The changing Scope of Private information[1]

1. General Principles

There may be a reasonable expectation of privacy for information imparted in an existing relationship, such as employer/employer or doctor/patient or between partners or friends (whether marital or otherwise). However quite apart from any existing relationship between the parties, information (including images and photographs), may be deemed to be private (or may attract a "reasonable expectation of privacy") where the nature of the information relates to sexual, marital, family or home relationships, or concerns financial, personal or medical information, or concerns highly embarrassing matters for any individual. It is also important to consider the intrusive way it is obtained, for example as a result of harassment, surveillance, long lens photography, trespass or theft.

Even relatively trivial information may be protected if it is obtained from inside a person's home or if a photograph is taken secretly at a wedding[2], or if it concerns vulnerable people or children. Similarly, a photograph taken with a long lens of say a couple at a restaurant, on a secluded beach or at home or in their garden may well be private even thought the informational content may be minimal. Another way of looking at this is that the surreptitious means of acquiring the information is a highly significant indicator that there is a reasonable expectation of privacy.

When the information arises from a pre-existing relationship, the necessary focus is on the nature of the relationship but in other situations the focus is on the nature of the information and how it was acquired.

As the Master of the Rolls said in Lord Browne said:

> *25. In McKennitt at [15], which is quoted in full below, Buxton LJ said that in the case where there is no pre-existing relationship of confidence, as in Campbell v MGN, Douglas v Hello! and von Hannover v Germany (2005) 40 EHRR , the primary focus is on the nature of the information. In a case like this, where there is a previous relationship of confidence, the focus is different.*
>
> *26. The cases make it clear that, in answering the question whether in respect of the disclosed facts the claimant has a reasonable expectation of privacy in the particular circumstances of the case the nature of any relationship between the relevant persons or parties is of considerable potential importance.*

As in Campbell and Douglas most cases against the media do not involve pre-existing relationships. So the focus has to be whether there is a reasonable expectation of privacy in respect of the particular information in the specific circumstances, i.e. the claimant and the nature of the information and how it is acquired and published.

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[1] This is an early draft of part of a chapter in the forthcoming book "The Law Of Personal Privacy " by David Sherborne, Mark Thomson and Hugh Tomlinson to be published by Hart Publishing in early 2009. A version of this article was published In 2008 in Convergence the Journal of the Intelectual Property, Coimmunications and Technology Section of the International Bar Association.

[2] Douglas -v- Hello

2. The Decision in Von Hannover

One month after the House of Lords decision in Campbell, the ECHR handed down its decision in the case of *Von Hannover v Germany* (in 24 June 2004) which concerned the scope of Article 8 protection in respect of information not obtained from an existing relationship.

The applicant was Princess Caroline of Monaco. She has long been an "international celebrity" whose every move has been of great interest to the tabloid press. She has brought legal actions in a number of countries to try to prevent the publication of photographs of her private life. These photographs typically showed her engaging in ordinary activities in a variety of public places. She complained that she was hounded by paparazzi who followed her every daily movement. The press was not, she argued, performing its essential role in a democratic society but was an "entertainment press", seeking to satisfy its readers voyeuristic tendencies and make huge profits.

In a series of important privacy cases in the German courts she had been successful in restraining the publication of photographs taken of her children and photographs taken in "secluded places" but there was no remedy in respect of photographs taken in public places. Princess Caroline was what German law calls a "figure of contemporary society *par excellence*" and, as a result, was not entitled to privacy when she was in public places. The public had a legitimate interest in knowing how such a person behaved generally in public.

The German government defended its national law and the Association of German Magazine Editors intervened in support. They (correctly) submitted that German law was half way between the powerful protections of French privacy law and the weak privacy protection in England. They went on to argue that the role of the press as watchdog could not be narrowly interpreted and that German law struck a fair balance between privacy and freedom of expression.

A unanimous Court of Human Rights disagreed. Their decision rested on three crucial points. First, the court said that the "zone of interaction of a person with others, even in a public context" fell within the sphere of private life (para 50). As a result, there was no doubt that the publication of photographs of the applicant in her daily life fell within the scope Article 8 (para 53).

Second, although the interferences were not by the State but by private bodies, Article 8 was relevant because the State owed positive obligations which "may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves" (para 57). This also applied to the protection of a person's picture against abuse. When considering these positive obligations to protect private life a balance had to be struck between privacy and freedom of expression.

Third, the publication of the photographs did not contribute to public debate. The Court stressed the essential role of the press in imparting information and ideas on matters of public interest which extended to the publication of ideas which "*offend, shock or disturb*" (para 58).

There was, however,

> "*a fundamental distinction … to be made between reporting facts … 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 … does not exercise official functions*" (para 63).

The publication of the photographs did not contribute to any debate of general interest and freedom of expression had to be given a "narrower interpretation" (paras 65-66).

In his concurring judgment Judge Zupan_i_ complained that the ECHR Court had, under American influence, "made a fetish of freedom of the press" and expressed the view that it was time that the pendulum swung back to a different kind of balance between what is private and what is public.

The Court unanimously found a violation of Article 8. Although, in concurring, Judges Cabral Barreto and Zupan_i_ took a more restrictive view of the rights of "celebrities" to be left alone in public places, they nevertheless agreed that German law did not provide sufficient Article 8 protection.

Three important points stand out. First, there is the extension of the domain of private life into "public" but non official activity. Shopping is as much part of "private life" as sitting at home watching television. The Court considered the ambit of the concept of private life:-

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

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

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

This approach can be contrasted with that taken in *Campbell v MGN* ([2004] 2 WLR 1232). This case makes it clear that publication of photographs taken in public places is actionable only in exceptional circumstances. The approach of the Court of Human Rights is much closer to the strict protections of privacy available in French Law.

Secondly, the Court used the concept of "positive obligations" to extend Article 8 privacy rights into the private sphere. The requirement that the State protect private individuals against interferences in private life by other private individuals means that the Convention has "horizontal effect" in this area.

Thirdly, the Court was strongly influenced by the "value" of the form of expression involved. The fact that the publications were aimed at entertainment, rather than the dissemination of information and ideas on matters of public interest meant that Article 10 protection was considerably weakened. As was said in an earlier case, an article

“having the sole objective of satisfying the curiosity of a section of the public about the intimacy of the private life [of the applicants] cannot claim to contribute to any debate of general interest for society, despite the fact that they are very well known” (*Société Prisma v France,* Judgment of 1 July 2003). This point echoes the reasoning of Lady Hale in the recent Campbell decision.

Although it is not “binding” on the English courts, the decision must be “taken into account” under section 2 of the Human Rights Act 1998 (“HRA”). The Court of Human Rights did not defer to the decisions of the German court, despite the fact that they had carefully considered the “balancing” issues and developed a sophisticated privacy law and stronger that the protection provided in the UK. In contrast to the cases in which privacy laws have been held to be consistent with Article 10 (eg *Société Prisma*), the state was not afforded a “margin of appreciation”. The positive obligations to protect privacy fall on the court as much as on the government

The most obvious effect of the decision concerns photography. The case makes clear that famous people have the right to be left alone, even when they are in public places. It is difficult to imagine a case where such pictures could be said to contribute to a debate on matters of public concern.

The case has been criticized by media and academic commentators.[3] It was initially thought to be confined to cases where there had been repeated harassment by the media.[4]

3. McKennitt –v- Ash

However the most explicit statement about the scope of private life arose in the first instance and the Court of Appeal decisions in *Mckennitt v Ash*.

In this action Loreena Mckennitt, the Canadian Folk singer/musician commenced proceedings in September 2005 seeking an injunction restraining publication of a book written by Niema Ash a former friend, confidant and employee of Ms Mckennitt as well as damages for the initial limited publication that had taken place prior to undertakings pending trial being given. The complaints made about the book were in 5 categories;

1. Ms McKennitt's personal and sexual relationships.
2. Her personal feelings and, in particular, in relation to her deceased fiancé and the circumstances of his death
3. Matters relating to her health and diet.
4. Matters relating to her emotional vulnerability.
5. The detail of a dispute between Ms McKennitt, on the one hand, and Ms Ash and Mr Fowkes on the other, concerning monies advanced to them by Ms McKennitt to assist in the purchase of a property in 1997 and the subsequent litigation in the Chancery Division (which was settled on the basis of a Tomlin order without ever coming to a public hearing).

[3] See Fenwick and Phillipson
[4] see also Elton John v Associated Newspapers(2006)

The Court ordered a speedy trial which took place in November 2005, with Judgment being handed down in December 2005. In finding for the Claimant, Eady J made a number of specific findings. First, that Ms Mckennitt had sought to protect her privacy wherever possible and that Ms Ash was aware of this and had signed a Confidentiality Agreement. Despite the fact that one part of the claim was based on contract, Eady J principally relied on the claim for threatened breach of confidence/misuse of private information, saying that the contract claim added little.

Secondly, although Ms Mckenniit had briefly spoken about some aspects of her private life in a number of interviews in the press, she was entitled to control her disclosures and, in any event ,the content of the book went substantially beyond the material that had been in the press. Thirdly, that although there were a number of passages which were found to be anondyne and therefore not to engage article 8, there were a substantial number of passages that were private and intrusive, including some which were concerning the description of the interior of Ms Mckennit's Irish Cottage and arguments that took place in the Cottage, Fourthly, there was no public interest or any other Article 10 justification in disclosing any of the private material.

Ms Mckennitt succeeded at trial and obtained an Injunction, restraining various passages in the book, a declaration that her privacy had been invaded and £5,000 in damages. The Court of Appeal dismissed Ms Ash's appeal in December 2006 and the House of Lords refused permission to appeal in March 2007.

Significantly, Eady J found that there was a wider scope of private information that was now protected; he held that the principles from *Von Hannover* was not limited to situations where there was harassment and had general application and that the English Courts should take account of the same. He also said that in the light of *Von Hannover*, and two other ECHR cases involving the United Kingdom, namely *PG and JH v United Kingdom* (Application 44787/98) and *Peck v United Kingdom* (2003) 36 EHRR 41.;

> "*… a trend has emerged towards acknowledging a "legitimate expectation" of protection and respect for private life, on some occasions, in relatively public circumstances. It is no longer possible to draw a rigid distinction between that which takes place in private and that which is capable of being witnessed in a public place by other persons."*

In another significant passage concerning details about the Interior of the Claimants Irish Cottage and arguments that took place within it Eady J held;

> *The fact that the work on the cottage was part of Ms Ash's own life does not mean that she is excused from "respecting" Ms McKennitt's entitlement to privacy. Likewise, it seems to me that the right to "respect" for one's privacy at home would cover not merely the physical descriptions of the building or contents but also conversations, communications or disagreements taking place in the home environment. People feel, and are entitled to feel, free in their homes to speak unguardedly and with less inhibition than in public places. Accordingly, it will be rare indeed that the public interest will justify encroaching upon such goings on. Naturally if criminal acts are committed, such as child abuse or the cultivation of illegal drugs, there would be a public interest to override the normal protection, but nothing of the sort is alleged here. (para 137)*

For obvious reasons I am not going to regurgitate the minute details to be found in the book about what was under the lino, the sanitary arrangements, or how many bunk beds were put up when visitors came to stay; suffice to say, it is intrusive and distressing for Ms McKennitt's household minutiae to be exposed to curious eyes and it is utterly devoid of any legitimate public interest. Applying, therefore, the "intense focus" to the parties' respective rights, I have no hesitation in concluding that the complaint is well founded."(para 138)

4. The Privacy of Relationships and Family Life

Another very significant aspect to the *Von Hannover* and the *PG* cases, was that the European Court recognised as part of Article 8

"a right to identity and personal development and the right to establish and develop relationships with other human beings."

The effect of this is not only to protect information concerning relationship which may take place in public (as Eady J mentioned in McKennitt), but also the level of information that may be protected at home. For example, domestic conversations at home, will in most circumstances, be within the scope of Article 8. A recent example was the case of *Lord Browne –v- Associated*, where Lord Browne sought and succeeded in preventing his former partner, from disclosing domestic conversations at home. The Court of Appeal even decided that a mere fact of a relationship, even if known to a few hundred people, would normally be within Article 8 and therefore publication could be restrained. In the this case, however, it was only because of the public interest element in the other matters that the Court decided could be published by the newspaper that the Court did not restrain the fact of the relationship.

5 Privacy Outside the Home

It was recognised, in the discussion in the Naomi Campbell case, by the House of Lords that photographs of people outside could, in certain circumstances, be private and come within Article 8, even though those people would be visible to members of the public. Lord Hoffman referred to someone in a state of distress or in an embarrassing situation, whereas Lady Hale made the point that there was nothing private in photographs taken of the model Naomi Campbell *"popping out for a pint of milk"*.

Their Lordships also made reference to the recent decision In *Peck v UK* where the ECHR held that publication by newspapers and broadcasters of CCTV footage of Mr Peck while in a suicidal state, walking on a street late at night, was an infringement of his Article 8 rights. The critical point from this ECHR case was although people in a public street outside may expect CCTV pictures being taken or even members of the public taking photographs with portable digital camera or cameraphones, it does not automatically follow that it is reasonable to expect such pictures to be published widely in the national media.

6. Murray v Express

This issue was specifically addressed by the Court of Appeal in Murray v Express in May 2008. The Court of Appeal allowed an appeal from the decision of Patten J striking out the action brought on behalf of David Murray the son of J.K.Rowling and her husband

Neil Murray. A paparazzi photographer from a photographic agency photographed the family in a street in Edinburgh on the way to a café. One of these photographs was published in the Scottish press and then subsequently, despite contractual undertakings, in the Daily Express in this jurisdiction. At first instance the Court struck out the action on the grounds that Article 8 was not engaged in respect of such everyday activity and that it was akin to what Baroness Hale in the House of Lords decision in *Campbell b MGN* described as Naomi Campbell popping out for a pint of milk.

The decision focused on the very nature of the scope of privacy and the meaning of the phrase "reasonable expectation of privacy"

> *"The first question is whether there is a reasonable expectation of privacy. This is of course an objective question. The nature of the question was discussed in Campbell. Lord Hope emphasised that the reasonable expectation was that of the person who is affected by the publicity. He said at [99]:*
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> > *"The question is 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."*
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> *As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.*
>
> *As we indicated earlier, it is our opinion that the focus should not be on the taking of a photograph in the street, but on its publication. In the absence of distress or the like caused when the photograph is taken, the mere taking of a photograph in the street may well be entirely unobjectionable. We do not therefore accept, as the judge appears to suggest in [65], that, if the claimant succeeds in this action, the courts will have created an image right.*

It is because of this additional focus that has to be made on the publication of the photographs, the special position of children and the fact that just prior to the appeal the Defendants disclosed a number of further photographs of David taken on the same occasion, that the Court allowed the claim to proceed to trial. They also made it clear that photographs of persons in everyday outside activities may engage Article 8.

> *We recognise that there may well be circumstances in which there will be no reasonable expectation of privacy, even after Von Hannover. However, as we see it all will (as ever) depend upon the facts of the particular case. The judge suggests that a distinction can be drawn between a child (or an adult) engaged in family and sporting activities and something as simple as a walk down a street or a visit to the grocers to buy the milk. This is on the basis that the first type of activity is clearly part of a person's private recreation time intended to be enjoyed in the*

company of family and friends and that, on the test deployed in Von Hannover, publicity of such activities is intrusive and can adversely affect the exercise of such social activities. We agree with the judge that that is indeed the basis of the ECHR's approach but we do not agree that it is possible to draw a clear distinction in principle between the two kinds of activity. Thus, an expedition to a café of the kind which occurred here seems to us to be at least arguably part of each member of the family's recreation time intended to be enjoyed by them and such that publicity of it is intrusive and such as adversely to affect such activities in the future.

We do not share the predisposition identified by the judge in [66] that routine acts such as a visit to a shop or a ride on a bus should not attract any reasonable expectation of privacy. All depends upon the circumstances. The position of an adult may be very different from that of a child. In this appeal we are concerned only with the question whether David, as a small child, had a reasonable expectation of privacy, not with the question whether his parents would have had such an expectation. Moreover, we are concerned with the context of this case, which was not for example a single photograph taken of David which was for some reason subsequently published

It is debatable whether the Judgment will be seen as a decision about protecting children from being targeted by the media. It seems to us that the principles are of general application, but the fact that a child is being targeted by the media is a highly relevant factor when considering whether Article 8 is engaged. As they made clear:

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

It is important to note that so to hold does not mean that the child will have, as the judge puts it in [66], a guarantee of privacy. To hold that the child has a reasonable expectation of privacy is only the first step. Then comes the balance which must be struck between the child's rights to respect for his or her private life under article 8 and the publisher's rights to freedom of expression under article 10. This approach does not seem to us to be inconsistent with that in Campbell, which was not considering the case of a child.

In these circumstances we do not think that it is necessary for us to analyse the decision in Von Hannover in any detail, especially since this is not an appeal brought after the trial of the action but an appeal against an order striking the action out. Suffice it to say that, in our opinion, the view we have expressed is consistent with that in Von Hannover, to which, as McKennitt v Ash makes clear, it is permissible to have regard.

In paragraph 60 there is a remarkable passage; the Court of Appeal went much further than it needed to in allowing an appeal against a successful application to strike out;

"The context of Von Hannover was therefore different from this but we have little doubt that, if the assumed facts of this case were to be considered by the ECtHR, the court would hold that David had a reasonable expectation of privacy and it seems to us to be more likely than not that, on the assumed facts, it would hold that the article 8/10 balance would come down in favour of David. We would add that there is nothing in the Strasbourg cases since Von Hannover which in our opinion leads to any other conclusion: see eg Reklos and Davourlis v Greece, petition no 1234/05, 6 September 2007."

In the light of Mckennitt, Von Han Hannover and Murray it appears that the scope of article 8 potentially extends to the information and photographs of persons engaged in every day activity even in public. This is not limited to situations with children nor situations where a person is in extremely distressing circumstances, such as grief or attempted suicide, but also, depending on the circumstances, where persons are engaged in everyday activity such as a family or couple walking in the park or an expedition to a local café or supermarket.

7 Limiting Principles to the Scope of Private Information

It is important here to recognise that under the traditional law of confidence, there were three limiting principles and these were identified by Lord Goff in *Att.-Gen. v Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109, 282: -

"The first limiting principle (which is rather an expression of the scope of the duty) is highly relevant to this appeal. It is that the principle of confidentiality only applies to information to the extent that it is confidential. In particular, once it has entered what is usually called the public domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential) then, as a general rule, the principle of confidentiality can have no application to it. …

The second limiting principle is that the duty of confidence applies neither to useless information, nor to trivia. There is no need for me to develop this point.

The third limiting principle is of far greater importance. It is that, although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply, as the learned judge pointed out, to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure".

In this new methodology it is important to know when these limiting principles are to be considered as well how far they can be applied. As the Courts have made clear, for example in *McKennitt*, the first consideration is whether Article 8 is engaged at all in respect of the specific material. If the information is bland or anodyne or sufficiently serious then it is not necessary to consider any Article 10 speech rights such as public interest or shared experience rights or to conduct any "intense focus" or "parallel

analysis". If Article 8 is not engaged the complaint fails. It is also clear that public interest contentions are part of the Article 10 rights to be considered in the second stage.

The position is less clear where there are public domain issues. It has been suggested that the fact that a person has placed material in the public domain affects the scope of the "reasonable expectation" of privacy, although it should be probably considered at later stage.

8. Trivial Information

As we have seen, one of the three limiting principles set out by Lord Goff in the Spycatcher case was that the duty of confidence did not apply to "useless information or trivia."

However given the expanding scope of the protection of private life and the absorption of convention rights, this protection now extends in certain circumstances to relatively trivial information.

Apart from the subjective nature of the term "trivial", it is nevertheless important to recognise that many aspects of information concerning private life are trivial. It may be that disclosure of the information would not cause any loss or affect the reputation of the person concerned; it may even attract sympathy. Indeed many intrusive articles published in the media appear sympathetic. Disclosure of such information could nevertheless be extremely distressing for the individual concerned.

In the case of McKennitt, Eady J discussed these issues in general terms before focusing on the individual passages in the book, which was the subject-matter of the action. He held

> "*the mere fact that information concerning an individual is "anodyne" or "trivial" will not necessarily mean that Article 8 is not engaged. For the purpose of determining that initial question, it seems that the subject-matter must be carefully assessed. If it is such as to give rise to a "reasonable expectation of privacy", then questions such as triviality or banality may well need to be considered at the later stage of bringing to bear an "intense focus" upon the comparative importance of the specific rights being claimed in the individual case. They will be relevant to proportionality*."

In McKennitt, Eady J restrained publication of information about the contents and description of Ms McKennitt's home in Ireland as well as details of arguments that took place within the home.

> *"Even relatively trivial details would fall within this protection simply because of the traditional sanctity accorded to hearth and home. To describe a person's home, the décor, the layout, the state of cleanliness, or how the occupiers behave inside it, is generally regarded as unacceptable. To convey such details, without permission, to the general public is almost as objectionable as spying into the home with a long distance lens and publishing the resulting photographs.*
>
> *…. Whether one is allowed into a person's home professionally, to quote for or to carry out work, or one is welcomed socially, it would clearly be understood that the details are not to be published to the world at large."*

In the Jameel case, Lord Hoffman explained that in its decision in Campbell the House had attempted to redress the balance in favour of privacy so that "*true but trivial invasions into private life"* could no longer be punished with impunity.

9. The Right to Control Dissemination and Zonal waiver

As Sedley LJ observed in *Douglas v. Hello! Ltd. (No.1) (2001) QB 967, 1001* and Lord Hoffmann in *Campbell v. MGN Ltd. (2004) 2 AC 457, 473C-D, §51*, the shift in the centre of gravity of the action for breach of confidence occasioned by the influence of Article 8 has been to focus upon the protection of human autonomy and dignity.

The Article 8 right to which Lord Hoffmann was referring involves not just the right to the esteem and respect of other people, but also *"the right to control the dissemination of information about one's private life"*:

In *McKennitt v Ash*, the Court of Appeal rejected the contention that once a person had revealed or discussed some information falling within a particular "zone" of their lives, they had a greatly reduced expectation of privacy in relation to any other information that fell within that zone. The Court of Appeal agreed with Eady J's statement at §79-80 that there is "*a significant difference between choosing to reveal aspects of private life with which one feels 'comfortable' and yielding up to public scrutiny every detail of personal life, feelings, thoughts and foibles of character*." Buxton LJ went on to say that:

> *If information is my private property, it is for me to decide how much of it should be published. The 'zone' argument completely undermines that reasonable expectation of privacy*" (§55).

10 False Private Information

In *Campbell v. MGN, ibid, p485D-E §102*, Lord Hope observed that such inaccuracies as were published did not detract from the private nature of what was published:-

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

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

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

The same approach can be seen at work in the decision of Tugendhat J in *W v. Westminster City Council [2005] EWHC 102 (QB)*, where a libel claim was dismissed on the ground of qualified privilege, but a claim for infringement of Article 8 succeeded, even though it was accepted that the material complained of was untrue.

More radically, in *McKennitt* Lord Justice Buxton held that

> *I would hold that provided the matter complained of is by its nature such as to attract the law of breach of confidence, then the Defendant cannot deprive the claimant of his article 8 protection simply by demonstrating that the matter is*

untrue. Some support is given to that approach by the European cases shown to us by Mr Browne that indicate that article 8 protects "reputation", broadly understood; but it is not necessary to rely on those cases to reach the conclusion that I have indicated".

Lord Justice Latham went further in his concurring judgment :

"The question in a case of misuse of private information is whether the information is private not whether it is true or false. The truth or falsity of the information is an irrelevant inquiry in deciding whether the information is entitled to be protected and judges should be chary of becoming side-tracked into that irrelevant inquiry. Cases such as Interbrew SA v Financial Times [2002] EWCA Civ 274, [2002] EMLR 446 (where a party claims protection on behalf of a source transmitting false information) are, of course, entirely different".

Although there has been some debate about whether these principles apply to wholly false information, as a matter of logic and common sense publication of wholly false information if by its nature private must engage Article 8. Accordingly, in any action for misuse of private information the Court need not enquire whether the information is accurate. As in Mckenniit, a factual enquiry is only necessary where the Defendant alleges facts in support of Article 10 issues, for example that there is public interest in publication of the material complained of as a result of the Claimants' conduct or that the Claimant has put similar material in the public domain.

In the case of *P, Q & R v Mark Quigley* [2008] EWHC 1051 (QB), the Court granted a false privacy final injunction, even though it was recognised that the material sought to be restrained in the form of a novella was "scurrilous" and "scandalous". Eady J held that the ultimate balancing act in accordance with Re S needed to be carried out and that this:

"comes clearly down in favour of restricting publication. That is because there is no conceivable public interest in making such scurrilous allegations against P and Q, whether directly or under the transparent disguise mentioned. The only effect of carrying out the threats contained in the 22 November letter would be to cause embarrassment and distress to the two individuals concerned. Very little value can be attached to the Defendant's freedom to do that. There is no suggestion, for example, that this is a libel claim in disguise and that P and Q are seeking to suppress defamatory allegations which he would wish to allege are true. What they are seeking to restrain is the publication of clearly scandalous matter which serves no legitimate purpose. There would appear to be no reason why the Defendant should be permitted to publish such allegations to the world at large, whether via the internet or by any other means".

This decision is highly significant since it is a pure false privacy claim. It seems clear that the terms of this injunction would be no different from an injunction based in libel. Although this was an application for summary judgment, it is difficult to work out the precise nature of the abuse that Buxton referred to if the same facts applied on the application for an interim injunction.

IMPACT OF RECENT CASES ON GENERAL PRINCIPLES

11. Murray v Express

Plainly Murray has had a substantial impact on the general principles and in particular the added emphasis on the circumstances of publication. It remains to be seen whether the House of Lords will grant permission to appeal which is due any day now.

12. Impact of Mosely v NGN April 2008 (# 1) [2008] EWHC 687 (QB)

This was a decision referring an interim injunction which was sought to restrain the republication of the video material on the News of the World website. The unchallenged evidence was that nearly 2,000,000 people had viewed the footage on the Sunday and Monday and that it had been copied and was available on numerous other websites.

The Court reluctantly declined to grant another injunction on the basis that it was so publicly accessible there was "*nothing left for the Court to protect*". It appears that the critical factor in this was the widespread availability of the footage on the other websites. The mere fact that 2,000,000 people had a week earlier seen the materials appears to have been a relevant but not a determinative factor. This case was really an application of established principles to the facts of the case.

The Court did comment that in relation to the public interest contention that the News of the World was seeking to correct a false statement that objective could be achieved without displaying the edited footage but merely by a statement to that effect (applying the logic in Campbell –v- MGN).

13. Impact of Mosely v NGN July 2008 (# 2) [2008] EWHC 1777 (QB)

The decision at the trial completely vindicated the Claimant in respect of the false Nazi allegations and this was despite the fact that this was a privacy action and not a libel action. As in the case of McKennitt a detailed factual enquiry was required because of the public interest contentions and (as in McKennitt) the public interest contentions were rejected firmly by the Court (even though plainly in both cases there was potential for a libel action to have achieved the similar result).

Nevertheless the decision is again a straight forward application of now established principles to statements of the case. There are however interesting comments on criminality, depravity as well as an important decision on damages.

13.1 Criminality

With regard to criminality the court made a number of interesting points about the level to which privacy may protect even criminal behaviour, indicating that if a Claimant was smoking a spliff at home it would still be an invasion of privacy for newspapers to publish such private information. It is unclear at what level of criminality would now give rise to a public interest defence and ultimately this may depend on the facts of the case and proportionality.

13.2 Depravity and adultery

With regard to depravity the court rejected the moralistic contentions of the newspaper in accordance with ECHR jurisprudence. In the absence of serious illegality or public interest the court will protect what happens in your home.

13.3 Damages

As to damages the Court assessed damages at £60,000 on the basis that the publication had potentially ruinous consequences. It appears that allowance was made for the alleged recklessness of the Claimant but this is not clear (para 226.)

In the writers view the current upper limit for very serious invasion of privacy is between £75,000 and £100,000 for the most serious invasion of privacy. Interestingly the Court indicated that damages can be awarded to vindicate an infringement of a right. It may be that like in libel a published apology vindicating the claimant's right will be relevant in assessment of damages in privacy akin to the practice in libel.

14. Impact of Applause v Raphael [2008] EWHC 1781 (QB)

This was an internet Facebook case for both libel and privacy. In respect of libel that Defendant alleged that:

> *'(as the Claimants plead) Mr Firsht owes substantial sums of money which he has repeatedly avoided paying by lying about when he will pay and making implausible excuses for not paying, and that as a result the Claimants are not to be trusted in the financial conduct of their business and represent a serious credit risk.*

In relation to the privacy claim, the Defendant had posted a false profile on Facebook;

> *'The false profile contained information as to Mathew Firsht's sexual orientation, his relationship status (that is to say, whether he was single or in a relationship), his birthday, and his political and religious views. Not all this information was accurate, but all of it is conceded by Mr Jeremy Pendlebury, counsel for the Defendant, to be information in respect of which Mr Firsht had a legitimate expectation of privacy.'*

After considerable evidence was given about I.P. address etc and whereabouts of the Defendant, the Court found against the Defendant and awarded damages of £15,000 in libel and £2000 in privacy.

Mark Thomson

Carter-Ruck

1st October 2008