Concurrent Themes in Libel and Privacy

Introduction

1. Convention Rights – Hierarchy, Equality and Conflict

1.1 For many years, the European Court of Human Rights (ECHR) have made robust statements in favour of freedom of expression, in the context of prior restraint, excessive libel damages[1], the burden of proof in libel and rights to a fair trial[2], defamatory allegations that are in the public interest,[3] or are comment [4].

1.2 Following the implementation of the Human Rights Act 1998 ("HRA"), the domestic Courts have attempted to deal with and resolve the conflict between Article 10 and Article 8 but this was mainly in the context of claims for privacy and/or breach of confidence. Even at that early stage, the domestic Courts took into account decisions of the ECHR. However, it took some time for the Courts to work out a methodology to resolve the conflict between Articles 8 and 10, especially in the light of the terms of section 12 of the Human Rights Act 1998 which appeared at first glance to give some priority to freedom of expression over privacy claims.[5] e.g. *Douglas v Hello! Ltd* [2001] QB 967, *Theakston v MGN (2003) QB and A v B plc (2003)QB 195*

1.3 While the domestic Courts grappled with the conflict between privacy rights and freedom of expression, they have, until recently explicitly or implicitly, assumed that Article 10 was of a higher order than the (non-convention right) to reputation.

Lord Justice Brown was explicit in the Court of Appeal decision in *Cream Holdings Limited & Others –v- Banerjee & Others* [2004] UKHL 44

"It is one thing to say, as indeed I myself said in Al-Fagih -v- HH Saudi Research & Marketing (UK) Ltd [2001] 2 EMLR 215, in a passage repeated with approval by this court in Loutchansky -v- Times Newspapers Ltd (Nos 2-5) [2002] QB 783, 803, that the media's right to freedom of expression, particularly in the field of political discussion "is of a higher order" than "the right of an individual to his good reputation"; it is, however, another thing to rank it higher than competing basic rights. (emphasis added)

It will be recalled that this decision concerned the construction of S.12(3) HRA [6] in the context of interim injunctions for breach of confidence/privacy. The House of Lords in its decision in *Cream Holdings* set out a flexible test.[7]

1.4 The Court of Appeal's decision in: *Re S* [2003] EWCA Civ 963.

This case concerned reporting restrictions during the trial for murder of the mother of child S, who had already lost his brother then aged 9. The Court of Appeal decision in July 2003 was one of the critical turning points for the Courts in resolving any

[1] *Tolstoy v United Kingdom* [1996] EMLR 152
[2] *Steel & Morris v UK* [2005] EMLR 15
[3] *Bladet Tromso & Stensaas v Norway* [21980/93] (2000) 29 ECHR
[4] *Lingens v Austria* [1986] 8 EHRR
[5] see also "Judicial Reasoning under the UK Human Rights Act" by Helen Fenwick, Gavin Phillipson and Roger Masterson – Cambridge University Press 2007
[6] S.12(3): *"No such relief may be granted unless the Court is satisfied that the applicant is likely to establish at trial that publication should not be allowed."*
[7] See *Cream Holdings v Banerjee* [2004] UKHC44

conflict of Convention Rights. The "Parallel Analysis" test set out in the decision of LJ Hale was accepted as correct in the subsequent House of Lords decision in *Campbell v MGN Ltd* (which by then included Baroness Hale).

1.5 A few months after the House of Lords decision in *Campbell v MGN Ltd*, in October 2004 the House of Lords finally and authoritatively laid down a procedure for resolving a conflict of Convention Rights in *Re S* [2003] EWCA Civ 963, by Lord Steyn as follows:-

> *"The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in Campbell v MGN Ltd. For present purposes the decision of the House on the facts of Campbell and the differences between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test".*

This applies to all convention rights and provides a methodology which is similar to the reasoning in decisions of the ECHR. This methodology was applied in recent domestic privacy decisions such as *Mckennitt v Ash, Lord Browne v Associated* [2007] EWHC 202, and *Mosley v NGN* [2008]. Explicit in the domestic privacy decisions is a comparative assessment of the quality of the speech rights and privacy rights involved and whether the interference with each right can be justified.

2. Reputation As A Convention Right

Although the domestic Courts and ECHR previously assumed that the right to reputation was not a convention right, it is now clear from recent jurisprudence from the ECHR that reputation is protected as an aspect of Article 8. Some decisions have suggested reservations about excessive protection of article 10 rights.

2.1. Radio France v France [2004] [8]

The French weekly magazine *Le Point* alleged that Mr Junot, when Deputy Prefect at Pithiviers from September 1942 to August 1943, had supervised the deportation of a thousand French and foreign Jews. The allegations were repeated over 60 times in broadcasts on Radio France. Criminal proceedings for libel were instituted and the Court fined the Defendants and ordered Radio France to broadcast a summary of the Judgment, each 30 minutes over a 24 hour period. The Defendants then applied to the ECHR.

The ECHR held that the allegations were significantly exaggerated in particular in relation to the suggestion that Mr Junot had admitted that he had organised the transport of the Jewish deportees. In the context of the serious allegations made and the fact that they were repeatedly broadcast on Radio France , this exaggeration was not permissible in the exercise of journalistic freedom. Accordingly there was no violation of Article 10. Critically the Court held ;

> *"The Court would observe that the right to protection of one's reputation is of course one of the rights guaranteed by Article 8 of the Convention, as one element of the right to respect for private life.* (para 31)

2.2 Cumpana v Romania [2004]

[8] See also *Rotaru v Romania [2000*]

The applicants was convicted and sentenced to prison for seven months for publication of an article making allegations of corruption against a deputy mayor DM and serving Judge RM. The applicants were also prohibited from working as journalists for a year. The ECHR held that although the right to reputation was protected by Article 8 the penalties were "manifestly disproportionate" and a violation of article 10.

2.3 *Lindon v France [2007]*

This case concerned a novel entitled "Jean-Marie le Pen on Trial" and contained a number of allegations that le Pen was "the chief of a gang of killers" and "that he advocated murder". Criminal proceedings for libel were instituted. The French Courts convicted the author and publisher of the novel and fined them each 15,000 Francs as well as compensation to Le Pen. The ECHR rejected the complaint that this decision was a violation of Article 10.

Significantly, Judge Loucaides in his concurring opinion, made a number of significant statements concerning the recent adjustment in position of the ECHR.

"When there is a conflict between two rights under the Convention, neither of them can neutralise the other through the adoption of any absolute approach. Both must be implemented and survive in harmony through the necessary compromises, depending on the facts of each particular case.

The principle established by the jurisprudence, that there is more latitude in the exercise of freedom of expression in the area of political speech or debate, or in matters of public interest, or in cases of criticism of politicians, as in the present case, should not be interpreted as allowing the publication of any unverified defamatory statements. To my mind this principle means simply that in those areas mentioned above, and in respect of politicians, certain exaggeration in allegations of fact or even some offending effect should be tolerated and should not be sanctioned. But the principle does not mean that the reputation of politicians is at the mercy of the mass media or other persons dealing with politics, or that such reputation is not entitled to the same legal protection as that of any other individual. Reputation is a sacred value for every person including politicians and is safeguarded as a human right under the Convention for the benefit of every individual without exception. And that is how I approached the facts of the present case.

The right to reputation, having the same legal status as freedom of speech, as explained above, is entitled to effective protection so that under any circumstances, any false defamatory statement, whether or not it is malicious and whether or not it may be inevitable for an uninhibited debate on public issues or for the essential function of the press, should not be allowed to remain unchecked.

One should not lose sight of the fact that the mass media are nowadays commercial enterprises with uncontrolled and virtually unlimited strength, interested more in profitable, flashy news than in disseminating proper information to the public, in controlling government abuse or in fulfilling other idealistic objectives. And although they may be achieving such objectives incidentally, accidentally or occasionally, even deliberately, they should be subject to certain restraint out of respect for the truth and for the dignity of individuals. Such restraint should include the duty to investigate defamatory allegations before rushing into print and the obligation to give an opportunity to the persons affected by their defamatory stories to react and give their own version. Furthermore they should remain legally accountable to the persons concerned for any false defamatory allegations. Like any power, the mass media cannot be accountable only to themselves. A contrary position would lead to arbitrariness and impunity, which undermine democracy itself.

2.4 *White v Sweden 2007*

The Applicant brought libel proceedings against newspapers who had alleged that he had murdered the Prime Minister of Sweden. The press were acquitted on the grounds that they had a reasonable basis for publishing the information and the public interest outweighed the Applicant's Article 10 rights. The Applicant complained that his Article 8 rights had been breached but the ECHR held that the public interest in publishing outweighed the applicant's article 8 rights.

3. The English Courts have now recognised Reputation as a Convention Right

3.1 The Courts have now also recognised reputation as a convention rights in a number of decisions eg. in *Greene v Associated* the Court of Appeal assumed this to be correct and this was expressly accepted by the Court of Appeal in *George Galloway MP –v-The Telegraph Group Ltd* [2006] EWCA Civ 17, in *Roberts v Gable* [2007] in *Charman v Orion* [2007].

3.2 In another recent qualified privilege *Prince Radu of Hohenzollern –v- Marco Houston & Sena Julia Publicatus Ltd* [2007] EWHC 2735 (QB),:- the Court heard the preliminary issue in respect of privilege and rejected the defences. In this case, the Court not only accepted the reputation was a convention right but also the new methodology as set out by Lord Steyn.

4. There is a positive obligation on member states to ensure protection of Article 8 Rights as between private parties.

Although it was thought that the positive obligation to ensure protection of Article 8 as between private parties was a recent ECHR development from *Von Hannover v Germany [2004]* , in fact this had been the position for some years Buxton LJ held in *Mckennitt v Ash [2006]* that Article 8 as extended by ECHR jurisprudence, (for example, *Markx v Belgium [1979]* and *Y v Netherlands [1985])* imposes not merely negative but also positive obligations on the state: to respect, and therefore to promote, the interests of private and family life

In the context of privacy, it is by means of the express absorption of articles 8 and 10 into the cause of action of breach of confidence that the state has complied with these positive obligations.[9]

In the libel context, the impact of the new methodology of resolving conflicts of rights and the fact that reputation is now a convention right appears at this stage to be limited despite the general terms of the guidance given by Lord Steyn in *Re S*. It may however be necessary to apply this new methodology where the conflict of convention rights is most acute, such as interim injunctions, fair comment and qualified privilege. Indeed in the recent ECHR defamation decisions the Court adopts as similar balancing process.

5. *Re:* S – Test in Qualified Privilege

5.1 *Prince Radu of Hohenzollern –v- Marco Houston & others* [2007] EWHC 2735 (QB); in this case, the Defendants alleged in Royalty Monthly that there was a "very strong case against the Claimant which to the present time he has failed convincingly to refute, that he was not granted a title or rank by the Fürst and that his claims to the contrary are false; and that he is relying upon a document, namely the Urkunde, in

[9] See the House of Lords decision in *Campbell v MGN [2004]* and the Court of Appeal decision in *Mckennitt v Ash [2006]*

support of his claims, and although it is not genuine and indeed contains a forged signature purporting to be that of the Fürst. The Defendants sought to rely upon common interest privilege, responsible journalism privilege and reportage. The Court rejected these defences and made explicit reference to the fact that reputation is a convention right and the Re S methodology must be considered.

"Lord Nicolls also explained the concept of "responsible journalism" in terms of trying to achieve an acceptable balance or reconciliation: see Reynolds at pp. 200-201. On the one side, obviously, is freedom of speech and the corresponding right of the public to be told; on the other hand, the reputation of the individual concerned.(para 43)

"Now, perhaps, this tension would be expressed more overtly as being between competing Convention rights under Article 10 and Article 8, since it has subsequently been acknowledged in Strasbourg that the protection of reputation is one of the functions of Article 8: see e.g. Radio France v France [2005] 40 EHRR 29; Lindon v France [2007] ECHR 836. Be that as it may, Lord Nicolls went into some detail about the considerations to be put in the scales alongside freedom of speech, albeit without express reference to Article 8…..(para 44)

"It is now recognised that when Convention rights come into conflict the courts must apply an "intense focus" to the facts of the case without according automatic priority to any one Convention right over another: see e.g. Re S (A Child) [2005] 1 AC 593 at [17], per Lord Steyn. It is against that background that the Judges must grapple with the notion of "responsible journalism".(para 45)

In relation to reportage the Court concluded that:-

In the end, I have come to the conclusion that the publication of this article did not meet the criteria recently expounded in Charman. I take into account all the matters I have mentioned in the body of this judgment. It is especially significant, in my assessment, that such serious allegations were put into circulation without giving any opportunity for the Claimant's side of the story to be stated on the alleged forgery of the Urkunde, its use for personal gain, his false claim that the Hohenzollerns adopted him, or his alleged service in the secret police. (I need hardly add that this conclusion is not to be equated with saying that privilege is lost because Mr Houston tripped over one or two of Lord Nicholls' ten "matters". That would be absurd. As always, the assessment has to be "in the round"). Accordingly, the plea based on Reynolds also fails. The preliminary issue is thus resolved in favour of the Claimant…

The Defendant appealed but the Appeal was dismissed on paper but May LJ gave permission to appeal the Reynolds privilege claim at an oral hearing. He held:-

6. <u>Conclusions</u>

6.1 It appears that over the last few years the English Courts have made a number of assumptions concerning freedom of expression and the right to reputation: namely –

(a) That Article 10 has priority over the right to reputation.

(b) That the right to reputation was not a convention right.

(c) That Strasbourg jurisprudence was almost universally in favour of Article 10.

6.2 In fact, it is now clear that these assumptions are no longer correct. Furthermore, the proper approach when dealing with a clash of convention rights is to conduct an ultimate balancing test as indicated in Lord Steyn in *Re: S*. This is not just limited to privacy claims but to all conflicts of convention rights.

6.3 The other consideration is that there is a positive obligation on the domestic states to ensure adequate protection between individuals. The effect of this new methodology and this positive obligation on the law of libel has not yet been fully tested but it may mean that certain aspects of the law of defamation will need to be reformulated, for example, where the law has been developed under the impetus of free speech/Article 10 considerations or where the English Courts have assumed that Strasbourg jurisprudence implies that article 10 is dominant. At the very least this new methodology may need to be applied to considerations of interim and final injunctions, Reynolds and/or reportage qualified privilege, fair comment, and possibly damages. Some recent decisions such as *Radu* appear to indicate that the domestic Courts are aware that some adjustment to the law of libel is necessary in the light of these considerations.[10]

7. Bonnard v Perryman and False Privacy; Injunctions Can Be Granted Restraining Publication of False Allegations

7.1 Shortly before the Appeal in the privacy case of *McKennitt v Ash* the media sought to intervene since they were concerned about a number if statements in the first instance of Eady in particular in relation to the effect of Von Hannover, the issue of trivial private matters and the application of privacy to false private information. The Court of Appeal decision *McKennitt v Ash* extended the reasoning of Eady J and went much further. Buxton LJ held that the accuracy of the information concerned does not matter what matters is whether the information is confidential. However he cautioned that it may be an abuse of process to use a claim for an interim injunction for misuse of private information where the nub of the complaint was falsity of the allegations.

Longmore LJ [11]went further in his 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 wary of becoming side-tracked into that irrelevant inquiry."

7.2 Although there may still be some debate whether privacy claims can now apply to totally false information and/or whether the statement of Longmore is correct since it was not approved by the other judges, it appears clear that privacy does apply to purely false information.[12]Accordingly it would apply to threatened publication of say, false medical or sexual information.[13]

A recent example of a pure false privacy case emerged in *P, Q & R v Mark Quigley* [2008] EWHC 1051 (QB); the Court granted a pure false privacy 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 :

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[10] see "Privacy, Reputation and Expression, the Strasbourg Article 8 Revolution" – by Hugh Tomlinson & Heather Rogers.

[11] Also see *Lord Browne v Associated [2007]*

[12] The French privacy laws have for many years applied to false information. Bridget Bardot successfully sued in privacy based on a story that she had attempted suicide.

[13] See also the recent talk by Desmond Browne QC entitled "Kiss & Tell and Snatched Photographs" (available on the 5RB website)

"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 work out the precise nature of the abuse that Buxton referred to if the same facts applied on the application for an interim injunction.

7.3 In libel any application for prior restraint is still however governed by the rule in *Bonnard v Perryman*. Therefore, if *P* and *Q* formulated their claim in libel, they would be faced with a different threshold test according to the Court of Appeal decision in *Greene v Associated Newspapers* [2005] EMLR 10[14]. Although reference was made in the decision to the House of Lords decision in *Re S* (handed down after argument in Greene), the Court of Appeal in Greene did not follow *Re S* in attempting to resolve the conflict of convention rights and no "parallel analysis" was conducted. In addition, the Court asserted that when allegations are first published, the Claimant's convention right of reputation is in suspension until trial. This cannot be right either as a matter of logic or ECHR jurisprudence. More significantly, if the balancing of convention rights is carried out in respect of the convention rights engaged, it surely cannot produce a different result depending on the nature of the claim where the remedy is the same. [15]

7.4 *Sunderland Housing Company Ltd & Another –v- Baines, Finn, Smith & Pallion Housing Ltd & Others;* [2006] EWHC 2359 QB) Eady J stated:-

In November 2006, there was an unreported decision of Eady J which appears obiter to indicate that the parallel analysis should be applied to libel injunctions, and therefore doubted whether the strict application of *Bonnard v Perryman* was always appropriate. The case concerned defamatory allegations that had been posted on a website in a campaign re allegations and sexual misconduct. In addition to libel, the Claimants also made claims in harassment and data protection.

Eady J granted an injunction in libel since the Defendant had produced no evidence in support of the stated intention that he intended to justify but allowed him the opportunity to discharge the injunction if he filed such cogent evidence. He held:-

"Mr Price is arguing effectively that the Article 10 free speech rights of his client trump the claimant's Article 8 rights to the protection of reputation and privacy and the integrity of the personality. It is necessary to remember that clear

[14] see also the similar decision of Tugendhat in *Coys Ltd v Autocheris* [2004] EMLR 25

[15] Indeed the Rule in Bonnard v Perryman does not apply rigidly in the context of harassment injunctions e.g *Howlett v Holdings [2006] EWHC 41 (QB)* nor in the context of trademark injunctions. *Boehringer v Vetplus [2007] EWCA 583.*

denials of all the defamatory allegations have been made by Mr Walls in his two witness statements. There is nothing at this stage to suggest that I should treat his evidence as false or dishonest as to its content. Is it right in those circumstances to refuse an injunction merely when there has been an expression of an intention to justify and then to permit a defendant to go on publishing widespread allegations which are as various and grave as these?

There is no doubt that Bonnard v Perryman is powerful authority which has been endorsed not only in modern times but also subsequent to the coming into effect of the Human Rights Act. Some weight, of course, must now be given to Article 8 interests where they are engaged, especially in the light of the proposition advanced by their Lordships in Re S to the effect that when such rights are engaged no one Article 10 will always weigh very powerfully, but Article 8 cannot simply be put out of account altogether"[16]

7.5 In terms of the convention rights, there is a substantial difference between the political speech allegations of, say, corruption about politicians in their official capacity and detailed and defamatory personal allegations about non-politicians. In the latter case, the Article 8 rights will be engaged on 2 levels; firstly since it affects reputation and, secondly, because of the private subject matter concerned. However, a blanket application of *Bonnard v Perryman* makes no allowance for the different levels of speech rights that may be involved.

7.6 Whether the *Sunderland* approach is followed, remains to be seen, but the issue may not arise if the Claimant relies upon false privacy and as long as such action does not amount to an abuse in the terms indicated by Lord Justice Buxton in the McKennitt decision. As to this alleged abuse it is not in any event clear the precise elements of such an abuse, since the overlap between the two causes of action is now so substantial.

Privacy Remedies Compared To Libel Remedies

Introduction

9. Under Article 13 of the Convention, there is an obligation on a convention state to provide an effective remedy in a domestic forum for a violation of a convention right. The remedy must be accessible and sufficiently independent of the body that is alleged to have breached the convention right[17]. The most effective remedy is an interim injunction preventing the threatened publication of the private information. Mere compensation for unlawful disclosure of private information is not a sufficient remedy[18].

Injunction At Trial In Privacy:

10. Injunctive relief is the most important remedy for misuse of private information, given the irretrievable nature of private or confidential information. Once it has been made public, the whole purpose of a right to (respect for) privacy is irrevocably undermined [19].

11. Although Section 12 HRA applies primarily to interim injunctions, it is clear that section 12(4) HRA also applies to final relief[20]. In addition to the considerations under Section 12(4),

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[16] See also the decision of Eady J in the related action *Gentoo Group Ltd & Others –v- Stephen Hanratty [2008] EWHC 627 (QB)*

[17] See *Govell v UK* [1996] 23 EHRR 413.

[18] See *I v Finland* [2008] ECHR

[19] Lord Nicholls summarised the point in *Cream Holdings Limited v Banerjee & others*, [2005] 1 AC 258 at ¶18a : "*confidentiality, once breached, is lost for ever*"

the court must also embark on the focused two stage approach as set out by Lord Steyn in Re S in respect of each item of confidential information[21].

12. A claimant should be granted a final injunction in respect of each item of the private material, held to be private, which is not outweighed by the article 10 considerations[22.] This approach was illustrated in McKennitt v Ash where claimant was not seeking to restrain the whole book but rather 34 separate passages in a book, although one of the items, item 33, covered approximately the last third of the book in dispute [23]. A distinction may need to be made between the fact of say a relationship and the detail. It may be possible to restrain both or just the detail of a relationship[24.]

13. A claimant may also be entitled to a final injunction event where an interim injunction was not granted, although this would probably not apply to material that had already entered into the public domain but this may not apply where the material has entered the public domain solely because of the defendant's unlawful acts[25]. It is noteworthy that whilst at the conclusion of the trial in *Mosely*, the Judge granted a final injunction against the Defendant newspaper group, it still contained a public domain provision which allows, amongst other things, for the republication of The News of the World 30 March 2008 article, which was the subject matter of the original complaint. This was probably inevitable by reason of the claimant's inability to obtain an injunction prior to the article being published, as well as the fact the article had been reproduced on numerous third party websites[26].

14. Notification to third parties

Notification of the terms of an interim order will in effect bind non-parties under the Spycatcher doctrine so that a publication by the non-party of the material which is the subject matter of the interim order will destroy the subject matter of the proceedings. Such publication will therefore be a contempt of court. However this principle does not apply to final orders. As the Court stated in *X & Y v Persons Unknown*[27]*;*

> *"The Spycatcher doctrine, as a matter of logic, has no application to a permanent injunction since, obviously, there is no longer any need to preserve the status quo pending a trial. This doctrine is directed at preventing a third party from frustrating the court's purpose of holding the ring*[28]*."*

Even though the Spycatcher doctrine does not apply to final orders, it would be most unwise for a third party to publish the subject matter of a final injunction since there would almost certainly be no defence to a fresh claim for breach of confidence.

20. Damages For Privacy[29] - compared to libel

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20 ¶ 56 of the trial judgment of Morland J in *Campbell v MGN* [2002]

21 See ¶ 46 to 49 in *McKennitt v Ash* [2006] EMLR 10

22 See *Lord Browne v Associated* [2007] 3 WLR 289 at ¶ 32 and 33

23 See ¶ 131- 158 in *McKennitt v Ash* [2006] EMLR 10

24 See *Browne v Associated* [2007] 3 WLR 289

25 See *Speed Seal v Paddington* [1985] 1 WLR 1327

26 The offending News of the World article and video is however no longer displayed on the News of the World website.

27 [2007] EMLR 290.

28 The judge referred to the discussion in *Att.-Gen. v Punch Ltd [2003] 1 AC 1046* at [87]-[88] in the Court of Appeal and at [95] in the House of Lords; and *Jockey Club v Buffham [2003] QB 462 (Gray J)*

29 For general discussion on damages see chapter 10 in *The Law Of Privacy and the Media(OUP) 2002 edited by Tugendhat and Christie* ; the 1997 *Law Commission Report 247 on Aggravated , Exemplary and Restitutionary Damages* HMSO; *Monetary Remedies For Breach of Confidence In Privacy Cases by* Dr Normann Wizleb Legal Studies Vol 27 No 3 September 2007 and "*Remedial Responses to Breach of Confidence: the Question of Damages"* by Linda Clarke, Civil Justice Quarterly 2005.

Although there has been considerable debate in the past as to whether damages were available for a past breach of confidence in addition to an injunction[30], it is now beyond dispute that the court can award damages or compensation for a publication or misuse of private information[31]. However, the precise basis of assessment is still in a state of development.

20.1 Inadequacy of Damages

As we have discussed above, damages for an invasion of privacy can never be an adequate or effective remedy, whatever the amount that is awarded. As the court said in the trial judgment in *Mosley*:

> *"…it has to be accepted that an infringement of privacy cannot ever be effectively compensated for by a monetary award. Judges cannot achieve what is, in the nature of things, impossible. That unpalatable fact cannot be mitigated by simply adding a few noughts to the number first thought of.*[32]"

In *Douglas v Hello Limited*, the Court of Appeal described the award of £14,600 made to the Douglases, whose privacy had been invaded by the publication of unauthorised photographs of their wedding, as a "*relatively small sum*"[33]. It continued:

> "*The characterisation of this sum as "relatively small" is not intended to indicate that we think that the level of damages should have been greater. The description is appropriate because damages, particularly in that sum, cannot fairly be regarded as an adequate remedy. As we have already observed, the Douglases would never have agreed to the publication of the unauthorised photographs. In those circumstances, bearing in mind the nature of the injury they suffered, namely mental distress, a modest sum by way of damages does not represent an adequate remedy."*

The inadequacy of damages is also illustrated by the substantial trade and market for unlawfully acquired private information as evidenced by the two reports "*What Price Privacy?*[34]" and "*What Price Privacy Now?*[35]" laid before parliament by the Information Commissioner. Many instances of invasion of privacy take place in deliberate disregard of the claimant's rights, for example where the victim is given no prior notice of the intended publication and therefore no opportunity to consider the position and if necessary seek interim relief from the court[36].

Although damages are inadequate, we submit that it is important that the assessment of financial remedies proceeds on a logical and principled basis, that takes into account the distress and humiliation caused, the conduct of the publisher, the nature and extent of the intrusion, the nature and extent of the publication and also the commercial value of the information.

20.2 The Two Alternative Bases of Assessment of Damages or Compensation

A claimant can at any time before judgment elect to chose between two financial remedies, damages or an account of profits, although the latter remedy is rarely pursued[37]. A claimant

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30 See *Breach of Confidence (OUP)* 1984 by Francis Gurry.

31 See *Campbell v MGN* [2004] and *Douglas v Hello!* [2005]. In *Douglas v Hello!* Hello! sought permission to cross-appeal the judgment (for damages and liability) in the Douglas's favour, that was upheld by the Court of Appeal. The House of Lords refused permission after receiving submission from the Douglases.

32 At ¶ 231

33 [2006] QB 125 at ¶256.

34 [2006] TSO HC 1056

35 [2006] TSO HC36

36 See ¶ 209 in *Mosely v NGN* [2008] EWHC 1777

37 See *Redrow Homes v Betts Bros* [1997]FSR 828

is entitled to some disclosure of the profits, so that he can make an informed decision on the election[38]. Where a claimant elects to chose damages, there are different bases to award damages for invasion of privacy[39].

The first basis is that of compensatory damages which provides damages for injury to feelings, consequential pecuniary loss and aggravated damages. The alternative second basis is the notional licence fee approach (which is also used for claims for infringement of copyright and other intellectual property claims). This assumes a hypothetical willing buyer and seller of the information. Since the HRA the only references to this approach are in the *Douglas* case[40]. The trial judge in *Douglas* held that the notional licence fee approach had to be alternative to the other compensatory claims[41].

20.3 The Compensatory Approach

20.3.1 Deterrence Element

In *Douglas v Hello* the Court of Appeal expressed the view that the award from the trial judge was small in the sense that it could not represent any real deterrent to a newspaper or magazine, with a large circulation, contemplating the publication of photographs which infringed an individual's privacy.[42]

However, in *Mosely* the trial judge expressed his concern about taking into account deterrence since it has a punitive element, and the defendant's means would have to be taken into account. In relation to the case before him, he declined to take into account any deterrence factor and stated[43]:

" Any award against the present Defendant would have to be so large that it would fail the test of proportionality when seen as fulfilling a compensatory function. There is also a concomitant danger in including a large element of deterrence by way of "chilling effect".

This appears at odds with the Privy Council decision in *Gleaner Company ltd v Abrahams* where Lord Hoffman indicated that compensatory damages in libel may have a punitive or deterrent function[44].

20.3.2 Vindicatory Element

Even though in *Mosley* the court considered that though no account should be taken of any deterrence, the court did recognise that a legitimate consideration when assessing damages for invasion of privacy is the vindication to mark the infringement of a right (as opposed to vindication of a person's reputation as in libel). Relying upon *Ashley v Chief Constable of Sussex*[45] and *Chester v Afshar*[46] the court stated;

"Again, it should be stressed that this is different from vindication of reputation (long recognised as a proper factor in the award of libel damages). It is simply to mark the fact that either the state or a relevant individual has taken away or undermined the

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38 See *Tring v Island Records* [1995] FSR 560

39 The jurisdictional origin of this compensation appears to be the law of restitution -See Lord Goff's statement of *A-G v Guardian* [1990]1 AC 109 at para 286B- and/or the law of constructive trusts. See *Damages for Breach of Confidence* by Jack Beatson (1991) 107 Law Q. Rev. 209

40 Prior to the HRA, this notional licence fee approach had been used in breach of confidence actions.

41 ¶ 13 [2004] EMLR 2

42 [2005] EWCA Civ 595 at ¶257.

43 [2008] EWCA 1777 ¶ 226-229 cf

44 ¶ 41 [2003] UKPC 55

45 [2008] 2 WLR 975 at ¶21-22

46 [2005] 1 AC 134 at ¶ 87.

right of another – in this case taken away a person's dignity and struck at the core of his personality. It is a relevant factor, but the underlying policy is to ensure that an infringed right is met with "an adequate remedy". If other factors mean that significant damages are to be awarded, in any event, the element of vindication does not need to be reflected in an even higher award. As Lord Scott observed in Ashley, ibid, " … there is no reason why an award of compensatory damages should not also fulfil a vindicatory purpose".

It is submitted that where the court also grants a declaration that a person's privacy has been invaded and/or confidence breached, then the vindicatory role in damages will be less significant[47].

20.4 Distress

The compensatory approach is the normal basis for assessment for invasion of privacy but until the decision in *Mosely* there has been little judicial discussion in decided cases about the nature of the assessment . In addition, it is important to recognise that there is a distinction between damages for injury to feelings for invasion of privacy cases and damages for distress in contract cases such as *Cornelius v De Taranto*[48] and *Archer v Williams*[49].

In *Campbell v MGN,* the award for the misuse of private information was £2500 for distress and injury to feelings plus £1000 for aggravated damages for publication to millions of Daily Mirror readers. In *McKennitt v Ash*[50] "modest" damages of £5,000 were awarded for hurt feelings and distress where there was a limited publication of about 490 copies of a highly intrusive biographical book about the folk singer Loreena McKennitt. All other copies were subject to the injunction granted at trial.

In *Mosely,* the court awarded of £60,000 compensatory damages. The court analysed and compared the nature and extent of injury between the publication of private information and libel. Although both are protected by article 8, awards in libel include elements for distress and hurt feelings and for vindication of the reputation:

"Because both libel and breach of privacy are concerned with compensating for infringements of Article 8, there is clearly some scope for analogy. On the other hand, it is important to remember that this case is not directly concerned with compensating for, or vindicating, injury to reputation. The claim was not brought in libel. The distinctive functions of a defamation claim do not arise. The purpose of damages, therefore, must be to address the specific public policy factors in play when there has been "an old fashioned breach of confidence" and/or an unauthorised revelation of personal information. It would seem that the law is concerned to protect such matters as personal dignity, autonomy and integrity.

"It has to be recognised, of course, that at first sight these notions appear somewhat incongruous when introduced in the present context. But, as I have already said in the context of liability, one must beware of being distracted by considerations which relate purely to taste or moral disapproval. One should be careful not to dismiss matters going to personal dignity because a particular sexual activity or inclination itself may seem undignified. After all, sexual activity is rarely dignified. That is far from saying, however, that intrusions into a person's sexual tastes and privacy

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47 Cf The declaration of falsity that is available in libel under Section 9 Defamation Act 1996 has a similar effect. See *Donnelly v Rubython* [2005] EWCA

48 [2001] EMLR 12.

49 [2003] EMLR 869.

50 [2006] EMLR 178.

cannot infringe the right to dignity protected by Article 8. The Strasbourg jurisprudence demonstrates the contrary[51]*."*

Nevertheless it was recognised in Mosely, that account should be taken of the facts that the information and images were intensely private, were obtained surreptitiously in breach of mutual obligations of confidence and were published extensively in hard copy and online. The court also took into account the effect of the publication on the claimant and it accepted that the publication had ruined the claimant's life.

Finally the court also took into account the fact that the newspaper had made and persisted in false allegations of nazi concentration camp role-play. There may be some overlap here with libel since these allegations were undoubted defamatory. This appears to be a legitimate consideration since article 8 now protects reputation[52] and human dignity.

20.5 Pecuniary Loss

Pecuniary loss can also be recovered as a head of damage, as in *Douglas* where in addition to the distress damages, the court awarded £7000 for additional expenses caused by the unlawful publication by Hello!. Given the personal nature of the cause of action, awards in respect of actual pecuniary loss are like to be rare.

20.6 Aggravated Damages

It is plain that aggravated damages are available to reflect the aggravation to the injury by reason of the conduct of the defendant, including the fact that no prior notice has been given, or, as in *Campbell*, subsequent offensive comment about the authenticity of the privacy complaint[53]. In *Douglas* the court declined to award aggravated damages despite the conduct of the defendants.

20.7 Exemplary Damages (c.f. libel)

It is clear that the power to award exemplary damages is now not limited by the particular type of cause of action that existed when the classic case of *Rookes v Barnard*[54] came to be decided[55]. However the courts are generally reluctant to award punitive damages in any type of action, and any substantial award may be vulnerable on appeal[56].

As the court said in Mosely: "*There is certainly no English authority which establishes that exemplary damages are recoverable in the context of this newly developed form of action*[57]." After reviewing the arguments advanced on both sides for the development of the law in this direction, the judge eventually held that[58]:

"exemplary damages are not admissible in a claim for infringement of privacy, since there is no existing authority (whether statutory or at common law) to justify such an extension and, indeed, it would fail the tests of necessity and proportionality."

Since exemplary damages are not currently permissible as a matter of law for misuse of private information, there is no punitive award which might be imposed truly to deter a

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51 ¶ [2008]

52 See *Radio France v France* [2005] 40 EHRR ECHR and chapter 6 above.

53 But in Douglas, trial judge awarded distress damages, plus damages for actual pecuniary loss plus damages under the Data Protection Act, but he declined to award any aggravated damages.

54 [1964] AC1129

55 *Kuddus v Chief Constable* [2002] 2 AC 122 overturning *A.B. v South West Water Services* [1993] QB 507

56 The Neill Committee in 1991 recommended that they be abolished but in 1997 the Law Commission recommended that they be retained and even extended.

57 ¶ 186 of the trial judgment.

58 ¶ 197

commercial publisher from providing its readership with details of the private lives of the 'celebrities' or other well-known (or even previously unknown) individuals.

20.8 The Notional Licence Fee approach

n *Douglas v Hello!* , it became clear that the claim for an account of profits was not viable, since Hello! had not made profits form their spoiler edition. Instead the claimants sought two alternative financial remedies. The first approach was compensatory and on this basis the court awarded distress damages of £3750 each to the Douglases for their retained element of privacy, together with £7000 for further actual loss and an additional £50 each compensation under the Data Protection Act, the total amount therefore being £14,600. OK! Magazine were awarded £1,033,156 for foreseeable loss and this was upheld by the house of lords.

As an alternative to this approach, the Court considered damages using a notional licence fee approach but making various legal assumptions in favour of the claimants without deciding the point. The court assessed the figure at £125,000, but presumed that the claimants would elect for the higher basis of compensation. The trial judge considered the approach[59];

" This basis requires me to assume a negotiation between the Douglases and OK! on the one hand and Hello! on the other as to the terms on which the former would together authorise the latter to publish the unauthorised photographs in the manner which, in the event, they did. I am to assume that the parties would come to terms as to a sum to be paid by Hello! despite all the facts suggesting they would never have done so. I am to assume them to be reasonable men and women of business, reasonably appreciative of the relative strengths and weaknesses of their respective positions)

I would fix the figure at £125,000 as emerging on the crude basis that OK! would "get away" with their syndication receipts not being likely to exceed £500,000, thus reducing the net cost to OK! to £500,000. Then, on the basis that the unauthorised photographs were for use in one issue only, were, in number and quality, only half as good as the full authorised set OK! would have, that net cost would be cut in half to £250,000, from which Hello!'s purchase price of £125,000 would be deducted, leaving a (notional) licence fee of £125,000. On any footing I cannot see the fee being anything like as great as the damages I have found on a conventional compensatory basis, which is why I have been able to dispose of the notional fee issue without resolving the issues of law it raises. OK! and the Douglases are, as I said earlier, to be presumed to opt for the higher alternative."

The court of appeal expressed grave reservations whether this approach was appropriate given that the Douglases would never have sold such photographs on the facts of the case.

21. Account of profits

A claimant is entitled to elect for an account of profits for an invasion of privacy as an alternative to damages. A claimant is entitled to some information and/or disclosure about the profit made by the defendant before the election is made.

Where there is more than one defendant, it may be appropriate to claim damages from the publisher in respect of the main publication and an account of profits from the other defendant who sold the information to the publisher. This other defendant will not only have misused the private information by selling it to the publisher but he will also have caused and procured the publication to the public.

As to an account of profits, this suffers from the problem not only that it is incapable in principle of rectifying the wrong which has been done (as with these other post-publication remedies), but also that it has never been successfully taken against a newspaper or other

[59] ¶ 63 and 64

media organisation[60]. Even in the field of intellectual property, this remedy is regarded with trepidation.[61]

Delivery up is sometimes sought as an interim remedy where the defendant's conduct indicates that he is not to be trusted and/or that there is a pressing need to for preservation[62].

23. Declaration

A declaration that a breach of confidence or an invasion of privacy has taken place is available and may be of considerable benefit especially since the trial or part of it may take place in private and it may be important that others are also made aware that a certain category of information is private[63]. A negative declaration can also be sought

The other consideration is that a declaration will provide an element of public vindication that a person's privacy or article 8 rights have been violated.

Mark Thomson
6 March 2009

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60 One of the leading textbook on equitable remedies, *Goff & Jones* on Restitution, 7th Edn at ¶34-021 demonstrates that there is almost no guidance on how such an account might be taken.

61 See Lindley LJ in *Siddell v Vickers* 1892) 9 RPC 152 at pp.162-3. *"... I do not know any form of account which is more difficult to work out, or may be more difficult to work out than an account of profits. ."*

62 See CPR 25(1)(c) (i) and section 4 of the Torts (Interference with Goods) Act 1977

63 A declaration was granted at the conclusion of the trial in *McKennitt v Ash.*