for claims that Google (the ‘data controller’), through its use of internet ‘cookies’, had misused their private information and breached their confidence; that Google had infringed s 13(2) of the Data Protection Act 1998 (DPA). All three individuals had used Apple computers and Safari browsers, between Summer 2011 and 17 February 2012, to access the internet during that time. They sued Google (situated in California, USA) in the London High Court.

 The issues before the Court of Appeal were:

1. whether the cause of action for misuse of private information is a tort, and
2. whether there can be a claim for compensation without pecuniary loss within the meaning of damage in section 13(2) of the Data Protection Act 1998?

The CA ruled that:

1. the misuse of private information constitutes a tort for the purposes of the rules providing for service of proceedings out of the jurisdiction, and
2. the claimants could recover damages for non-material loss;[[230]](#footnote-230)
3. that s 13(2) DPA should be disapplied on the grounds that it conflicts with the rights guaranteed by Articles 7 (‘right to private and family life’) and 8 (‘right to protection of personal data’) of the EU Charter of Fundamental Rights.

Google then applied for permission to appeal to the Supreme Court which granted permission to appeal in part. The Court ordered that permission to appeal be refused on ground 1 (the issue whether the claim is in tort) because this ground does not raise an arguable point of law. The Court ordered that permission to appeal be granted on all other grounds.

 ***Vidal-Hall v Google Inc*** is a landmark decision, not only for the confirmation that misuse of private information is a tort, but for the disapplication of primary domestic legislation on the basis of incompatibility with an EU Directive and provisions of the Articles 7, 8 and 47 of the EU Charter of Fundamental Rights (see also: ***Benkharbouche v Embassy of the Republic of Sudan*** (2015)[[231]](#footnote-231)). This means that claims for compensation for breach of the Data Protection Act can be made for damages for distress even though one has not suffered any pecuniary loss; moreover this case was not related to purposes of journalism, the arts or literature.

**See Chapter 4.7**

 If we then accept that there now exists a tort of privacy (‘misuse of private information’) it follows that we can safely assume that this law now affords protection to information in respect of which there is a reasonable expectation of privacy, even in circumstances where there is no pre-existing relationship. This in itself will then give rise to an enforceable duty of confidence. The law now seems to be concerned with the prevention of the violation of a person’s autonomy, dignity and self-esteem taking into account Convention rights as well as common law development since the coming into force of the HRA 1998 and the Douglas case in 2001.

 Is it not about time that Parliament addresses a statutory tort of privacy, particularly in the digital age of online blogs and social networking? Mindell argues that ‘proper’ privacy legislation could acknowledge breaches of privacy ‘in both primary and secondary forms and understanding the remedial possibilities of each’ so that the law could ultimately protect private information because it is ‘private’ and undisclosed, rather than because it is ‘confidential information’.[[232]](#footnote-232)

 Eady J observed in his speech on ‘privacy’ to intellectual property lawyers in 2009 that the statutory tort could be less restrictive of the media than the law of privacy as it subsequently developed. For example, it would have excluded anything touching on the conduct of a business, trade or profession, and it would have been directed purely at the protection of personal life. It would also have excluded anything occurring in a public place.[[233]](#footnote-233)

 Clearly there are misunderstandings and social differences in what some deem ‘private’ and some regard or even misuse as ‘confidential’ information. The law in this area could then provide objective criteria for the courts to apply when misuse of another’s private information has taken place.

** FOR THOUGHT**

Former Liberal Democrat MP, John Hemming, who named footballer Ryan Giggs as the subject of a superinjunction by using Parliamentary Privilege in 2011, said such privacy orders were unfair as they were only available to the rich and famous, who could ‘gag’ the media with the application of ‘large sums of money’. He said, “I just don’t think that it is a reasonable use of state power.” Would you agree that once a superinjunction has been breached in Scotland or abroad and leaked via social networking sites they just become “a complete nonsense”? Discuss with reference to leading authorities.

1.8 Further reading

Bingham, T. (1996) ‘Should there be a law to protect rights of personal privacy?’ European Human Rights Law Review 1996, 5: 455–462.

Lord (Tom) Bingham discusses the protection of breach of confidence and whether there should be law to protect personal privacy following the ***Gordon Kaye*** case (where he was one of the judges). Bingham argues that the expansion and distortion of any confidence action cannot serve as an adequate substitute for a full privacy action and a ‘proper’ privacy law, unless, by either judicial sleight of hand or the bold grasping of the privacy nettle, a free-standing tort of privacy emerges fully from any from confidence action.

Carter-Silk, A. and Cartwright-Hignett, C. (2009) ‘A child’s right to privacy: “out of a parent’s hands” ’. Entertainment Law Review 2009, 20(6), 212–217.

This article discusses whether children have a fundamental right to privacy separate from that of their parents and what happens if the parents ‘waive’ their children’s rights in order to gain financially. The authors argue that some celebrities use their children to obtain privacy via the back door. The authors ask whether any purported waiver of that privacy right is void unless it is in the child’s best interest?

Foster, S. (2015) ‘**Reclaiming the public interest defence in the conflict between privacy rights and free speech’, *Coventry Law Journal*. Cov. L.J. 2014, 19(2), 1-23 .**

Steve Foster discusses some of the leading authorities regarding privacy applications and the press defence of ‘public interest’. Foster argues that the distinction between what is in the public interest and what is mere ‘tittle-tattle’ has become blurred when dealing with revelations about the private lives of public figures.

Mindell, R. (2012) ‘Rewriting privacy: the impact of online social networks’. Entertainment Law Review, 23(3), 52–58.

This article discusses the meaning of ‘privacy’ in English common law in relation to technological innovations, such as Twitter and Facebook which have put privacy at risk. He argues that the force of social media remains uncontrolled.

Phillipson, G. (2003) ‘Breach of confidence, celebrities, freedom of expression, legal reasoning, newspapers, privacy, public interest, right to respect for private and family life’. European Human Rights Law Review (Special Issue on ‘Privacy’), 54–72.

The article criticizes the legal reasoning applied by the Court of Appeal in A v B Plc in respect of two key issues: (1) the horizontal application of Article 8 ECHR in cases concerning media intrusion, and (2) the circumstances in which the public interest justification for publication. The author questions the meaning of public interest in relation to ‘public figures.’

Pillans, B. (2012) ‘Private lives in St Moritz: von Hannover v Germany (no 2)’. Communications Law, 17(2), 63–67.

Brian Pillans discusses the judgments in Axel Springer and von Hannover No 2. He looks at the nature of the individuals involved and the publications and examines the ECtHR’s balancing test in respect of the right to freedom of expression and the individuals’ right to privacy.

Smartt, U. (2011) ‘Twitter undermines superinjunctions’. Communications Law, 16(4), 135–140.

The article discusses common law in respect of personal privacy, grounded in the equitable doctrine of breach of confidence and relevant case law with specific discussion of Douglas v Hello! Ltd (2001) and the development of superinjunctions (CTB v NGN (2011) and DFT v TFD (2010). Smartt examines the remedies available in an action for breach of confidence and asks whether superinjunctions have become meaningless in the age of social media.

Warren, S. D. and Brandeis, L. D. (1890) ‘The right to privacy’. Harvard Law Review, 4(5) (15 December 1890), 193–220.

This classic publication by Warren and Brandeis developed the concept of an individual’s right to privacy at the time when this was absent in (US) law and is often cited in scholarly research.

1. See: Markesinis, B. S. and Unberath, H. (2002). [↑](#footnote-ref-1)
2. (1991) FSR 62. [↑](#footnote-ref-2)
3. See: ‘Society of Editors: Paul Dacre’s speech in full’, Press Gazette, 9 November 2008: [www.pressgazette.co.uk/story.asp?storycode=42394](http://www.pressgazette.co.uk/story.asp?storycode=42394). [↑](#footnote-ref-3)
4. The Human Rights Act 1998 and the Scotland Act 1998 were enacted at the same time in Scotland. The primary function of the Scotland Act 1998 was to set up a system of devolved government for Scotland, but it also included important provisions relating to the protection of the rights guaranteed by the Convention ('Convention rights'). It is necessary to read both Acts in order to understand the status of Convention rights in Scots law. [↑](#footnote-ref-4)
5. See: Warren, S. D. and Brandeis, L. D. (1890) at pp. 193–220. [↑](#footnote-ref-5)
6. ‘Yellow Press’ or ‘yellow journalism’ is an American term, akin to ‘tabloid’ journalism in the UK, meaning ‘exaggeration’, ‘scandal­mongering’ and ‘sensationalism’. See: Campbell, W. J. (2001). [↑](#footnote-ref-6)
7. [1988] 849 F 2d 460 Case No: 87–6168) United States Court of Appeal (for the Ninth Circuit) on 22 June 1988. The case centred on the protectability of the voice of the celebrated chanteuse from commercial exploitation without her con(2005) 40 EHRR 1

sent. [↑](#footnote-ref-7)
8. See: Raymond, J. (1998), pp. 109–136. [↑](#footnote-ref-8)
9. See: Habermas, J. (1962, translation 1989). [↑](#footnote-ref-9)
10. (2005) 40 EHRR 1. [↑](#footnote-ref-10)
11. See: Mill, J. S. (1859). [↑](#footnote-ref-11)
12. Albert (Prince) v Strange [1849] 1 Macnaghten & Gordon 25 (1849) 41 ER 1171. [↑](#footnote-ref-12)
13. Ibid. at 1173. [↑](#footnote-ref-13)
14. [2006] EWHC 522 (Ch). [↑](#footnote-ref-14)
15. [2015] UKSC 21. [↑](#footnote-ref-15)
16. [2001] Ch 685 (Ch D). [↑](#footnote-ref-16)
17. ***AG*** v Jonathan Cape Ltd***; AG v Times Newspapers Ltd.*** [1976] QB 752 (‘Crossman Diaries Case’). [↑](#footnote-ref-17)
18. AG v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109, at 283–284 (Lord Goff of Chieveley) (‘Spycatcher Case’). [↑](#footnote-ref-18)
19. R v Shayler [2003] 1 AC 247. [↑](#footnote-ref-19)
20. [1976] QB 752 at pp. 765D-E, 769H - 770A, B-D, G - 771H, 772A-C. [↑](#footnote-ref-20)
21. Ibid. at 735 (Lord Widgery). [↑](#footnote-ref-21)
22. See: Andrew, C. (2009). [↑](#footnote-ref-22)
23. See: Wright, P. (1987), pp. 104–106. [↑](#footnote-ref-23)
24. Attorney-General v Guardian Newspapers Ltd and Ors ***(No 1)*** 1987] 1 WLR 1248 (“Spycatcher’). [↑](#footnote-ref-24)
25. ***Attorney-General v Guardian Newspapers Ltd (No 2***) [1990] 1 AC 109 [1990] 1 AC 109. [↑](#footnote-ref-25)
26. For further discussion see: Barendt, E.(1989), p. 204; also: Bindman, G. (1989), p. 94. [↑](#footnote-ref-26)
27. See: Lee, S. (1987), p. 506; see also: Leigh, S. (1992), p. 200. [↑](#footnote-ref-27)
28. See: AG v Guardian Newspapers (No 2) [1990] 1 AC 109 at 261 (Lord Keith of Kinkel). [↑](#footnote-ref-28)
29. See: R v Shayler [2003] 1 AC 247. [↑](#footnote-ref-29)
30. For further discussion see: Hollingsworth, M. and Fielding, N. (1999). [↑](#footnote-ref-30)
31. See: Coco v A. N. Clark (Engineers) Ltd [1969] RPC 41 at 47 (Megarry J). [↑](#footnote-ref-31)
32. For further discussion see: Richardson, M. and Thomas, J. (2012). [↑](#footnote-ref-32)
33. (1948) 65 R.P.C. 203. [↑](#footnote-ref-33)
34. For further discussion see: Carty, H. (2008) at pp. 416–455. [↑](#footnote-ref-34)
35. ***Coco*** [1969] RPC 41 at 47 (Megarry J). [↑](#footnote-ref-35)
36. #  See: Practice Direction CPR 25A ‘Interim Injunctions’.

 [↑](#footnote-ref-36)
37. See: **Malone v Metropolitan Police Commissioner** [1979] 1 Ch 344 (Sir Robert Megarry VC). [↑](#footnote-ref-37)
38. See: ***Argyll v Argyll and Others*** [1967] Ch 301. [↑](#footnote-ref-38)
39. [1988] 1 Ch 449. [↑](#footnote-ref-39)
40. [1913] AC 417. [↑](#footnote-ref-40)
41. [1967] Ch 301. [↑](#footnote-ref-41)
42. Lennon v News Group Newspapers [1978] FSR 573. [↑](#footnote-ref-42)
43. See: Lennon, C. (2005).  [↑](#footnote-ref-43)
44. See: ***Barrymore v Newsgroup Newspapers Ltd and Another*** [1997] FSR 600 (Ch D) [↑](#footnote-ref-44)
45. Ibid., at 602 (Jacobs J). [↑](#footnote-ref-45)
46. [1988] 1 Ch 449. [↑](#footnote-ref-46)
47. See: Theakston (Jamie) v MGN and Ors [2002] EWHC 137 (QB). [↑](#footnote-ref-47)
48. Ibid., at 69 (Ouseley J). [↑](#footnote-ref-48)
49. Phillipson, G. (2003) at pp. 54–72. [↑](#footnote-ref-49)
50. Earl Spencer and Countess Spencer v UK (1998) 25 EHRR CD 105 (App Nos 28851/95, 28852/95) of 16 January 1998. [↑](#footnote-ref-50)
51. Victoria Lockwood had married Earl Spencer in 1989, with Prince Harry as a pageboy. [↑](#footnote-ref-51)
52. See: Hixson, R. (1987). [↑](#footnote-ref-52)
53. See: Barber, N. W. (2003). [↑](#footnote-ref-53)
54. Source: Moore, B. (1984), p. 5. [↑](#footnote-ref-54)
55. See: Rachels, J. (1975), p. 323. [↑](#footnote-ref-55)
56. (1991) FSR 62. [↑](#footnote-ref-56)
57. Ibid., at 66 (Glidewell LJ). [↑](#footnote-ref-57)
58. See: Mosley (Max) v Newsgroup Newspapers Ltd [2008] EWHC 1777. (QB), [↑](#footnote-ref-58)
59. See: von Hannover v Germany (No 1) (2005) 40 EHRR 1. [↑](#footnote-ref-59)
60. See: ***Trimingham v Associated Newspapers Ltd*** [2012] EWHC 1296. [↑](#footnote-ref-60)
61. Mr Christopher Huhne MP had been re-elected as the Member of Parliament for Eastleigh in Hampshire at the General Election held in May 2010. He became Secretary of State for Energy in the Coalition Government. He was one of the leading figures in the Government and in the Liberal Democrat Party. [↑](#footnote-ref-61)
62. Mr Huhne and his by now ex-wife Vicky Pryce, a prominent economist, were convicted of perverting the course of justice after she took speeding points for him following an incident on the M11 in 2003. Pryce had claimed the defence of marital coercion. Both were found guilty at Southwark Crown Court in March 2013 and given an eight-months prison sentence each. [↑](#footnote-ref-62)
63. ***Trimingham*** [2012] EWHC 1296 at para 70 (Tugendhat J). [↑](#footnote-ref-63)
64. Ibid., at para 249. [↑](#footnote-ref-64)
65. [2010] ECHR 1497 [↑](#footnote-ref-65)
66. ***Trimingham*** [2012] EWHC 1296 at para 252. [↑](#footnote-ref-66)
67. [2005] EWCA Civ 173. [↑](#footnote-ref-67)
68. ***Trimingham*** [2012] EWHC 1296 at para 255. [↑](#footnote-ref-68)
69. [2007] EWCA Civ 1270 [↑](#footnote-ref-69)
70. ***Trimingham*** [2012] EWHC 1296 at para 261. [↑](#footnote-ref-70)
71. Ibid., at para 263. [↑](#footnote-ref-71)
72. [2007] EWHC 1908 (Ch). [↑](#footnote-ref-72)
73. ***Trimingham*** [2012] EWHC 1296 at paras 328, 337, 338. [↑](#footnote-ref-73)
74. [2005] EWHC 679 (Ch). [↑](#footnote-ref-74)
75. See: Witzleb, N. (2009). [↑](#footnote-ref-75)
76. See: Bennett, T. D. C. (2010). [↑](#footnote-ref-76)
77. (1998) (28851/95, 28852/95) 25 EHRR CD 105. [↑](#footnote-ref-77)
78. IPSO is the UK Regulator charged with enforcing the Editors’ Code of Practice, enshrined in the contractual agreement between IPSO and newspaper, magazine and electronic news publishers. [↑](#footnote-ref-78)
79. Source: ISPO – The Editors Code of Practice, March 2015. [↑](#footnote-ref-79)
80. [2001] EMLR 563 (QB). [↑](#footnote-ref-80)
81. See: OBG Ltd and others v Allan and others, Douglas and another and others v Hello! Ltd and others, Mainstream Properties Ltd v Young and others and Another [2007] UKHL 21 (on appeal from: [2005] EWCA Civ 106 [2005] EWCA Civ 595, [2005] EWCA Civ 861 (sub nom Douglas v Hello! No 7) – judgment of 2 May 2007 (HL)). [↑](#footnote-ref-81)
82. Douglas v Hello! Ltd. [2001] EMLR 563 at 236, para 115 (Sedley LJ). [↑](#footnote-ref-82)
83. Ibid., at 236, para 138. [↑](#footnote-ref-83)
84. See: ***Beckham v Mirror Group Newspapers Ltd*** (June 28, 2001, unreported). [↑](#footnote-ref-84)
85. Ibid., at 9, line C (Eady J). [↑](#footnote-ref-85)
86. Campbell v Mirror Group Newspapers Ltd [2002] EWHC 499 (QB). [↑](#footnote-ref-86)
87. Ibid., at 502 (Morland J) (CA) [↑](#footnote-ref-87)
88. Campbell v MGN [2004] 2 AC 457 (HL). [↑](#footnote-ref-88)
89. [2004] 2 AC 406 [↑](#footnote-ref-89)
90. (1999) 31 EHRR 28. [↑](#footnote-ref-90)
91. (1994) 19 EHRR 1. [↑](#footnote-ref-91)
92. (2003) 36 EHRR 719. [↑](#footnote-ref-92)
93. Murray v Big Pictures [2008] EWCA Civ 446 (Patten J). [↑](#footnote-ref-93)
94. ibid. at 65–66. [↑](#footnote-ref-94)
95. Ting Lang Hong and Child KLM v XYZ and Others [2011] EWHC 2995 (QB). [↑](#footnote-ref-95)
96. Ibid., at para 5. [↑](#footnote-ref-96)
97. Axel Springer v Germany (2012) (Application No 3995/08) Strasbourg judgment of 7 February 2012 (ECTHR). [↑](#footnote-ref-97)
98. Mosley v NGN [2008] EWHC 1777 QB. [↑](#footnote-ref-98)
99. Ibid., at 173. [↑](#footnote-ref-99)
100. Francome v MGN [1984] 1 WLR 892. [↑](#footnote-ref-100)
101. Ibid., at 989 (Sir John Donaldson MR). [↑](#footnote-ref-101)
102. Mr Mosley was at the time President of the Fédération Internationale de l’Automobile (FIA) - Formula One’s governing body (1993 – 2009). [↑](#footnote-ref-102)
103. Sir Oswald Ernald Mosley, 6th Baronet (1896 – 1980) was an English politician, known principally as the founder of the British Union of Fascists (BUF) in 1932. [↑](#footnote-ref-103)
104. [2006] EWHC 2783 (QB). [↑](#footnote-ref-104)
105. Mosley v NGN [2008] EWHC 1777 QB at 2–6 (Eady J). [↑](#footnote-ref-105)
106. Mosley v UK (Application no. 48009/08) Judgment by the Strasbourg European Court of Human Rights of 10 May 2011 (ECTHR). [↑](#footnote-ref-106)
107. Ibid., at 132. [↑](#footnote-ref-107)
108. Source: Witness statement by Max Rufus Mosley to the Leveson Inquiry at MOD100023418 and MOD100023425 signed & dated 31 October 2011: www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-­of-Max-Mosley.pdf. [↑](#footnote-ref-108)
109. ***Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González*** (‘right to be forgotten’ Case C-131/12) Court of Justice of the European Union, Luxembourg, 13 May 2014. [↑](#footnote-ref-109)
110. [1985] QB 526. [↑](#footnote-ref-110)
111. [1984] 1 WLR 892. [↑](#footnote-ref-111)
112. Jameel (Mohammed) v Wall Street Journal [2007] 1 AC 359. [↑](#footnote-ref-112)
113. Ibid., at 31–33 (Lord Bingham). [↑](#footnote-ref-113)
114. [2008] EWCA Civ 446. [↑](#footnote-ref-114)
115. Ibid., at 24. [↑](#footnote-ref-115)
116. Mosley v NGN [2008] EWHC 1777 (QB). [↑](#footnote-ref-116)
117. AMP v Persons Unknown [2012] All ER (D) 178. [↑](#footnote-ref-117)
118. Von Hannover v Germany (No 1) [2004] EMLR 21. [↑](#footnote-ref-118)
119. AG v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109 (Spycatcher’). [↑](#footnote-ref-119)
120. Her official title is: Princess Caroline Louise Marguerite, Prinzessin von Hannover, Herzogin zu Braunschweig und Lüneburg. She married Ernst August Prinz von Hannover on 23 January 1999, her second marriage, after Caroline of Monaco had married Philippe Junot on 28 June 1978; their marriage was annulled on 9 October 1980. [↑](#footnote-ref-120)
121. Von Hannover (No 1) (2005) 40 EHRR 1. [↑](#footnote-ref-121)
122. Born 1954 and of particular interest since he is a member of the royal House of Hannover as: Ernst August, Prince of Hanover, Duke of Brunswick and Lüneburg (Ernst August Albert Paul Otto Rupprecht Oskar Berthold Friedrich-Ferdinand Christian-Ludwig Prinz von Hannover Herzog zu Braunschweig und Lüneburg Königlicher Prinz von Großbritannien und Irland). [↑](#footnote-ref-122)
123. Von Hannover v Germany (No 2) (2012) (Application Numbers – 40660/08, 60641/08) (unreported) Judgment of 7 February 2012. [↑](#footnote-ref-123)
124. Von Hannover (No 1) (2005) 40 EHRR 1 at 32 (Judge Zupani). [↑](#footnote-ref-124)
125. Axel Springer v Germany (2012) at para 90. [↑](#footnote-ref-125)
126. Ibid., at para 91. [↑](#footnote-ref-126)
127. Ibid., at para 92. [↑](#footnote-ref-127)
128. Ibid., at para 93. [↑](#footnote-ref-128)
129. Ibid., at para 94. [↑](#footnote-ref-129)
130. Ibid., at para 95. [↑](#footnote-ref-130)
131. The German left-wing daily newspaper TAZ (Tageszeitung) disclosed X’s identity, that of Bruno Eyron, well-known for playing a RTL-TV cop, ‘Kommissar Balko’. Source: ‘Caroline von Monaco zu Recht geknipst. Ein europäisches Gericht stärkt die deutsche Pressefreiheit: Ein Foto von Caroline von Monaco durfte gedruckt werden. Ebenso das Bild eines koksenden Schauspielers’, by Christian Rath, TAZ, 7 February 2012. [↑](#footnote-ref-131)
132. Ibid., at para 99. [↑](#footnote-ref-132)
133. See also: Pillans, B. (2012). [↑](#footnote-ref-133)
134. ***Von Hannover v Germany (No 3)*** (2013) (Application No. 8772/10) ECHR 264. [↑](#footnote-ref-134)
135. #####  The Criminal Justice and Courts Act 2015 inserted s 39A into the 1933 Act including “Prohibition on publication of certain matters: providers of information society services” extending publication beyond the real of ‘newspapers’.

 [↑](#footnote-ref-135)
136. #####  Section 15 Victims and Witnesses (Scotland) Act 2014 (‘Reporting of proceedings involving children’) amended restrictions on reporting proceedings involving children in section 47 Children (Scotland) Act 1995 so that they apply to a person under 18, rather than under 16. Section 47 of the 1995 Act puts certain restrictions on newspapers to prevent them revealing the identity of persons under 16 who are involved in criminal proceedings (as the person against or in respect of whom the proceedings are taken, or as a witness). However, the court has discretion to dispense with these requirements if it is satisfied that it is in the public interest to do so. The provisions also apply to sound and television programmes.

 [↑](#footnote-ref-136)
137. ***AAA (by her litigation friend BBB) v Associated Newspapers*** [2013] EWCA Civ 554; [2012] EWHC 2103 (QB). [↑](#footnote-ref-137)
138. Murray (David) v Express Newspapers and Others [2008] EWCA Civ 446 (CA) (also known as: ‘Murray v Big Pictures’). [↑](#footnote-ref-138)
139. For further discussion see: Carter-Silk, A. and Cartwright-Hignett, C. (2009) pp. 212–217. [↑](#footnote-ref-139)
140. See: Campbell v MGN Ltd [2004] 2 AC 457 (HL). [↑](#footnote-ref-140)
141. ***Z (A Minor) (Identification: Restrictions on Publication),* Re** [1996] 2 FCR 164 CA. [↑](#footnote-ref-141)
142. ***KD (A Minor) (Ward: Termination of Access),* Re** [1988] FCR 657 (HL) . [↑](#footnote-ref-142)
143. [2012] EWHC 2103 (QB). [↑](#footnote-ref-143)
144. ***AAA v Associated Newspapers*** [2013] EWCA Civ 554. [↑](#footnote-ref-144)
145. [2012] EWHC 2103 (QB) at 121 – 122 (Davies J). [↑](#footnote-ref-145)
146. [2006] QB 125 at 105 [↑](#footnote-ref-146)
147. (2009) (Application No 1234/05) (ECtHR). [↑](#footnote-ref-147)
148. [2013] EWCA Civ 554 (CA) at 39 (Master of the Rolls, Lord Justice Tomlinson). [↑](#footnote-ref-148)
149. Ibid., at 118 - 119. [↑](#footnote-ref-149)
150. #  For a full coverage of the story see: ‘Boris's secret lovechild and a victory for the public's right to know: Judge rejects lover's attempts to keep daughter's birth quiet’, by Michael Seamark, Daily Mail, 20 May 2013 at: <http://www.dailymail.co.uk/news/article-2328067/Boris-Johnsons-secret-lovechild-daughter-Stephanie-victory-publics-right-know.html>

 [↑](#footnote-ref-150)
151. [2012] EWHC 2103 (QB) at 129 (Davies J). [↑](#footnote-ref-151)
152. Re X (a woman formerly known as Mary Bell) and CC v A [1985] 1 All ER 53. [↑](#footnote-ref-152)
153. See: Sereny, G. (1998). [↑](#footnote-ref-153)
154. Re X: A Woman Formerly Known as ‘Mary Bell’ and another v O’Brien and Others [2003] EWHC 1101 (QB). [↑](#footnote-ref-154)
155. Venables and Thompson v News Group Newspapers Ltd [2001] Fam 430. [↑](#footnote-ref-155)
156. Ibid., at 268, para 25. [↑](#footnote-ref-156)
157. Ibid., at 288, para 82 (Butler-Sloss P) [↑](#footnote-ref-157)
158. Ibid., at 286–290, paras 77–87. [↑](#footnote-ref-158)
159. Ibid., at 295, para 101. [↑](#footnote-ref-159)
160. [1974] AC 207. [↑](#footnote-ref-160)
161. [1996] AC 563. [↑](#footnote-ref-161)
162. (1998) 29 EHRR 245. [↑](#footnote-ref-162)
163. ‘Gagging orders are out of control, says Andrew Marr as he abandons High Court injunction over his extra-marital affair’, by Sam Greenhill, Daily Mail, 26 April 2011. [↑](#footnote-ref-163)
164. [2007] UKHL 21. [↑](#footnote-ref-164)
165. [2011] EWCA Civ 439. [↑](#footnote-ref-165)
166. Sometimes referred to as ‘super-injunctions’. [↑](#footnote-ref-166)
167. See: ***PJS v News Group Newspapers Ltd*** [2016] EWCA Civ 100 (Lord Justice Jackson and Lady Justice King). [↑](#footnote-ref-167)
168. See: ***John Terry (LNS) v Persons Unknown*** [2010] EWHC 119 (QB). [↑](#footnote-ref-168)
169. See: ***AMM v HXW*** [2010] EWHC 2457 (Jeremy Clarkson superinjunction) [↑](#footnote-ref-169)
170. ***PJS*** [2016] UKSC 26 (Lord Mance, Lord Neuberger, Lady Hale and Lord Reed; Lord Toulson dissenting). [↑](#footnote-ref-170)
171. Ibid., at paras 44 – 45. [↑](#footnote-ref-171)
172. #  Source: ‘Privacy in a Connected World: The Celebrity Threesome Injunction’, by Louise Berg and Michael Skrein, 20 May 2016 at: <https://www.reedsmith.com/Privacy-in-a-Connected-World-The-Celebrity-Threesome-Injunction-05-20-2016>

 [↑](#footnote-ref-172)
173. Ibid., at para 86 (Lord Toulson dissenting). [↑](#footnote-ref-173)
174. Criminal Procedure Rules (CPR) 5. 4C(7). [↑](#footnote-ref-174)
175. For a detailed discussion how to conduct any privacy action see: Tugendhat and Christie (Warby, M., Mareham, N. and Christie. I., eds) (2011) pp. 706–719. [↑](#footnote-ref-175)
176. Ibid., at para 72 (Lady Hale). [↑](#footnote-ref-176)
177. #  *ETK v News Group Newspapers Ltd* [2011] EWCA Civ 439 (also known as: *K v News Group Newspapers Ltd*)

 [↑](#footnote-ref-177)
178. [2007] EWCA Civ 295. [↑](#footnote-ref-178)
179. [2006] EWHC 2783 (QB). [↑](#footnote-ref-179)
180. [2013] EWHC 24 (Ch). [↑](#footnote-ref-180)
181. [2005] 1 AC 593. [↑](#footnote-ref-181)
182. ***PJS v News Group Newspapers Ltd*** [2016] UKSC 26 at paras 1 – 45 (Lord Mance). [↑](#footnote-ref-182)
183. For example the IPSO Editors’ Code of Practice Clause 3 ‘Privacy’. [↑](#footnote-ref-183)
184. John Terry [2010] EWHC 119 (QB). [↑](#footnote-ref-184)
185. Ibid., at 120 (Tugendhat J). [↑](#footnote-ref-185)
186. [2003] EWHC 1101 (QB). [↑](#footnote-ref-186)
187. ***PJS*** [2016] UKSC 26 at paras 33 – 34. [↑](#footnote-ref-187)
188. Ibid., at para 35. [↑](#footnote-ref-188)
189. Ibid., at para 35 (Lord Mance). [↑](#footnote-ref-189)
190. ***PJS***  [2016] EWCA Civ 393 at para 47(ii) (CA). [↑](#footnote-ref-190)
191. John Terry [2010] EWHC 119 (QB) at 120 (Tugendhat J). [↑](#footnote-ref-191)
192. Mosley v NGN [2008] EMLR 679. [↑](#footnote-ref-192)
193. Von Hannover v Germany (No 1) [2005] 40 EHRR 1 at 63. [↑](#footnote-ref-193)
194. H (A Healthcare Worker) v Associated Newspapers Ltd [2002] EMLR 425. [↑](#footnote-ref-194)
195. See: AMP v Persons Unknown [2012] All ER (D) 178. [↑](#footnote-ref-195)
196. [1999] 31 EHRR 28. [↑](#footnote-ref-196)
197. The United Nations ‘Minton Report’ (September 2009) had exposed a toxic waste dumping incident in August 2006 in Ivory Coast, involving the multinational Dutch oil company Trafigura. [↑](#footnote-ref-197)
198. The author of this initial draft study, John Minton, of consultants Minton, Treharne and Davies, said dumping the waste would have been illegal in Europe and the proper method of disposal should have been a specialist chemical treatment called wet air oxidation. Source: ‘Minton Report: Carter-Ruck give up bid to keep Trafigura study secret’, by David Leigh, Guardian, 17 October 2009. [↑](#footnote-ref-198)
199. Source: ‘Guardian gagged from reporting Parliament’, Guardian, 12 October 2009 [↑](#footnote-ref-199)
200. See: Trafigura Limited v British Broadcasting Corporation (2009) QBD 15 May 2009. Claim No: HQ09X02050. Unreported. [↑](#footnote-ref-200)
201. See: Goodwin (Sir Fred) v News Group Newspapers [2011] EWHC 1309 (QB). **May 19**. The Liberal Democrat Peer Lord Stoneham revealed during a debate in the House of Lords that Sir Fred Goodwin had obtained an injunction to stop reports that he had a sexual relationship with a colleague. [↑](#footnote-ref-201)
202. See: ***CTB v News Group Newspapers*** [2011] EWHC 1326 (QB) (‘Ryan Giggs superinjunction’). [↑](#footnote-ref-202)
203. [2009] EWHC 3148 (QB). [↑](#footnote-ref-203)
204. [2010] EWHC 119 (‘John Terry Superinjunction’). [↑](#footnote-ref-204)
205. CTB (Ryan Giggs) [2011] EWHC 1326 (QB). [↑](#footnote-ref-205)
206. See: Sunday Herald, front page, 22 May 2011. [↑](#footnote-ref-206)
207. Paul McBride (1964 – 2012) was a leading Scottish criminal lawyer. He died suddenly on a trip to Pakistan aged 47. [↑](#footnote-ref-207)
208. David McKie is a partner in the Glasgow law firm Levy & McRae. In an interview with the author on 2 July 2015, Mr McKie recounted the complex legal background to the Ryan Giggs’ publication in the Sunday Herald. [↑](#footnote-ref-208)
209. Source: ‘Sex, lies and private laws’. Analysis by Richard Walker. *Sunday Herald*, 22 May 2011, pp. 12 – 16. [↑](#footnote-ref-209)
210. Source: Richard Walker in an interview with the author on 2 July 2015 at the Glasgow Herald Headquaters. [↑](#footnote-ref-210)
211. Ryan Giggs (Nr 2) [2012] EWHC 431 (QB) at para 1 (Tugendhat J). [↑](#footnote-ref-211)
212. Source: ‘Jeremy Clarkson lifts the gag on his ex-wife: She claims she had an affair with Top Gear star after he remarried’, by Michael Seamark, Daily Mail, 27 October 2011. [↑](#footnote-ref-212)
213. [2010] EWHC 2457 (QB); [2010] All ER (D) 48 (Oct) (‘Jeremy Clarkson superinjunction’). [↑](#footnote-ref-213)
214. See: Smartt, U. (2011), pp. 135–140. [↑](#footnote-ref-214)
215. See: Master of the Rolls (2011) Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice (‘the Neuberger Report’): www.judiciary.gov.uk/Resources/JCO/Documents/Reports/super-­injunction-report–20052011.pdf. [↑](#footnote-ref-215)
216. Mindell, R. (2012), pp. 52 – 58. [↑](#footnote-ref-216)
217. (2003) 36 EHRR 719. [↑](#footnote-ref-217)
218. ***Campbell v MGN Ltd*** [2004] 2 AC 457 at 51.   [↑](#footnote-ref-218)
219. Ibid., at 34. [↑](#footnote-ref-219)
220. Source: House of Commons (1973) ‘Privacy: Younger Committee’s Report’. HC Debate, 6 June 1973. [↑](#footnote-ref-220)
221. House of Commons (1990) ‘The Calcutt Report’. HC Debate, 21 June 1990. [↑](#footnote-ref-221)
222. (1991) FSR 62. [↑](#footnote-ref-222)
223. Von Hannover v Germany ***(No 1)*** (2005) 40 EHRR 1. [↑](#footnote-ref-223)
224. Von Hannover v Germany (No 2) (2012) (Application Numbers – 40660/08, 60641/08) Strasbourg Judgment of 7 February 2012. [↑](#footnote-ref-224)
225. Von Hannover v Germany (No 1) (2005) 40 EHRR 1. [↑](#footnote-ref-225)
226. Beckham v MGN Ltd (June 28 2001; unreported). [↑](#footnote-ref-226)
227. Ferdinand (Rio) v Mirror Group Newspapers Ltd [2011] EWHC 2454 (QB). [↑](#footnote-ref-227)
228. Von Hannover v Germany (No 2) (2012) (Application Numbers – 40660/08, 60641/08) Judgment of 7 February 2012. [↑](#footnote-ref-228)
229. See: ***Judith Vidal-Hall, Robert Hann and Marc Bradshaw and the Information Commissioner v Google Inc*** [2015] EWCA Civ 311 (CA). [↑](#footnote-ref-229)
230. The issue of compensation for a contravention by a data controller is dealt with in Article 23 of the Directive (95/46/EC). The CA found it was not possible to interpret section 13(2) DPA in a way that was compatible with Article 23. [↑](#footnote-ref-230)
231. [2015] EWCA Civ 33. [↑](#footnote-ref-231)
232. Mindell, R. (2012) at pp. 52–58. [↑](#footnote-ref-232)
233. Source: Sir David Eady’s Speech on Privacy to TIPLO (The Intellectual Property Lawyers’ Association), House of Lords, 18 February 2009: www.publications.Parliament.uk/pa/cm200809/cmselect/cmcumeds/memo/press/uc7502.htm. [↑](#footnote-ref-233)