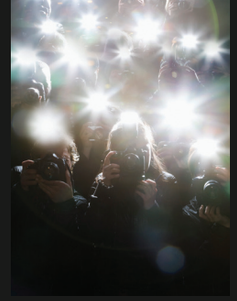

CELEBRITY AND ROYAL PRIVACY, THE MEDIA AND THE LAW

1ST EDITION

Robin Callender Smith

The legal landscape surrounding celebrity, royalty, privacy and the media is more complex than ever. This new work examines how English law has, and has not, balanced celebrities' legal expectations of informational and seclusional privacy against the press and the media's rights to inform and publish. It considers the raft of important recent cases that has significantly changed and clarified the law in this area, including:

- *Campbell*
- *Mosley*
- *Von Hannover 1, 2 and 3*
- *Martinez v MGN*
- *Google Spain*
- *Weller v Associated Newspapers*
- *Google Inc v Vidal-Hall*
- *Lachaux*
- *Gulati v MGN*
- *YXB v TNO*

It covers key concepts such as proportionality, breach of confidence, protected information, misuse of private information and parliamentary privilege in the age of social media. It explains the regimes that protect the anonymity of celebrities' children and shows how celebrities can use copyright, data protection and the Defamation Act 2013 as privacy remedies. The position of the Monarch and members of the Royal family in relation to privacy laws is also explored.
This book offers expert advice, analysis and guidance to practitioners, academics, students, journalists and data protection stakeholders on celebrity and royal privacy, media and the law.

ABOUT THE AUTHOR: Professor Robin Callender Smith is an intellectual property and media lawyer with extensive judicial, regulatory and academic experience. He sits as an Information Rights judge and an Immigration judge and has been a media law barrister for 35 years, advising publications including the Daily Express, Sunday Express, Daily Star, The Sun and The Sun on Sunday. He also lectures on the LLB and LLM Privacy & Information Law and Media Law courses at Queen Mary University London (QMUL) and its Centre for Commercial Law Studies where he is visiting Professor of Media Law.

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1ST EDITION

Robin Callender Smith

CELEBRITY AND ROYAL PRIVACY, THE MEDIA AND THE LAW

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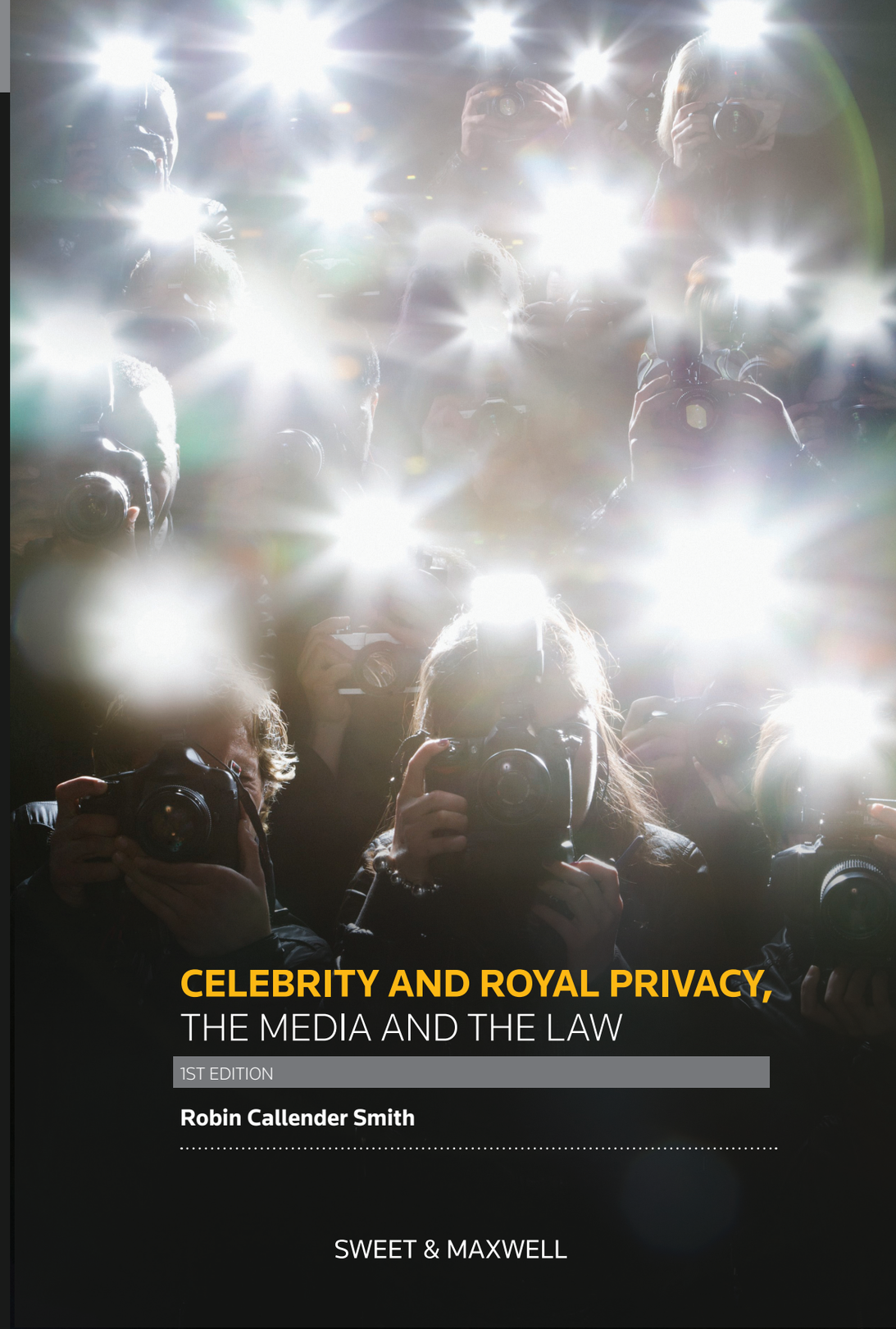

CELEBRITY AND ROYAL PRIVACY, THE MEDIA AND THE LAW

1ST EDITION

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SWEET & MAXWELL

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Celebrity and Royal Privacy, the Media and the Law

Robin Callender Smith

LLB, LLM, PhD
Visiting Professor in Media Law at the Centre for Commercial Law Studies
Queen Mary, University of London (QMUL)
Barrister of Gray's Inn

Judge, First Tier Tribunal GRC: Information Rights
Judge, First Tier Tribunal: Immigration and Asylum

Imprints (to be supplied?)

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DEDICATION

This book is dedicated to my wife—Valerie Eliot Smith BA and Barrister of Gray's Inn—a determined and resolute campaigner on behalf of those, like her, who live with Myalgic Encephalomyelitis: http://valerieeliotsmith.com

PREFACE AND ACKNOWLEDGEMENTS

I have had the great fortune for nearly 40 years of working closely with the editors and news desks of a number of different daily and Sunday national newspapers. My work on Sunday newspapers began in the days of the late Sir John Junor (JJ) in 1981 on the *Sunday Express*.

JJ had written a trenchant comment about consultant paediatrician Dr Leonard Arthur during his trial at Leicester Crown Court for the murder of a three-year-old boy suffering from Down's Syndrome. His comment was along the lines of ". . ..members of the jury, you should have no difficulty in convicting 'Doctor Death'. . ..". He and Express Newspapers both pleaded guilty to the contempt charges brought against them by the Attorney General, Sir Michael Havers. He was personally fined £1,000 and Express Newspapers was fined £10,000. It was made clear to the editor that any further contempt proceedings during his editorship would result in immediate imprisonment.

The duty lawyer that weekend vanished from the rota of barristers working as "night lawyers", the external lawyers who check all the pre-publication copy for libel, contempt, copyright, libel and privacy problems. I was given the chance to fill the gap because I was already working on the *Daily Express* legal rota and was a Glaswegian Scot by birth, if not by accent. The theory was that JJ might take more notice of me if he strayed too close to the line in the future. His experience of the contempt proceedings in the High Court remained with him so vividly that he needed little help from me to stay out of prison. His misfortune, however, started me in a weekend occupation that I love and which has continued ever since. Traditionally it has been part of the Sunday newspapers' raison d'être to break the interesting, investigative or scandalous stories. For that reason their duty, pre-publication lawyers' work on a Saturday, has always been perhaps more interesting than the normal work during the evenings of the production of daily papers.

Added to that, I had started my working life as a journalist before I studied law and became a barrister. I completed my articles of apprenticeship from 1966–1970 on the *Eastern Daily Press* and *Eastern Evening News* in Norfolk and Suffolk. University courses in journalism or the media were unknown. The trade skills required as an apprentice journalist were shorthand, a knowledge of local government processes and procedures and newspaper law (an examination I failed at my first attempt at the end of my pre-entry course at Harlow Technical College in 1966) as well as some idea of the dark, sub-editors' arts of newspaper production. I did a great deal of court reporting, both criminal and civil, during this time. This stimulated my interest in the

law and made it inevitable that at the end of my apprenticeship I would study law more formally first as an undergraduate at what is now Queen Mary, University of London (QMUL) and then for my Bar Finals at Gray's Inn. Then I taught newspaper law for three years to journalists studying on the various courses back at Harlow before going into practise as a barrister. Among those students were Alan Rusbridger, formerly of *The Guardian* and now Master of Lady Margaret Hall, Oxford, and Frances Gibb of *The Times*. From that time came my first book for Sweet & Maxwell, *Press Law*, in 1978.

It has taken just over 35 years for me to return to this area with a second book. Media law is now a vast and complex area. There are numerous and excellent student and practitioner's texts covering much of the technical and practical detail that media law now encompasses. This book acknowledges and draws from those rich resources but concentrates on the specific area that has been my main interest: celebrity privacy and the media. That was the focus of my 2014 PhD thesis at QMUL's postgraduate Centre for Commercial Law Studies (CCLS) at Lincoln's Inn Fields.

This book allows me to break out of the confines of the rigour of demonstrating that I have added academic knowledge to this particular area in no more than 100,000 words. In many senses any PhD thesis is like a tortuous, four-year version of the BBC Radio 4 comedy programme *Just a Minute*. It is time limited and punishes hesitation, repetition or deviation. It was a useful and challenging exercise to undertake full time in my mid-60s, while working in other judicial and regulatory jobs. It reunited me with the joys of teaching the developing complexities of media and privacy law both to postgraduate LLM and undergraduate LLB students at QMUL and elsewhere.

I have also had the advantage during the intervening years, since starting work as a journalist and then becoming a barrister, of seeing the practical aspects of the law and the judicial landscape from a variety of different perspectives. These have included advising on aspects of contested FTSE-100 takeover bids and defences, being involved at a senior level with the intricacies and sensitivities of inner city youth crime in London and in judicial training. Running parallel to the rediscovery of teaching and studying has been regulatory and judicial work.

On the regulatory side, this has included membership of the Financial Conduct Authority (FCA)'s Regulatory Decisions Committee (RDC) from 2005—working as a Deputy Chairman from 2012—until 2015 dealing with allegations of serious irregularities in the financial services market including Libor and Euribor cases, membership of Ofgem's Enforcement Decisions Panel (EDP) in respect of market abuse issues in the gas and electricity market and chairing the Independent Appeals Body of PhonepayPlus, the premium telephone regulator recognised by Ofcom. Since 2013 I have been the Adjudicator for the Qatar Financial Centre Regulatory Authority's Consumer Dispute Resolution Scheme. In 2014 I joined the Executive Board of the Chartered Insurance Institute and now also serve on its Professional Standards Board. My pre-publication newspaper work excludes me from press regulatory work for any of the existing or proposed bodies.

On the judicial side, I have been an Information Rights Judge—dealing with Freedom of Information, Data Protection and Environmental Information

Regulation appeals from the Information Commissioner—since 2007 and an Immigration and Asylum Judge since 2006. Before I had to relinquish the work to complete my PhD I also sat until 2013 as a Deputy District Judge (Crime) and as a Mental Health Judge. In 2015 I was appointed by the Council of Europe to lead an expert team to report on the data protection, privacy and transparency measures to improve access to judicial decisions in Kazakhstan.

The patience, perseverance, guidance and encouragement I have received from my two PhD supervisors, Professor Ian Walden and Professor Christopher Millard, have been invaluable. They were the inspiration for restarting academic work in this area. Professor John Angel, also of QMUL's CCLS, suggested that I audited the LLM module on the Privacy and Information Law course that Ian and Christopher taught with Professor Anne Flanagan in 2008/2009. In 2009/2010, I completed my LLM in Computer and Communications Studies, 42 years after completing my LLB at QMUL in 1973.

I would also like to thank and acknowledge the support of the academic community at QMUL/CCLS and Professors Joanna Gibson, Julia Hörnle, Spyros Maniatis, Duncan Matthews, Chris Reed and Uma Suthersaanen, Drs Gaetano Dimita and Tom O'Shea together with Gavin Sutter. Also, beyond QMUL/CCLS, Professors Catherine Barnard at Trinity College, Cambridge, Phillip Johnson at Cardiff University, Adam Tomkins at Glasgow University and Bjørnar Borvik at the University of Bergen and Päivi Korpisaari at the University of Helsinki together with Drs Gillian Black at Edinburgh University and Richard Danbury and David Erdos at Cambridge.

Of my own former PhD colleagues, the camaraderie at CCLS of Dr Marie-Aimée Brajeux, Dr Nefissa Chakroun, Patrick Graham, Dr Kuan Hon, Dr Aleksandra Jordanoska, Dr Troels Larsen, Dr Marc Mimmler, Tatjana Nikitina, Metka Potocnik, Dr Sarah Singer and Dr Hélène Tyrrell was a tonic during the more challenging phases of this entire process. Also, at the City University (and now Director of the Centre for Law and Information Policy at the Institute of Advanced Legal Studies) Dr Judith Townend. The same goes for the cheerful shouts of encouragement from all my former LLM Media Law colleagues and students particularly Olga Demian, Advokat JurD Eva Ondřejová, Ruth Hennessy, Linda McElwee and Isobel McGrath. I am grateful to Victoria McEvedy of McEvedys for critical and proofing assistance but the errors which remain are mine.

My friends—former senior in-house counsel at *Express Newspapers* Stephen Bacon and senior in-house counsel at *The Sun* and *The Sun on Sunday* Justin Walford—have given me the opportunity over the years to practise some of what is developed in this book thanks particularly to the patience of Martin Townsend (editor of the *Sunday Express*) and Victoria Newton (editor of *The Sun on Sunday*).

Comments, suggestions for improvement or identification of errors are welcome for the second edition of the book at: rcs.celebrity@gmail.com

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PART ONE

Scope of the book, key concepts, the sequence of chapters and limitations

Chapter 1

KEY CONCEPTS OF CELEBRITY, PRIVACY AND PROPORTIONALITY

"Some are born great, some achieve greatness and some have greatness thrust upon them."[1]

1.1 Introduction

1–001 This book examines the various privacy regimes in English law that have been, are and may be used by celebrities. It explores the tension between the elements that protect such privacy and those which permit intrusion. That tension generally manifests itself as a conflict between the information celebrities wish to keep private and that which the press and media wish to comment upon, expose and publish.

The substance of the analysis in this book is the increasingly clearly articulated judicial concept of proportionality, a concept that also informs the way contemporary domestic and European legislation and jurisprudence is constructed. Its observable explicit or implicit existence or absence, whether called proportionality or something similar, is the core theme running through the chapters of this book. Issues of proportionality—the application of an articulated and visible rule of reason—allow for the consideration of where the balance lies in either protecting or permitting interference with an individual's seclusional or informational privacy. It can prevent unreasonable and excessive legal consequences both within the development of case law and in the framing and application of statute law. It provides a touchstone by which the effect of any unbalanced and inadequate statutory measures and case-law can be moderated and moulded into a coherent framework to protect celebrity privacy.

Celebrity status, which will be examined more closely below, carries within it a paradox. At its most extreme the paradox creates the *Streisand* effect.[2] This occurs when an individual's legal actions to attempt to protect, hide or remove personal information, has the opposite effect of drawing attention to the information sometimes making its public revelation a particular media

[1] Malvolio *Twelfth Night* Act 2 Scene 5 144–146 (misunderstanding the letter written by Maria and thinking it is from Lady Olivia telling him that he will achieve greatness by becoming her husband. . . only to be mocked for his delusions by both Olivia and the Clown).

[2] *http://www.economist.com/blogs/economist-explains/2013/04/economist-explains-what-streisand-effect*

goal.[3] The most notable recent manifestation is the attributed global celebrity accorded to Spanish citizen Mario Costeja González, immortalised after his successful battle against Google to stop linking his name with an old (and subsequently satisfied) debt.[4] Another manifestation of the *Streisand* effect is that the detail sought to be protected may be spread rapidly via social media and on the internet. This emphasises how the traditional media are effectively constrained by the law and self-regulation in ways that do not bind the non-traditional media. Hence the chanting of "CTB! CTB! CTB!" that greeted the footballer Ryan Giggs when he appeared at Manchester United FC matches during 2011 after obtaining and maintaining a privacy injunction. The paradox itself, and its effect, is not an internet phenomenon. Rumour and social traffic in private information is ageless. What has changed is where the revelations take place, the nature of the material being revealed (which is often of a sexual nature) the scale of the audience who may now receive the information and the speed at which such revelations can occur.

1–002 The book considers ways in which celebrity litigants have used and shaped traditional and emerging privacy regimes. Their pockets have often been deeper than those of ordinary members of the public. The majority of celebrity challenges have been met and tested by equally well-resourced media counter-arguments. The synthesis resulting from such litigation has provided a rich and informative seam of case law which applies as equally to ordinary members of the public as it does to the celebrity protagonists. The chronological starting point for the examination of the major cases in this book is *Prince Albert v Strange* in 1849. The examples, cases and statutes considered cover nearly 175 years with a cut-off point of 31 July 2015.[5] These privacy domains have developed by convention, at common law, by way of European law decisions or have been introduced by statute (sometimes incorporating EU Directives or Regulations).[6]

Also examined is another paradox. Celebrities have helped drive an accumulation of substantive law available for use to protect privacy. However, the procedural elements necessary to enforce, preserve and protect private information have been rendered less effective as a result of the technological environment in which the substantive law operates. Celebrities are obvious targets for unlawful and unrestrainable revelations and ill-informed speculation via texts, tweets, un-moderated comments in chat rooms and through online discussions in the social media on internet platforms like Facebook. The internet provides a route for what might be seen as an "unregulated" and unruly section of society to

[3] This also needs to be seen in the context of the growth of access to information on the internet. In 2000, 30% of UK households had internet access. *http://www.statista.com/statistics/272765/internet-penetration-of-households-in-the-united-kingdom-uk/* By 2013 this had risen to 80% when 36 million adults (73%) accessed the internet every day, 20 million more than in 2006 when the Office for National Statistics began its records. *http://www.ons.gov.uk/ons/rel/rdit2/internet-access---households-and-individuals/2013/stb-ia-2013.html*

[4] Case C-131/12 *Google Spain and Google Inc v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*. The case is discussed in detail at Chapter 6.3.2.

[5] The date on which all the web references were checked as being live and accessible.

[6] Regimes like copyright, data protection and protection from harassment are not celebrity-specific in their origins but all have seen "early adoption" by celebrities for the protection of their privacy.

subvert legal rules and procedures by identifying and publishing some information that celebrities seek to keep private. The means of addressing, discouraging and preventing such privacy breaches by regulation as well as by civil and criminal actions are, variously in a state of flux—currently ill-formed and only randomly effective. This presents a major legal challenge for the future.

An additional issue, which has been developing noticeably since September 2010, has been the increasing willingness of the English and CJEU courts to assert the ability to deal with actions that might previously have been thought to be outside their jurisdiction. Recently the most profound manifestation of this came in April 2015 with the Court of Appeal decision in *Google v Vidal-Hall* which removed s.13 (2) of the Data Protection Act 1998 from the operative provisions of the statute—apparently validly passed by Parliament—by making it compatible with EU law.[7] Other practical effects of this area, it is argued, are to import the jurisdiction for on-line digital image rights into UK law and—in the privacy regime of data protection—to make internet search engines in the US and elsewhere domestically liable for breaches and links to content in ways not previously appreciated.

The next three sections examine elements of the three key words and concepts in the title.

1.2 KEY CONCEPTS

1–003 There are three key concepts examined and explored in this book: celebrity, privacy and proportionality.

1.2.1 Celebrity

1–004 A taxonomy of celebrity might be thought to be as simple and concise as Malvolio's formulation quoted at the beginning of this chapter. But a review of academic sources in the field of media studies and social history indicates that the taxonomy is broad and multi-faceted and covers a proliferation of approaches and definitions.[8]

1.2.1.1 Taxonomy: defining celebrities

1–005 Leslie suggested that six characteristics are required for an individual to be considered a celebrity: leading a public life or working in the public sphere; accomplishing something of importance and interest to the public; being

[7] *Google v Vidal-Hall* [20152015] EWCA Civ 311 [83–104] where the unanimous opinion of the Master of the Rolls (Lord Dyson) with McFarlane and Sharp LLJs concluded [105]: ". . ..What is required in order to make section 13 (2) compatible with EU law is disapplication of section 13 (2), no more and no less. The consequence of this would be that compensation would be recoverable under section 13 (1) for *any* damage suffered as a result of a contravention by a data controller of any of the requirements of the DPA. No legislative choices have to be made by the court." The Supreme Court will hear the s.13 (2) point at an appeal hearing in May/June 2016.

[8] See, generally, *The Celebrity Culture Reader* edited by P. David Marshall (Routledge, Oxford, 2006) and David Rolph *Reputation, Celebrity and Defamation Law* (Ashgate, 2008).

well known or famous; seeking celebrity by being seen and heard regularly; being highly visible in the media, and, finally, connecting with the public by embodying its dreams and aspirations.

> "If one accepts those characteristics, then celebrity begins when all six factors are met. Note that celebrity does not depend on age, gender, place of birth, talent, or skill, although those qualities can be helpful to some people rather than others. Celebrity depends on the action taken by individuals. That means how they use their talent, skills, age, gender and so forth."[9]

Boorstin[10] encapsulated the issue with the aphorism that celebrities are persons who are "well-known for their well-knownness".

Rojek[11] usefully defines celebrity as the consequence of the "attribution" of qualities to a particular individual through the mass media. He identifies three categories: Firstly the *ascribed* celebrity is related to lineage and birth. This status typically follows from blood lines and individuals who may "add to or subtract from their ascribed status by virtue of their voluntary actions. . . .".[12] The group includes royalty, the aristocracy, heirs and heiresses and political dynasties. The second category relates to *achieved* celebrity and derives from the "perceived accomplishments of the individual in open competition".[13] This group includes scientists and intellectuals, philanthropists, entrepreneurs and leading business figures, artists, musicians, writers, heroes and explorers, politicians and campaigners, sports stars, film stars, actors and entertainers, models and pop stars. Finally, the third group comprises of *attributed* celebrity, something which is largely the result of the "concentrated representation of an individual as noteworthy or exceptional by cultural intermediaries".[14] Many of the achieved celebrities may—at some time—have also populated this group along with "one-hit wonders, stalkers, whistle-blowers, streakers, have-a-go heroes, and mistresses" as well as "celeactors" like "soap" and "reality TV stars".[15] For Giles,[16] celebrity is a "process", a consequence of the way individuals are treated by the media.

What all the commentators recognise is that, from the 1990s onwards, the "celebrity" notion expanded into such an important commodity that it became a growth area for content development by the media itself. This in itself has increased the appetite of the media to have the freedom to make greater use of the commodity.[17]

> "In a highly convergent media environment, where cross-media and cross-platform content and promotion has become increasingly the norm, the manufacture of and trade in celebrity

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[9] Larry Z. Leslie *Celebrity in the 21st Century: A Reference Handbook* ABC-CLIO (Santa Barbara, California, 2011) p.31.
[10] Daniel Boorstin, *The Image: A Guide to Pseudo-events in America* 25th Anniversary Ed. Vintage Books New York 1992, p.52.
[11] Chris Rojek, *Celebrity* Reaktion Books London 2001, pp.181–200.
[12] Rojek, *Celebrity*, p.17.
[13] Rojek, *Celebrity* p.18.
[14] Rojek, *Celebrity*, pp.18–28.
[15] Rojek, *Celebrity* p.12.
[16] David Giles, *Illusions of Immortality: A Psychology of Fame and Celebrity* (Palgrave Macmillan, 2000) p.5.
[17] In ECHR Article 10 terms.

> has become a commercial strategy for media organisations of all kinds.. . . The phenomena of *Big Brother* made that clear. . ..The celebrity is also a commodity: produced, traded and marketed by the media and publicity interest industries. In this context, the celebrity's primary function is commercial and promotional."[18]

Celebrities, too, see their status as a commodity, the marketing of which is increasingly something they want to control. For instance:

> "The reality is I don't have to leave my house to be in the public eye. I am, whether I do it by choice or not. So I'd rather do it by choice. That way I can get my point across. If I don't, then every Tom, Dick and Harry is going to be selling stories on my life anyway. They'd be making a s*** load of money and I'd have nothing to do with it. If I'm not part of it, things are going to get written about me anyway. So I want my fingers in them pies as well please. I've got kids to feed.
>
> I'll be around as long as the public want me. I don't know how long that'll be for but until then it's not something I've really got a choice over. It's not a normal job where there's a retirement age. If I did want to quit, where do I hand my resignation into? Being in the public eye also means I'm able to help people. That's probably one of my biggest achievements. I get women writing to me all of the time. Most of my messages are about eating, exercise, mental health and being a mother. The fact that I got through my problems, it helps them get through theirs."[19]

Leslie has argued that celebrity, as the term is used in contemporary culture, is a concept that was not present in the earliest civilisations. It developed over time. It depended, among other things, on the quality and flow of information to the general public, something given greater depth and reach via the internet/social media. New methods have developed to communicate with the public and, as a consequence, the concept of celebrity has evolved to become more complex.[20]

1.2.1.2 Taxonomy: synthesis

1–006 With all this variety, a slight adjustment of Malvolio's observation has been required for the celebrity taxonomy in this book. It accepts that his (or rather Shakespeare's) words have been unconsciously reflected in the fundamental structure of research, debate and definition in this area. Those words also have the advantage of being the taxonomy of the three forms of celebrity which has stood the test of time over the centuries. Malvolio's first category defines *ascribed* celebrities like the British monarch, the royal family, the aristocracy, heirs and heiresses and political dynasties. Such individuals generally have high-profile public personae. They, like all the others, are also entitled to private life rights. His second category recognises the celebrity based on accomplishment or competition—politicians and the like—who have *achieved* celebrity. Those in both of the two groups described above are sometimes described as celebrities "par excellence"[21]—literally "better or more than all others of the same kind".[22] Malvolio's third category describes

[18] Graeme Turner, *Understanding Celebrity* (Sage, 2004) p.9.
[19] Kerry Katona (former a member of Atomic Kitten): *Daily Star on Sunday* 28 December 2014.
[20] Larry Z. Leslie, *Celebrity in the 21st Century* 23.
[21] Used, particularly, as a legal term of art in the German Courts and the ECtHR.
[22] *The Oxford Essential Dictionary of Foreign Terms in English* 2002 eds Jennifer Speake, Mark LaFlaur.

those evanescent celebrities whose status is generated by media identification and whose celebrity status also falls within Rojek's *attributed* categorisation.

1.2.1.3 Taxonomy: effect of synthesis

1–007 The celebrity taxonomy used throughout this book adopts the Malvolio/Rojek model of *ascribed*, *attained* and *attributed*. This model allows celebrities, in their lifetime, the opportunity to move through all three manifestations.

An example would be Kate Middleton. She began with an attributed celebrity profile as a St Andrew's University undergraduate who was one of Prince William's housemates before she moved to the attained celebrity when she became engaged to him and, finally, at her marriage to her ascribed celebrity status as Katherine, Duchess of Cambridge, a future queen and the mother of Prince George and Princess Charlotte, third and fourth in line to the throne and both—in their own right—immediately ascribed celebrities.

A diagram, developed as a linear and non-hierarchical representation of such celebrity movement through the stages of the taxonomy, follows below.

The British royal family is one of the world's leading celebrity brands.[23] Its members—from the monarch and her immediate family through to its more distant members —have for many years been the object of press and media attention domestically and internationally. Its existence provides a historical benchmark against which its continuance as a celebrity brand can be observed,

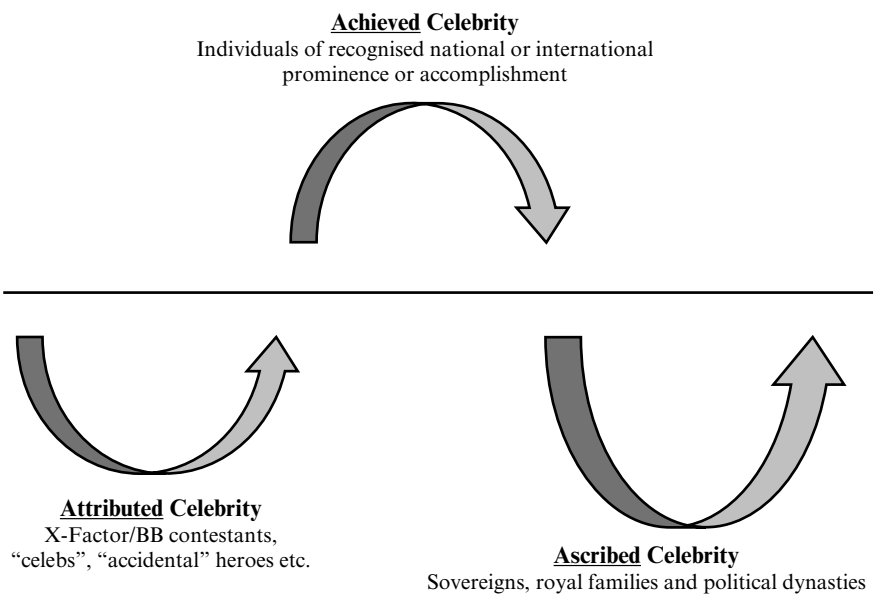

Figure 1.1 Graphic representation of the Taxonomy of Celebrity

[23] For a marketing perspective on this topic see John M.T. Balmer, "A Resource-Based View of the British Monarchy as a Corporate Brand" *Int. Studies of Mgt. & Org.*, 2007–8 37, no. 4, 20–44.

particularly in terms of issues of privacy. While the arc of fame and celebrity for many individuals varies from the clichéd 15 minutes to something more substantial,[24] the British royal family is in the unusual position of providing a measure that endures in the public gaze from generation to generation. As such, it is probably unique on the world stage. The methods by which it might preserve its "brand integrity", such as the limitation of photo opportunities, are becoming more evident.[25] A more aggressive and active pre-litigation and litigation strategy, of which there is some evidence already, is also being deployed to preserve informational and seclusional privacy rights.[26] Such strategies become more viable and effective when the substantive law settles and matures, as it has in this area. The inherent problem with the threat of, or actual, litigation is that overseas publications—and those using the social media outside the jurisdictional control of English law—confound the results of such efforts.[27]

1–008 This book does not seek to measure the royal family's—or any celebrity's—rise or fall in popularity, its raison d'être, or any reasons why the celebrity status should or should not continue to exist. It seeks only to present an evidence-based view derived from archive material, case law, statute law and European legislation of the legal issues relating to informational and seclusional privacy and the legitimate external scrutiny that can be applied to the royal family's members and celebrities generally. In this way a proportionate balance is achieved between the privacy rights themselves and the rights to interfere with them on an individual basis or as justifications for interference on a societal level.

In so far as the royal family is referred to, the perspective of the book is neither monarchist nor republican. Members of the royal family, with the exception of the monarch, are subject to—and may make use of—the civil and criminal law of England by the routes which relate to everyone.[28] The book and, in particular its third section, does observe, however, the role that the monarch and the royal family have played, and continue to play in the development of the laws of privacy since the 1840s. Sometimes their actions have put them in the vanguard, often they have been in the mainstream and occasionally they have let issues pass. As privacy law develops with judgments from Luxembourg and Strasbourg respectively shaping and influencing English law, together with the domestic reflection and incorporation of European legislation, further opportunities may present themselves.

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[24] "*Brand Beckham*" is an example of the latter.

[25] The Duke and Duchess of Cambridge restricted pictures in the UK media of their attendance at St Mark's Church, Englefield, on Christmas Day 2012. They were, however, used by overseas publications and show their annoyance at being photographed: *http://www.usmagazine.com/celebrity-news/news/kate-middleton-prince-william-attend-christmas-mass-at-st-marks-church-20122512*

[26] For instance the five pre-Christmas warnings issued on behalf of the Queen discussed in the Protection of Harassment Act 1997 chapter. Also the Civil Aviation Authority ban on over-flying the Sandringham area with planes or drones for three months from 1 November 2015.

[27] Most recently, revealing pictures of the Duchess of Cambridge's backside were published in the German magazine *Bild* on 28 May 2014: *http://www.bild.de/unterhaltung/leute/catherine-mountbatten-windsor/und-kim-kardashian-schoene-kehrseiten-36136770.bild.html*

[28] The unusual position of the monarch is examined in Section 3 of this book.

1.2.2 Privacy

1–009 Legal definitions of privacy abound and can become prolix.[29] Commentators on the nature and elements of privacy generally identify different but overlapping features. The four major commentators whose approaches are recognised and reflected in this book are the late Alan F. Westin,[30] Daniel J. Solove,[31] Nicole Moreham,[32] and Raymond Wacks.[33] Helen Nissenbaum's work also provided informative and invaluable background reading.[34]

1.2.2.1 Westin

1–010 Westin's theory of privacy concentrates on the ways in which people may protect themselves by temporarily limiting access to themselves by others.[35] According to him, privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.[36] Viewed in terms of the relation of the individual to social participation, privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means, either in a state of solitude or small group intimacy or, when among large groups, in a condition of anonymity or reserve. He suggests that people have a need for privacy that, in concert with other needs, helps individuals to adjust emotionally to daily life with other people. His privacy is both a dynamic process—where privacy can be regulated so it serves momentary needs and role requirements—and also something more passive, where individuals can have too little, sufficient, or too much privacy. For him, privacy is neither a self-sufficient state nor an end in itself, but a means for achieving the overall end of self-realisation, particularly in the context of Western societies.

Westin identified four states of privacy which are the means by which the functions—the purposes or ends of privacy—are achieved. Solitude is being free from observation by others. Intimacy refers to small group seclusion for members to achieve a close, relaxed, frank relationship. Anonymity refers to freedom from identification and from surveillance in public places and for public acts. Reserve is based on a desire to limit disclosures to others; it requires others to recognise and respect that desire. The functions for these, the "whys" of privacy, are also fourfold. Personal autonomy refers

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[29] For instance, since 1947 there have been three Royal Commissions into the British Press as well as the *Younger Report into Privacy* (1972) and two reports by Sir David Calcutt QC into privacy and the press (1990 and 1993). See more fully 1.2.2.5.

[30] Formerly Professor of Public Law and Government at Columbia University.

[31] John Marshall Harlan Research Professor of Law at the George Washington University and author of *Understanding Privacy* (Harvard University Press, 2008).

[32] Associate Professor at Victoria, University of Wellington, New Zealand and a co-author of Tugendhat and Christie's *Law of Privacy and the Media* 2nd edn, (Oxford University Press, 2011).

[33] Professor of Law and Legal Theory, University of Oxford, and author of *Privacy and Media Freedom* (Oxford University Press, 2013).

[34] Helen Nissenbaum *Privacy in Context: Technology, Policy and the Integrity of Social Life* (Stanford, 2010).

[35] Alan F., Westin *Privacy and Freedom* (New York, Atheneum, 1967).

[36] Alan F. Westin, *Privacy* p. 7.

to the desire to avoid being manipulated, dominated, or exposed by others. Emotional release refers to release from the tensions of social life such as role demands, emotional states, minor deviances, and the management of losses and of bodily functions. Privacy, whether alone or with supportive others, is personal space allowing opportunities for emotional release. Self-evaluation refers to integrating experience into meaningful patterns and exerting individuality on events. It includes processing information, supporting the planning process such as the timing of disclosures, integrating experiences, and allowing moral and religious contemplation. The final function, limited and protected communication, has two facets: the former sets interpersonal boundaries and the latter provides for sharing personal information with trusted others.[37]

1.2.2.2 Solove

1–011 Solove has focussed his work on creating, developing and working within a taxonomy of privacy that seeks to give a form, boundaries and meaningful expression to the concepts that inhabit this area of law. His taxonomy of privacy recognises four categories: information collection, information processing, information dissemination and invasion. He notes that, in terms of information collection, surveillance can play a significant part.[38] He suggests that surveillance in this contemporary Age of Information can alter people's behaviour by the potentially chilling Panopticon effect.[39] Information processing allows for private information to be aggregated and analysed in a way that can reveal facts and facets about an individual which would not immediately be apparent and which the individual might not expect to be combined and mined in this way. In terms of the dissemination of private information it can lead to breaches of confidence and

> ". . . .the exposing to others of certain physical and emotional attributes about a person. These are attributes that people view as deeply primordial, and their exposure often creates embarrassment and humiliation. Grief, suffering, trauma, injury, nudity, sex, urination, and defecation all involve primal aspects of our lives—ones that are physical, instinctual, and necessary. We have been socialized into concealing these activities."[40]

In terms of invasion as a privacy harm, Solove notes that this does not always involve information. It can occur by way of intrusion—particularly on an individual's seclusion— or by decisional interference in such personal and private matters.[41] The seclusional interference created by intrusion often

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[37] Alan F. Westin, *Privacy* p.14.

[38] "What is the harm if people or the government watch or listen to us? Certainly, we all watch or listen, even when others may not want us to and we often do not view this as problematic. However, when done in a certain manner—such as continuous monitoring—surveillance has problematic effects. For example, people expect to be looked at when they ride the bus or subway, but persistent gawking can create feelings of anxiety and discomfort." Daniel J. Solove *Understanding Privacy* (Harvard, 2009) p.107.

[39] The philosopher and social reformer Jeremy Bentham's idea for prison construction in 1787 where all inmates could be overseen by way of an effective and ergonomic architectural design.

[40] Daniel J. Solove *A Taxonomy of Privacy* 2006 Pennsylvania. L.R. 154 (Jan)477–564, 536.

[41] *Griswold v Connecticut* 381 US 479, 485–86 (1965) on contraception and *Roe v Wade* 410 US 113, 153 (1973) on abortion.

interferes with solitude, the state of being alone or able to retreat from the presence of others. Indeed, Warren and Brandeis wrote from a tradition of solitude inspired by Ralph Waldo Emerson, Henry David Thoreau, and Emily Dickinson.[42]

1.2.2.3 Moreham

1–012 This portion of Solove's observation on the appropriate taxonomy, and its effects, links conveniently to Moreham's more tightly-focussed approach. For her, and it is a practical expression of the approach adopted by many contemporary English privacy law practitioners, privacy is:

> "the state of desired 'inaccess' or as 'freedom from unwanted access'. In other words, a person will be in a state of privacy if he or she is only seen, heard, touched or found out about if, and to the extent that, he or she wants to be seen, heard, touched or found out about. Something is therefore 'private' if a person has a desire for privacy in relation to it: a place, event or activity will be 'private' if a person wishes to be free from outside access when attending or undertaking it and information will be 'private' if the person to whom it relates does not want people to know about it."[43]

This definition and approach differs markedly from the broader data protection conception, which includes controlling the use of personal data whether private or public. English practitioners and judges appear—until recently—to have found the privacy elements of data protection regimes difficult to factor into the privacy landscape that they observe as will be seen in the Data Protection chapter. Arguably, this definition is also only a sub-set of Article 8 jurisprudence, which extends to public arenas.

1.2.2.4 Wacks

1–013 Raymond Wacks does not believe that any of the current approaches to privacy are correctly formulated or tenable. For him, an acceptable definition of privacy remains elusive. He considers that Warren and Brandeis "ruined the show" by introducing into the concept of private life the "superfluous" feature of the "right to be let alone".[44] For him, the protection of an individual's privacy should be limited to the protection of personal information.[45] The "private" element of such information he regards as having been treated "in disappointingly nebulous terms" by all courts so that the critical question of what constitutes the class of information that was susceptible to legal protection has been obscured.

He urges that a focus on the type of private information—rather than the circumstances that may give rise to an expectation of privacy—would

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[42] Daniel J., Solove *A Taxonomy of Privacy*, p.554.

[43] N.A. Moreham, "Privacy in the common law: a doctrinal and theoretical analysis" L.Q.R 2005, 121(Oct), 628–656, 635. See also, most recently, her position that a physical privacy action can and should be developed from within English common law: N.A. Moreham "Beyond information: physical privacy in English law" C.L.J 2014, 73 (2) 350–377.

[44] Raymond Wacks, *Privacy and Media Freedom* (Oxford University Press, 2013) p.238.

[45] Wacks, *Privacy* p.240.

establish clearer boundaries between privacy and free speech.[46] In essence, his approach to the protection of privacy is to "identify the specific interests of the individual" that the law should secure. The nucleus of the right to privacy was the "safeguarding of private facts".[47] The only way to have clear and authoritative guidelines for its intrusive and ill-defined antidote—the public interest—is to enact a statutory definition specifically in relation to the public interest. He supplied that definition in Clause 4 of his draft Protection of Privacy Bill.[48]

1.2.2.5 Privacy definition in English law

1–014 Having described briefly the range and differing conceptual bases of privacy, as expressed by those four commentators, it is instructive to look next at the chronology of the lack of success faced by specifically privacy-centred recommendations or attempts at legislation in English law before the Human Rights Act 1998 (HRA). For a while it was as if, by finding that privacy was too difficult to define, it was somehow acceptable to consign it to the "awkward and unsolvable" box where it could then only exist as a problem without a solution or vaguely contained—in newspaper terms—by the less-than-objective variables of restraint by self-regulation. This is despite the UK having ratified the ECHR in 1951.

A series of six privacy Bills went before Parliament without ever gaining traction for actual legislation.[49] In 1972—at a cross-party level—there was the Younger Committee Report on Privacy: it achieved little.[50] Its two recommendations for the creation of individual and new specific torts—unlawful surveillance and disclosure or other use of information unlawfully acquired—were ignored by Parliament.[51] It did, however, highlight the difficulties of defining the meaning of "privacy".[52]

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[46] Wacks, *Privacy* p.241.

[47] Wacks, *Privacy* p. 256.

[48] The draft Bill was based largely on several of the 2004 recommendations of the Law Reform Commission of Hong Kong's report *Civil Liability for Invasion of Privacy* on which he served.

[49] Those sponsored by Lord Mancroft (1961), Alexander Lyon MP (1967), Brian Walden MP (1969), William Cash MP (1987), John Browne MP (1989: the author assisted in drafting the public benefit defence elements of this Bill which was withdrawn before the Report stage) and Lord Stoddard (1989).

[50] Cmnd 5012.

[51] It referred to the Law Commissions of England & Wales and Scotland the issues relating to breach of confidence with a view to clarification and restatement in statute law. During this period there was also the Lindop Report in 1978 (Cmnd 7341) which considered the practical aspects of data protection and how this might be implemented. Its key recommendations were the creation of a Data Protection Authority and the adoption of Codes of Practice for different sectors, a precursor for the Data Protection Act 1984.

[52] "The first difficulty we faced as a Committee was in trying to define privacy and, in the event, we decided that it could not satisfactorily be done. We looked at many earlier attempts and we noted they either went very wide, equating the right to privacy with the right to be let alone, or that they amounted to a catalogue of assorted values to which the adjectives "private" or "personal" could be applied" explained Lord Byers (a member of the Younger Committee): H.L. Deb 06 June 1973 Vol. 343 cc106. The Younger Committee drew particular attention to Westin's privacy definitions and Brian Walden MP's Right to Privacy Bill 1970, drawing from a

Then, in 1990, came the report of the Committee on Privacy and Related Matters chaired by David Calcutt QC.[53] It grasped the nettle of definition and decided that privacy related to the right of an individual to be protected

> "against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information."[54]

The Calcutt right to privacy included specific protection against physical intrusion; publication of hurtful or embarrassing personal material (whether true or false); publication of inaccurate or misleading personal material and publication of photographs or recordings of an individual taken without consent. Two years later Calcutt reviewed the area again.[55] He concluded that newspaper self-regulation had failed and that a privacy law was required.[56] Again nothing happened save a promise from the Government that there would be a focus on improving self-regulation delivered two years after the report was presented to Parliament.[57] It was, perhaps, inevitable that the consistent Parliamentary lack of resolve to address more formally the privacy issues identified in these reports, in relation to the press particularly, led to the Leveson Inquiry.

1.2.2.6 Privacy as expressed in this book

1–015 Significantly, nearly 25 years after Calcutt's 1990 privacy formulation, it prefigured the elements of the contemporary tort of misuse of private information. It encompasses the informational and seclusional celebrity privacy issues that are explored in this book. The author does not believe that any single approach derived from the privacy theories advanced by the four referenced commentators satisfactorily encapsulates the practical dynamic of the privacy elements that celebrities seek to protect in litigation. All of them mark out important parameters for consideration and all feature at various stages in the case law. However, Moreham's concept that something is private if a person has a desire for privacy in relation to it clearly corresponds most closely to celebrities' perceptions of what privacy *should be* as it is articulated in reported litigation and case law. A place, event or activity is private if a person wishes to be free from outside access when attending or undertaking it. Information is private if the person to whom it relates does not want people to know about it. It is a subjective, flexible "bubble". Wacks—at the

"Justice" Committee draft—before concluding that "the concept of privacy cannot satisfactorily be defined": Cmnd 5012 [58–73].

[53] Cmnd 1102.

[54] Ibid [3.7]. This effectively adopts the definition provided by Justin Walford—then of *Express Newspapers*—in his evidence to the Committee recorded at [3.2].

[55] Cmnd 2135 January 1993 *Review of Press Self-Regulation 1991–92*. The triggers for the review were the PCC's responses to long-lens pictures of young Princess Eugenie playing naked in her parents' private garden (*The People* July 1991), topless pictures of her mother in the South of France (*Daily Mirror* August 1992), the publicised disintegration of the marriage of the Prince and Princess of Wales during 1992 and the treatment by the press of MPs Clare Short, Paddy Ashdown, Virginia Bottomley and David Mellor: 4.41–4.69.

[56] David Eady QC, as he was then, was a Calcutt Committee member.

[57] Cmnd 2918 July 1995 *The Government's Response to the House of Commons National Heritage Select Committee on Privacy and Media Intrusion*.

other end of the scale—represents the objective scepticism about the imprecise definitions of privacy and public interest, urging greater concentration on the type of private information which should be protected from publication in the exercise of proportionate decision making.

It is the act of actual or proposed publication that creates privacy issues for celebrities of all categories to a much greater extent than issues of surveillance. That is not to diminish the significance of the product of such celebrity surveillance. This can lead not only to harassment but fears of publication of the product which infringes privacy rights, as evidenced in the egregious phone hacking that became the focus of the Leveson Inquiry which concluded in 2012, the demise of *The News of the World* and the large-scale prosecution of senior editorial staff and journalists.

Calcutt's original 1990 report included consideration of the ECHR Article 10 freedom of speech balance in relation to privacy and issues of proportionality. The Report noted the UK's lack of a written constitution and the fact that it had not directly incorporated the Convention into domestic law.[58] It rejected the approach to the balancing exercise in John Browne MP's Protection of Privacy Bill.[59] It preferred the alternative, "pre-eminent" Article 10 approach evidenced in the EHRR's judgment in the *Thalidomide* case.[60] It failed to recognise the objective necessity for the "intense focus" required for each individual right—privacy and freedom of speech—before any other more generally balancing evaluation. So, while not adopting Calcutt's Article 10 approach to striking the balance between free speech and privacy, the definition of privacy contained in his Report is the one reflected in this book. Privacy is breached when there is intrusion into an individual's personal life or affairs, or those of his family, by direct physical means or by publication of information. This is also closest to the definition used in contemporary celebrity litigation. How that privacy right is balanced is the next issue for examination.

1.2.3 Proportionality[61]

1.2.3.1 Introduction

Proportionality has been an evolving concept in English law. Some jurists focus on its origins[62] in the approach of the German Constitutional Court to **1–016**

[58] Cmnd 1102 [3.12–3.18].

[59] Ibid [3.16]: "Any public use or public disclosure of private information is a tort of breach of privacy. . ..[unless] the defendant satisfies the court that there was or is a public interest or public benefit in the information being so used or disclosed; and the plaintiff is unable to satisfy the court that the public interest or public benefit in the use or disclosure is outweighed by the public interest or public benefit involved in upholding the privacy of the information."

[60] Ibid [3.17–3.18] relying on *Sunday Times v UK* 2 EHRR 245. "The court emphasised that it was 'faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted'. This meant that the Committee ". . ..started from a position that freedom of speech is pre-eminent. Certain exceptions protecting individual privacy may then prove to be necessary."

[61] For a concise review of this concept see Eric Engle "The History of the General Principle of Proportionality: an overview" (2012) 10 *Dartmouth Law Journal* 1–11.

[62] Lady Arden LJ, in a speech on 12 November 2012 at King's College London at the annual

proportionality (*verhältnismäßigkeit*).[63] The Federal Constitutional Court of Germany, established after World War II, adopted and developed the proportionality principle. It applies the proportionality principle as a generalised head of review for administrative action and the concept plays a key role in the administrative law of Germany.[64] It uses proportionality in cases in which there are conflicts between individual rights. These rights may not be qualified to a further extent than is necessary to reconcile them. Even today there is nothing about proportionality that is explicit in German basic law. However, outlines of the principle of proportionality and the importance of balancing competing interests pre-date the HRA.[65] Principles of proportionality can be discerned within the fabric of English law in many of the 12 equitable maxims that developed historically to correct the harshness and inflexibility of some common law rules and precedents.[66]

1.2.3.2 Equity and Proportionality

1–017 In terms of the development of the English equitable doctrine of breach of confidence as a privacy remedy at least one commentator believes the claim to the equitable origins of the action has been overstated.[67] Even he, however, concedes that the Courts of Equity did make important contributions to the development of this area of protected private information.

Also the development of the public interest defences, to make the scope of equitable action more proportionate, lies in pre-HRA and pre-European Convention of Human Rights Convention law.[68] There is a close affinity between these separate concepts of the "public interest" and "proportionality" but that does not mean they produced the same, or even a consistent benchmark.

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address of the UK Association for European Law, narrows its origin to *Kreutzberg* 14 June 1882, Pr OVG, 29, 253. There, the Prussian Supreme Administrative Court developed the notion that the state required special permission in order to interfere with a citizen's liberties.

[63] See Basil S. Markensis "Privacy, freedom of expression and the horizontal effect of the Human Rights Bill: lessons from Germany" (1999) L.Q.R 115 (Jan) 44–88.

[64] Proportionality comprises three elements: (1) Suitability—the measure should be suitable for the purpose of facilitating or achieving the desired objective; (2) Necessity—the measure should be necessary and (3) Fair balance—the measure should not be disproportionate to the restriction which it involved.

[65] *R v Goldstein* [1983] 1 W.L.R, 151, 155B: Lord Diplock described proportionality as meaning "in plain English, you must not use a steam hammer to crack a nut, if a nutcracker would do."

[66] Particularly "where there is equal equity, the law shall prevail", "equality is equity ", "equity looks to intent rather than form" and "equity looks on that as done which ought to be done. . .". The full list is detailed in *Snell's Equity* 32nd edn (Sweet & Maxwell, 2010).

[67] Lionel Bently's review of its historical development at Chapter 2.02 in *Gurry on Breach of Confidence* 2nd edn (Oxford University Press, 2012).

[68] *Gartside v Outram* (1857) 26 L.J.Ch. 113. The claimant alleged that a clerk had copied confidential documents. The defendant said they disclosed fraud. The defendant filed interrogatories which the claimant refused to answer. Page-Wood V.C. said the claimant had to answer: "The true doctrine is that there is no confidence as to the disclosure of an iniquity. You cannot make me the confidant of a crime or fraud. . ."

1.2.3.3 Proportionality post-Human Rights Act (HRA) 1998

Lord Steyn's summary in *Re S* of the operation of proportionality in relation to the tension between private life issues and freedom of speech in post-HRA 1998 English law is a classic of conciseness.[69] **1–018**

> "The interplay between Articles 8 and 10 has been illuminated by the opinions in the House of Lords in *Campbell v MGN Ltd* [2004] 2 WLR 1232. . ..What emerge[s] 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."[70]

As European Court of Human Rights (ECtHR) Article 8 and Article 10 case law has developed through, in particular, its Grand Chamber judgments so the "values" identified in *Re S* have been developed, explained and underpinned in Strasbourg and reflected back into English case law.[71] The criteria laid down in the ECtHR's case law include consideration of the contribution to a debate of general interest; how well-known and relevant the person concerned is in the context of the report; the prior conduct of the individual in question; the method of obtaining the information and its veracity; the content, form and consequences of the publication and, finally, the nature and severity of any sanctions imposed as a result of publication. These general elements were reviewed by the Supreme Court in *Bank Mellat v HM Treasury*.[72] Most recently the Supreme Court, in *R. (Lumsdon) v Legal Services Board*,[73] underlined the difference between ECtHR proportionality (as in *Bank Mellat*) and EU proportionality.

From English cases it is possible to discern the range of Article 8 issues that will be considered prima facie as involving private information and given value.[74] These include the following in relation to individuals: physical

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[69] *Re S* [2004] UKHL 47.

[70] *Re S* [17].

[71] See *Axel Springer AG v Germany* [2012] ECHR 227, discussed in greater detail in Chapter 3.3.3.2 and 3.5.3.1.

[72] In *Bank Mellat v HM Treasury* [2013] UKSC 39 the Supreme Court reviewed the history and practical application of the proportionality test in, striking down a direction telling all financial institutions not to deal with an Iranian bank. The legal ground was that the direction was "disproportionate". Lord Sumption described it as involving "an exacting analysis of the factual evidence in defence of the measure" [20].

[73] *R (Lumsdon) v Legal Services Board* [2015] UKSC 41. Lord Reid delivered a 20-page judgment which explored the differences. EU proportionality is now part of the Treaty on European Union (art.5(4)): "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties". In the UK, the EU concept is put "in more compressed and general terms" than in German and Canadian law: [69] *Bank Mellat*. Lord Reed remarked the EU cases are "not always clear, at least to a reader from a common law tradition". In EU proportionality there are three main areas: (i) as a ground of review of EU measures themselves *R (Lumsdon)* [36]; (ii) a review of national measures relying on derogations from general EU rights *R (Lumsdon)* [37] and (iii) a review of national measures implementing EU law.

[74] There is a detailed list with full citations of the relevant cases in Mullis and Parkes *Gatley on Libel and Slander* 12th edn (Sweet & Maxwell, 2013) para. 22.5

or mental health; physical characteristics, including nudity; racial or ethnic characteristics; emotional states, particularly in the context of distress, injury or bereavement; personal and family relationships; sexual orientation; intimate details of personal relationships and information conveyed in the course of such relationships; political opinions and affiliations; religious commitment; financial and tax-related information; communications and correspondence; matters relating to the home and to children and past involvement with criminal behaviour and involvement in crime as a victim or witness.

The freedom of expression values protected by Article 10 in English law had earlier been explained—also by Lord Steyn—in *R. Ex p. Simms v SSHD*.[75]

> "In a democracy it is the primary right: without it an effective rule of law is not possible. . . .it promotes the self-fulfilment of individuals in society. . ..The free flow of information and ideas inform political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country."

Although he was talking about public life, his explanation applies equally to its private life values. It deters inappropriate behaviour—including such conduct as phone hacking and tapping—and encourages the modification of bad behaviour through public discussion and, where necessary, direct legal action.

1.3 Arrangement of Chapters

1–019 Ultimately no arrangement of the sequence of the chapters in this book conveniently accommodates the logic or the chronological development of celebrity privacy rights and proportionality. The sequence of the privacy regimes described in the chapters which follow was chosen because Breach of Confidence and Misuse of Private Information are, in essence, common law or equitable developments. Copyright, the Protection from Harassment, the Data Protection Acts and Defamation (most recently) are statutory regimes.

1.4 Limitations

1–020 Subject to the limitations below the law and cases explored here reflect matters as of 31 July 2015.

[75] *R Ex p. Simms v SSHD* [2000] 2 A.C. 115, 125–6.

1.4.1 Defamation

1–021 Defamation is a major privacy remedy.[76] For a time, post-*Mosley* in 2008, it looked as if defamation had been relegated to the position of an also-ran in celebrity litigation about private life rights. Put simply, why should celebrities issue statements of claim in libel writs when the rule in *Bonnard v Perryman* allowed the media claiming truth to continue to publish with only the penalty of damages at the conclusion of an unsuccessful trial as the cost of business? A misuse of private information statement of claim and injunction, on the other hand, could secure immediate anonymity for the target up to (and potentially after) the conclusion of the trial.

Defamation is included in this book in an abbreviated form and primarily in the context of its role as a celebrity privacy remedy. The chapter is not an extensive exploration of all of the boundaries and intricacies of this historic cause of action.[77] Defamation is a complex tort which has recently seen the practical consequences of changes to this area of law in the Defamation Act 2013. Many of the changes are (as yet) untested.[78] Defamation actions—as will be seen later—currently outnumber recorded privacy actions by a significant factor. Proportionality—as a balance between conflicting Article 8 and Article 10 ECHR issues—has still to work its way fully into the fabric of defamation litigation.[79] The development and impact of defamation type claims brought under the provisions of the Data Protection Act 1998 are dealt with in detail within the Data Protection chapter.

1.4.2 Leveson[80]

1–022 Past regulation of the press was by the Press Complaints Commission (PCC) by way of its Editors' Code of Practice. A significant portion of the newspaper

[76] In *Application by Guardian News Media in HM Treasury v Ahmed* [2010] UKSC 1, the *Guardian* contended that reputation did not fall within the scope of Article 8, relying on the decision of the Court of Human Rights in *Karako v Hungary* [2009] ECHR 712. Lord Rodger, rejecting that argument, drew attention to the clear statement on the point in the decision in *Petrina v Romania* [2009] ECHR 2252. He suggested [at 42] that some degree of attack on personal integrity was required before Article 8 was engaged.

[77] There are three major practitioners' texts that provide the detail in comprehensive form: *Gatley on Libel and Slander* 12th edn (Sweet & Maxwell, 2013) *Collins on Defamation* (OUP, 2014) and *Duncan and Neill on Defamation* 4th edn (LexisNexis, 2015).

[78] Its major provisions did not come into force until 1 January 2014.

[79] As the editors of the 12th edition of *Gatley on Libel and Slander* note in the Preface (vi): "Precisely how these two developments—the progressive recognition by the courts of the importance of reputation as a protected right and the greater weight accorded to expression rights in some provisions of the [Defamation] Act [2013]—will play out is difficult to predict. Inevitably, the short term consequence will be a high volume of litigation as to the true effect of the new Act which, in several areas expressly abolishes the common law, is explored through the courts. However, the new Act will have to be interpreted against the background of the rights context underpinned by the European Convention on Human Rights and the Human Rights Act 1998 and consequently, while some movement in favour of expression rights seems probable, any changes are unlikely to prove as significant as the promoters of statutory reform may expect."

[80] *http://webarchive.nationalarchives.gov.uk/20140122145147/http:/www.levesoninquiry.org.uk/* The four volumes of An Inquiry into the Culture, Practices and Ethics of the Press was published

industry then created and proclaimed its own post-Leveson regulator—the Independent Press Standards Organisation (IPSO)—continuing with the framework of its predecessor's Editorial Code.[81] IPSO began its work in 2014.[82] The effect of the Code of Practice is examined in the chapters relating to the Protection from Harassment Act 1997 and Data Protection.

Given the political, legal and practical uncertainties which have surrounded, and continue to surround this area it would not have been productive to pursue the ever-changing script on this topic. As well as IPSO there now also exists the Press Recognition Panel (PRP)[83] which has consulted on its proposals for how it will receive and determine applications for recognition from independent press self-regulators.[84] The PRP was set up under the provisions of the Royal Charter on self-regulation of the Press.[85] There is also the Impress Project.[86] This may seek recognition from the PRP.

The Leveson Inquiry did focus part of its attention on data protection issues and this is reflected, as appropriate, in this book.

1.4.3 Forthcoming EU Data Protection Regulation

1–023 The gestation of the soon-to-be-finalised EU Data Protection Regulation has been prolonged. It began its life on 25 January 2012 when the European Commission released a draft to replace Directive 95/46/EC, the foundation for current EU (and UK) data protection legislation. When it is finally agreed the Regulation could have a significant and wide-ranging impact on businesses, imposing new compliance obligations with significant sanctions for non-compliance.

On 12 March 2014 the European Parliament concluded the formal First Reading to confirm the compromise text of the draft Regulation approved by Parliament's LIBE Committee in October 2013.[87] The final version of the European Council of Ministers text was published on 15 June 2015.[88] Given its progress so far the eventual EU Data Protection Regulation may be agreed either in late 2015 or, more likely, early 2016. There is then likely to be a

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on 29 November 2012: *http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780_i.pdf*

[81] The list of its regulated 1,400 titles can be found here: *https://www.ipso.co.uk/assets/82/List_of_regulated_print_titles___April_2015.pdf* The list of its 1,000 online titles can be found here: *https://www.ipso.co.uk/assets/82/List_of_regulated_online_titles___April_2015.pdf*

[82] *https://www.ipso.co.uk/IPSO/index.html*

[83] *http://pressrecognitionpanel.org.uk/*

[84] The consultation closed on 31 July 2015.

[85] *ttps://www.gov.uk/government/uploads/system/uploads/attachment_data/file/254116/Final_Royal_Charter_25_October_2013_clean__Final_.pdf*

[86] *http://impressproject.org/* Impress seeks to regulate the press in compliance with the Leveson criteria. It states that it will encourage "the highest ethical standards in journalism whilst safeguarding the fundamental right to freedom of expression. Independent self-regulation which complies with Leveson's criteria can work for both the press and the public."

[87] Vote: 621 in favour of the Regulation, 10 against and with 22 abstentions.

[88] The official version however does not contain the 649 paragraphs of scrutiny reservations which shows the degree of disagreement between Member States. The full version showing those 649 paragraphs can be found at *http://amberhawk.typepad.com/files/council-of-ministers-text-plus-objections-from-member-states.pdf*

two-year transitional period before it comes fully into effect. Current breach provisions and penalties allow for Data Controllers to be fined up to £100m or between 2–5 per cent of annual of worldwide turnover.[89]

Its shifting provisions are not included in this book. The CJEU judgment of *Google Spain*, however, may have set the direction of travel for some of the EU Data Protection Regulation's eventual provisions.

[89] Which may create Convention Article 10 (Charter Article 11) freedom of speech/ "chilling effect" media-based submissions for the future

PART TWO

The Privacy Regimes

Breach of Confidence
Misuse of Private Information
Copyright and Image Rights
Protection from Harassment
Data Protection
Defamation

CHAPTER 2

BREACH OF CONFIDENCE AS A PRIVACY REMEDY

2.1 Introduction

2–001 Breach of confidence has jurisdictional origins and manifestations in contract, tort and property as well as equity. Many consider it is *sui generis* in nature.[1] Its association with such a broad spectrum of areas of legal activity helps to explain its durability, flexibility and utility from 18th to the 21st century. The traditional narrative that places *Prince Albert v Strange*[2] as the watershed case in this regime is, perhaps, too limited.[3] It also ignores some of the irresolvable idiosyncrasies in the case. Although some key cases in Chancery were important developments, the primary mechanisms for protecting confidentiality were not simply the inventions of Chancery from before the Judicature Acts. In fact, the courts seem to have been willing to be pragmatic in the protection of confidential information by using "whatever mechanism was to hand".[4] As a classic celebrity case however and with all its faults—the ascribed celebrity of the Queen's consort seeking the protection of the Queen's own courts to protect the royal couple's privacy—it is an example of circumstances that could occur as much now as then.[5] There are many echoes which were replayed with only a slightly different factual matrix with another ascribed celebrity in the Prince of Wales' *Hong Kong Diaries* case in 2006. It was also, as will be explored, a missed opportunity to define and develop more clearly a specific English law of privacy. It was left to Warren and Brandeis in the US to pray elements of the *Prince Albert* case in aid as they formulated their common law synthesis.

This chapter concentrates on the celebrity privacy rights of all categories protected by breach of confidence, acknowledging that this regime has grown through the development of a broader case law encompassing commercial and trade secrets. There it still has a vital and active role. This chapter considers not only the protected interests but also the ways in which permitted

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[1] A full discussion can be found in Aplin, Bently, Johnson and Malynicz *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford, 2012) 4.01 – 4.117.

[2] *Prince Albert v Strange* (1849) 1 De G & SM 652.

[3] *Gurry* 2.01–2.157.

[4] *Gurry* 2.02

[5] As it did on 18 July 2015 when *The Sun* published a seven-page edition of pictures and a video of a 17-second home movie clip—apparently from the Royal Archives and shot in the early 1930s—of the Queen and her sister as children being encouraged to make Nazi salutes.

interference with the rights has evolved. Then the civil elements of the remedies and enforcement issues are examined.

Issues relating to what would now be termed proportionality in the development of the regime will be considered because breach of confidence is the major area of this book to have faced the irresistible domestic impact and mutational effect of the HRA.[6] Issues of proportionality and the balancing exercise—when played out in the context of the new, post-*Campbell*[7] tort of misuse of private information—resulted in breach of confidence having two manifestations. The first is the "traditional" formulation, dealt with in this chapter, and which includes the "hybrid" breach of confidence action involving the kind of personal information that also contains within it a commercial value as in *Douglas v Hello*.[8] The second is where, as in *Campbell*, the claim is for misuse of private information and which forms the basis of the new tort explored in the next chapter in terms of Misuse of Private Information.[9] The true basis of that action relates to the protection of personal autonomy and dignity.[10] Whether, as a celebrity privacy remedy, breach of confidence has become something of a specialist adjunct will only become clear with

[6] Described as a "tectonic" shift by Raymond Wacks *Privacy and Media Freedom* (Oxford, 2013) 3.

[7] *Campbell v MGN* [2004] UKHL 22.

[8] *Douglas v Hello (No 8)* [2007] UKHL 1.

[9] *ZYT and BWE v Associated Newspapers* [2015] EWHC 1162 (QB) is a recent example of a "rolled up" Breach of Confidence and Misuse of Private Information claim which led to the grant of the temporary injunction to prevent either of the claimants being identified ahead of a trial on the issues. Warby J explained that the information in question related to a personal relationship between the claimants of a private and confidential nature [2]. The first claimant was married but separated and held "a senior position in an educational institution". The second claimant was an adult associated with the institution [7]. There was evidence that their relationship was known to some in the media because an anonymous letter had been circulated to the media giving some of the information about the relationship although it did not name the second claimant. "There is no evidence that the relationship is in the public domain" [8]. ". . . . I am not satisfied that there are. . . .good or reasonable grounds to believe or suspect that the first claimant has engaged in any breach of trust or abuse of his position. The proposition appears speculative. I accept that there is a genuine public interest in debating the ethics of personal relationships within an educational context, and how these should be approached and dealt with. I accept also that it is important for such a debate to be more than an arid theoretical one. There is a legitimate interest in such a debate being informed by concrete examples or illustrations. I do not consider it likely however that at trial the court would conclude that the facts of and surrounding the relationship between these two claimants are such that it is in the public interest to make those facts known for those purposes" [14].

[10] *Campbell* per Lord Nicholls [13–15] and Lord Hoffman [48–50]. Lord Hoffman's point was picked up and emphasised most recently by Mann J in the phone-hacking damages case of *Gulati v MGN* [2015] EWHC 1482 at [111]: "Those values (or interests) are not confined to protection from distress, and it is not in my view apparent why distress (or some similar emotion), which would admittedly be a likely consequence of an invasion of privacy, should be the only touchstone for damages. While the law is used to awarding damages for injured feelings, there is no reason in principle, in my view, why it should not also make an award to reflect infringements of the right itself, if the situation warrants it. The fact that the loss is not scientifically calculable is no more a bar to recovering damages for "loss of personal autonomy" or damage to standing than it is to a damages for distress. If one has lost "the right to control the dissemination of information about one's private life" then I fail to see why that, of itself, should not attract a degree of compensation, in an appropriate case."

the passage of time. Post-HRA, the "traditional" breach of confidence has been "utilized, colonized, hollowed [and] then discarded" in favour of the two-stage test. Having used it initially as a "vehicle" the courts then shed its confines so that its classical elements are no longer structurally important.[11]

2.2 Protected Rights

The nature of confidential information was aptly characterised by Lord Donaldson in the *Spycatcher* case as being like an ice cube: **2–002**

> "Give it to the party who undertakes to keep it in his refrigerator and you still have an ice cube. . . . Give it to the party who has no refrigerator or who will not agree to keep it in one, and by the time of the trial, you just have a pool of water which neither party wants. It is the inherently perishable nature of confidential information which gives rise to unique problems."[12]

The classic formulation of breach of confidence requires the following elements: there must be information which is confidential, the claimant must be able to show that the defendant is under an obligation not to use or disclose the information *and* must also be able to show that either the proposed or actual use or disclosure of that information is in breach of the obligation of confidentiality. If the information becomes public then it cannot—any longer—be confidential. In these circumstances it will have lost its "quality of confidence".[13] This area—when facts *are* in the public domain—will be examined in respect of the implicit fourth element of the action: the public interest defence. This requires consideration separately and in greater detail than the other elements described briefly above. It may be open to the discloser to justify the breach of confidence on the basis that, among other things, it is in the public interest.[14]

Contemporary celebrity cases like *Campbell* and *Douglas*—which are dealt with later—confirm that breach of confidence[15] remains a developing and flexible area of law "the boundaries of which are not immutable but may change to reflect changes in society, technology and business practice"[16] and which can alter its "centre of gravity"[17] allowing it to protect informational

[11] Rebecca Moosavian "Charting the journey from confidence to the new methodology" (2012) E.I.P.R., 34 (5) 324–335.

[12] *AG v Guardian Newspapers Ltd (Number 2)* [1989] 2 FSR 27 [48].

[13] "Something which is public property and public knowledge cannot *per se* provide any foundation for breach of confidence": Megarry J in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 [47]. Meggary J's approach was approved in *AG v Observer Ltd* [1990] 1 AC 109, 168 per Lord Griffiths and unanimously by the House of Lords in *Douglas v Hello* [2008] 1 A.C. 1, [307].

[14] See Y. Cripps "The Public Interest Defence to the Actions for Breach of Confidence and The Law Commission's Proposals on Disclosure in the Public Interest" (1984) *Ox. J. L. S.* 361. What is less clear is whether its absence is a substantive pre-requisite of the action or whether it operates as a defence.

[15] The breach of confidence claim in *Campbell* was abandoned in the Court of Appeal because she accepted that she had presented herself in a "false light", anticipating a successful defence on that issue on public interest grounds. In equitable terms, she had not come to the court "with clean hands".

[16] [2001] QB 967, 1011 [165] (CA) per Keene LJ.

[17] [2004] 2 A.C 457 (HL), 473 [51] per Lord Hoffman.

privacy. As a consequence— in terms of the second element—being able to demonstrate that the recipient of the information understood that information was confidential or private may result in the court treating the recipient as being bound.[18]

2.2.1 A celebrity cause of action *par excellence* or a convenient accommodation? *Prince Albert v Strange*

2–003 The celebrity chronology of breach of confidence actions starts with *Prince Albert v Strange* because that was the cause of action on which the court issued and then confirmed the restraining injunction.[19] But it only got to that result by adopting a strained formulation within the litigation itself and the Courts' judgments in their various reported iterations—to steer the arguments through the copyright "reefs" which might have wrecked the action.[20] This case is a significant example of judicial ingenuity in accommodating the litigation and privacy needs of the royal couple.

The Prince had sought an injunction to prevent Strange from publishing a catalogue that Strange had prepared, describing private etchings made by the Queen and the Prince "principally of subjects of private and domestic interest". Strange did not know that, at the time he prepared the catalogue, the copies of the etchings he had seen had been obtained without the royal artists' consent.

Although the case was decided on breach of confidence grounds, there is an underlying groundswell of copyright within it.[21] It was opened on behalf of the Prince —on the avowed basis that it did *not* turn upon the question of copyright—by Mr Sergeant Thomas Talfourd, a copyright expert who drafted the relevant Copyright Act.[22–23] Lord Cottenham, the Lord Chancellor, could not be seen to decide the case using pure copyright law because the law only applied to published works (and the Prince asserted that the etchings had not been published). There was a separate line of authority in Chancery restraining the use or publication of unpublished literary and artistic works as common law property.

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[18] *Gurry* Ch 1 [1.03].

[19] See also *Gurry* Ch 2 [2.05 – 2.09] and [2.39–2.57]; Jeremy Phillips *Prince Albert and the Etchings* [1984] 12 E.I.P.R. 344–349; D. Tritter *A Strange Case of Royalty: The Singular "Copyright" Case of Prince Albert v Strange* (1983) 4 J.M.L. & P. 111–129,113 and Fiona R. Burns *Lord Cottenham and the Court of Chancery* Journal of Legal History Vol. 24 No. 2 (August 2003) 187–214, 195 (recording the comment by Sir John Rolt—a former Attorney General and Lord Justice in Chancery—that Lord Cottenham tended "to crush the facts of any case so as to fit any principle upon which he preferred to act".)

[20] [1849] EWHC Ch J20 (08 February 1849); 41 E.R. 1171, 1 McN & G 2, [1849] EWHC Ch J20, (1849) 2 De Gex & Sim 652. D.Tritter *A Strange Case of Royalty* 112 observes: "The several reports of *Prince Albert v Strange* generally recite the same events, although with important differences, depending upon which affidavit is being summarised. To a present-day observer, Chancery's idiosyncrasies make it impossible to say which, if any, of the recitations of the occurrences can be identified as incontrovertible fact. . .. From a modern viewpoint, findings of fact must seem the product of the most fragile laboratory of truth."

[21] Or more correctly, copyright denial.

[22–23] Copyright Act 1842.

In the Prince's original affidavit in the Royal Archives sworn on the 20 October 1848 he states:

> "And I say that the impressions of the said etchings were intended to be for the private use of Her Majesty and myself only and that – although copies of some of such etchings have been given (occasionally and very rarely) to some of the personal friends of Her Majesty one to one friend and one to another, yet I say (speaking positively for myself and to the best of my belief for her Majesty) that no such collection as that so advertised for exhibition as aforesaid was ever given away by us or either of us or by our or either of our permission."

It was not suggested that Strange's catalogue itself breached the royal couple's copyright: Strange was simply describing what he had seen.

But it was not only Strange who had seen the works, a point which goes to the heart of any viable breach of confidence action.[24] *The Times* on 7 September 1848 carried a detailed review of the etchings "about to be presented to the public".[25]

Although Counsel for the Prince contended that property in the drawings had been interfered with, he submitted that that interference was not essential to the argument mounted.[26] Defence submissions focussed on this.[27] The judgment for the Prince was clearly founded upon his having property in the sketches such that (somehow) any catalogue listing them thereby impaired the property.

But it was actually a breach of privacy that supplied the basis for the relief founded in breach of confidence.[28] The original Bill from Prince Albert used the terms "private" and "privacy" several times.[29] During the preliminary injunction hearing before Vice-Chancellor Knight Bruce the judge also used the word "privacy" together with that of "property": there had been "the abstraction of one of its most valuable quality, namely privacy".[30] He added:

> "All the cases in which the court has interfered to protect unpublished letters or manuscripts . . . proceed upon that principle of protecting privacy[31] . . ..[and that] the defendant's conduct had been an intrusion – an unbecoming and unseemly intrusion . . . a sordid spying into the privacy of domestic life".[32]

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[24] The existence of *The Times* review—ahead of the initial injunctive proceedings—does not feature at any stage in the legal argument or decisions on this case. If Strange himself had written the review for the "Berkshire paper" it is odd that nothing to this effect was mentioned during the proceedings. To date it has not been possible to locate the paper in question from which *The Times* printed this review.

[25] As noted immediately above *The Times* on p. 5 credited the review to "a Berkshire paper". The Prince's affidavit, on which the original bill was filed and on which the Prince's action was based, is dated six weeks later on 20 October 1848. *The Times* review described the works as dating back to 1840 and being signed by the royal couple.

[26] 2 De G & Sm 652 at 677–679.

[27] 1 Mac & G 25 at 33–35.

[28] 1 Mac & G 25 at 47.

[29] The Prince's Affidavit of 20 October 1848 was witnessed by S, Anderson. It specifically states that the drawings and etchings were "principally subjects of private and domestic interest . . . For greater privacy, they (had been made) by means of a private press . . . The impressions had been placed in some of the private apartments of Her Majesty . . . Such etchings were private portraits."

[30] *Prince Albert v Strange* (1849) 1 De G & SM 652, at 670.

[31] At 671.

[32] At 700.

When the matter came before Lord Cottenham, the Lord Chancellor, similar language was used:[33]

> "In the present case, where privacy is the right invaded, the postponing of the injunction would be equivalent to denying it altogether. The interposition of this Court in these cases does not depend on any legal right; and, to be effectual, it must be immediate."

2–004 Whatever the reason—perhaps the need to accommodate the royal couple with some kind of remedy which was more conveniently labelled breach of confidence to distract from the latent copyright issues—the case is a crucible that mixes all the major elements: the attributed celebrity of the royal family, an itinerant, disaffected journalist (the precursor of the modern paparazzo),[34] a profit-motivated publisher, a "burgeoning public avid for news"[35] and the technologies that allowed mass speed printing and mass distribution of the product.[36] The court itself acknowledged that "the importance which has been attached to this case arises entirely from the exalted station of the Plaintiff."[37] These ingredients remain as constants in the contemporary privacy landscape.

Another key factor in the judgments was the fact that the plates from which the etchings had been made belonged to the Prince.[38] Lord Cottenham LC noted:

> "the catalogue and the descriptive and other remarks therein contained, could not have been compiled or made, except by means of possession of the several impressions of the said etchings surreptitiously and improperly obtained. . . .The possession of the defendant. . . .must have originated in breach of trust, confidence or contract. . . ."[39]

Thus, at the outset, this portion of the law of private information—with significant elements within the judgment that could have been used to fashion a law of privacy *per se* in English law—began its "celebrity" life. The formulation by the Lord Chancellor of an action founded on "trust, confidence or contract" which was binding on the defendant's conscience stretches what might be

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[33] *Prince Albert v Strange* [1849] EWHC Ch J20 (8 February 1849) 12, [5].

[34] Jasper Tomsett Judge had made a career as a royal-watcher, filing news and gossip about the court, and publishing cheap pamphlets describing the stables and kitchens at Windsor and other such matters for tourists. He discovered that a cache of the engravings had been given to a former employee of an occasionally out-sourced printer. This former employee, Thomas Middleton, and Judge struck a deal: £5 for 60 of the prints. Judge then agreed with Strange to publish a critical catalogue of these etchings, to be sold to visitors to the exhibition planned for Strange's shop in Paternoster Row. Judge issued a number of press releases publicizing both pamphlet and exhibition.

[35] Megan Richardson and Leslie Hitchens *Celebrity privacy and the benefits of simple history* (Chapter 10, 266) in Andrew T. Kenyon and Megan Richardson *New Dimensions in privacy law: international and comparative perspectives* (Cambridge University Press, 2004).

[36] It is possible that it was one of Judge's press releases that was picked up and used verbatim in the "Berkshire paper" which was then reproduced in *The Times* of 7 September 1848. See also the pamphlet written by Judge and published by Strange in 1849 selling for half-a crown: *"The Royal Etchings". A Statement of Facts Relating To The Origin, Object, and Progress of the Proceedings in Chancery, Instituted by Her Majesty & the Prince Consort*. An original of this is in LSE's Women's Library.

[37] (1849) 2 De Gex & Smale 652; 64 E.R. 293; (1849) 1 Mac & G 25, 41 ER 1171, CA.

[38] Ibid: [the law] "shelters the privacy and seclusion of thoughts and sentiments committed to writing, and desired by the author to remain not generally known".

[39] (1849) 1 Mac & G 25, 41 ER 1171, 1178 – 1179.

regarded as truly "confidential" in a modern sense.[40] What it does encapsulate, express and prevent as a corrective equitable thread, however, is what amounts to unconscionable conduct and any benefit that might be derived from such unfairness.

The privacy elements, articulated clearly in the case, were quickly picked up in the US. Just over 120 years ago Samuel Warren and Louis Brandeis wrote their seminal Harvard Law Review article.[41] They argued that a new tort of privacy was not only necessary—given the pace of social and technological developments at the cusp of the 20th century in US society—but that fundamental common law principles could be applied to create it. Until the HRA, this creative process to define and develop a nominate tort in respect of privacy was avoided in England and Wales.[42]

Despite having ventured into this area of private matters, the potential lay dormant in English law for nearly 100 years until the middle of the next century.[43] There was only one other breach of confidence case of note in the 19th century: *Pollard v Photographic Co* in 1888.[44] There a photographer was restrained from selling or exhibiting copies of a photograph "got up as a Christmas card" of a lady who had commissioned him to take a picture of her.[45] The closest English law came to touching on any development of the law of privacy *per se* beyond *Prince Albert v Strange* were remarks in 1894 by Lord Halsbury in *Monson v Tussauds Ltd*—in words that he might have applied to *Google Spain* had it been before him[46]—where he said:[47]

> ". . . .The exhibition in question is dedicated to the gratification of the public curiosity in regard to every person or event which may for the moment be interesting. I confess I regard such a scheme with something like dismay. Is it possible to say that everything which has once been known may be reproduced with impunity in words or pictures; every incident of a criminal or other trial be produced, and its publication justified; not only trials, but every incident which has actually happened in private life, to furnish material for the adventurous exhibitor, dramatised peraventure and justified because, in truth, such an incident had really happened?

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[40] Tugenhat and Christie *The Law of Privacy and the Media* 2nd edn (Oxford, 2011) 165 (footnote 11) in Chapter 4.

[41] Samuel D. Warren and Louis D. Brandeis *The Right to Privacy* (1890) 4 Harvard LR 193.

[42] However this did not stop English and Scots law—40 years later—using Warren and Brandeis' precise route to create the new tort/delict of negligence in *Donoghue v Stevenson* [1932] *AC 562*. In Scotland the thwarted efforts of Professor Sir TB Smith QC to explore privacy law within the Roman Law *actio iniuriarum* approach—as Professor of Scots Law at Edinburgh University and as a Scottish Law Commissioner—have since been the subject of two positive retrospective analyses*: A mixed Legal System in Transition: TB Smith and the Progress of Scots Law* Ed Elspeth Reid and David Carey Miller (Edinburgh University Press, 2005) and *Rights of Personality in Scots Law: A Comparative Perspective* eds Niall R. Whitty and Reinhard Zimmermann (Dundee University Press, 2009).

[43] See generally R. Callender Smith "Freddie Starr Ate my Privacy: OK!" (2011) *Queen Mary Journal of Intellectual Property* Vol. 1 No. 1 (Apr) 53–72.

[44] *Pollard v Photographic Co* (1888) 40 Ch D 345.

[45] Per North J at 354 (applying *Prince Albert v Strange*): ". . ..the Court of Chancery always had an original and independent jurisdiction to prevent what that Court considered and treated as a wrong, whether arising from a violation of an unquestionable right or from breach of contract or confidence. . .."

[46] In the context of how a person is remembered.

[47] *Monson v Tussauds Ltd* [1894] 1 Q.B. 671, 687.

That case did no more than establish "libel by innuendo" and did nothing further to buttress privacy arguments.[48] Attempts to broaden the approach of the English courts to matters relating to privacy remained intractably stuck in the traditional causes of action or failed completely.[49]

2.2.2 Classification of Confidential Information

2–005 Four main classes of information have traditionally been protected within breach of confidence: trade secrets, personal confidences, artistic and literary confidences and government information. Trade secrets, generally,[50] falls outside the context of this book but the other three classes have celebrity issues in the case law because of the personalities involved.[51]

2.2.2.1 Personal confidences

2–006 The key formulation in this area was set by the litigation involving the achieved celebrity Duke of Argyll's attempt to publish his account[52] of his life with the socialite wife he had divorced—on the grounds of her adultery[53]—after an agreement that she would not contest the divorce on the basis that nothing more would be said about her adultery.[54] Ungoed-Thomas J—relying particularly on *Prince Albert v Strange*—was satisfied that a breach of confidence could arise independently of property or contract and that such an obligation could be enforced in equity "independently of any law".[55] No public interest argument of any substance was advanced in this case.

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[48] Alfred John Monson had been accused in Scotland of murder. The jury had returned a "not proven" verdict. Madame Tussaud's Gallery in London erected a waxwork of him—at the entrance to the Chamber of Horrors—holding a gun. In the libel action he recovered one farthing.

[49] Three examples of this lack of success taken from representative points across the 20th century illustrate this point: *Tolley v Fry* [1931] A.C. 333: appropriation of the Claimant's image in an apparent brand endorsement resulted only in a libel by innuendo; *Bernstein of Leigh v Skyview & General* [1978] Q.B. 479: photographic aerial over-flights did not breach privacy if the picture was taken from an angle outside the property and, finally, *Kaye v Robertson* [1991] FSR 62 which is discussed later in this chapter.

[50] The exception is remarks made in the *Douglas* case: see Lord Phillips MR at Chapter 3.6.1.

[51] Although it is a trade secrets case *Vestergaarde Frandsen A/S & Ors v Bestnet Europe Ltd & Ors* [2013] UKSC 31 considered the scope of the duty of confidence and emphasised that an individual could not be liable without knowledge that the information was confidential. The Supreme Court held that an action for breach of confidence was based ultimately on conscience. In that case one of the key parties (Mrs S) had never acquired the confidential information in question and had, in effect, been honestly unaware that trade secrets were being developed. In order for the conscience of the recipient to be affected she must have information which she has agreed, or knew, was confidential or she must be party to some action which she knew involved the misuse of confidential information [23]. She had not had that knowledge and could not be held liable in Breach of Confidence.

[52] In *The People*.

[53] The Duke's petition for divorce listed 88 putative lovers including two Cabinet Ministers, three Hollywood stars and three members of the royal family. Within the litigation that led to the injunction the Duchess herself cross-petitioned alleging that the Duke was having an affair with her step-mother—Mrs Wigham—who recovered £25,000 for this allegation.

[54] *Argyll v Argyll* [1967] Ch 302.

[55] Ibid 322 B–D. There is an over-riding impression that all this inter-linked litigation had only

What resembles a breach of confidence can arise out of misusing private—rather than trade or commercial—information obtained by way of a contract of employment.[56] When this happens the contractual element becomes a factor for consideration in the proportionality balancing exercise.[57] The jurisdiction to enforce the contractual duty of confidence comes from the 19th century principle in *Doherty v Allman:* equity will intervene to enforce the parties' bargain.[58]

In *Attorney General v Barker* Malcolm Barker was employed in the royal household between 1980 and 1983 on terms which included a contractual undertaking not to disclose, publish or reveal any incident, conversation or information concerning any member of the royal family or any visitor or guest which came to his knowledge during his employment unless authorised.[59] The undertaking was perpetual and worldwide and the first defendant expressly acknowledged that it included an agreement on his part not to publish any such matter in any book. He set up a Canadian company to publish his unauthorised book *"Courting Disaster. . ..the hilarious and shocking recollections of a Buckingham Palace official"* in the UK and he refused to comply with his undertaking.

The Attorney General successfully applied in England for worldwide injunctions against him.[60] In terms of both the injunction and its extra-territorial effect, the Court of Appeal upheld the original decision because the Attorney General had *not* based the claim on breach of confidence but on breach of contract. Mr Barker had entered—with consideration—into a negative covenant which was limited neither territorially nor in time. That covenant was enforceable provided it could not be attacked for obscurity, illegality or on public policy grounds such as being in restraint of trade. The covenant was not void on any ground of public policy or on the ground that it restricted the freedom of expression abroad contrary to ECHR Article 10.[61]

2–007 The 1988 case of *Stevens v Avery*—with the attributed celebrity notoriety of the claimant—provides a more contemporary example together with a fleeting acknowledgement, if only as a path not taken, of the competing interests

one object: to pay off the lawyers' bills rather than because of any real animosity between the amphetamine-taking Duke and the promiscuous Duchess.

[56] It is not a true breach of confidence but one where the breach of contractual undertakings in a contract of employment created the litigation, producing a similar effect. See also *Attorney General v Blake* [2001] 1 AC 268 which successfully prevented the notorious Russian spy George Blake from further benefitting from the profits of the publication of his biography.

[57] See *HRH Prince of Wales v Associated Newspapers* [2006] EWHC 11 (Ch) and [2006] EWCA Civ 1776.

[58] *Doherty v Allman* (1878) 3 App Cases 709, 720: a House of Lords case involving reversions of leases and the contractual effect of covenants.

[59] *AG v Barker* [1990] 3 All ER 257.

[60] Despite the world-wide injunction, the book is available on Amazon.co.uk.

[61] In *Grigoriades v Greece* Application 24348/94 (1997) 27 EHRR 464 the ECtHR determined that Article 10 applied to contracts of employment, at least for those in the public sector. A different approach was adopted by the New Zealand Court of Appeal in *AG for England and Wales v R* [2002] 2 NZLR 91. The New Zealand Bill of Rights Act 1990 contains a provision which is analogous to ECHR Article 10. That right to expression had no bearing on the construction of a confidentiality contract between an SAS soldier and his former employer, the Ministry of Defence. The court, however, refused injunctive relief on proportionality grounds.

in play in terms of proportionality and the balancing test. Rosemary Stevens had a secret lesbian lover, a Mrs Telling, whose husband had killed her when he had discovered the two ladies together.[62] Anne Avery was a close friend of Mrs Stevens and had later been told about her lesbian relationship with the deceased woman.[63] She sold the information to the *Mail on Sunday* who ran it under the headline "Rosemary's Story". In an unsuccessful appeal to strike out Mrs Steven's breach of confidence claim the defendants sought to limit what could be regarded as confidential to matrimonial secrets and not relationships between unmarried partners.

Browne-Wilkinson VC concisely despatched that argument on the basis that, although it had never been argued, there was no reason in principle why "that most private sector of everybody's life. . ..sexual conduct" could not be the subject of a legally enforceable duty of confidentiality. Moreover:

> "The basis of the equitable intervention to protect confidentiality is that it is unconscionable for a person who has received information on the basis that it is confidential subsequently to reveal that information. . ..it is the acceptance of the information on the basis that it will be kept secret that affects the conscience of the recipient of the information."[64]

He identified that there was a fundamental difficulty with the case—involving what would now be the proportionate result of the Article 8 and 10 balancing exercise—because of the relationship between "the privacy to which every individual is entitled to expect" and freedom of information.[65]

> "To many, the aggressive intrusion of sectors of the press into the private lives of individuals is unpalatable. On the other hand, the ability of the press to obtain and publish for the public benefit information of genuine public interest, as opposed to general public titillation, may be impaired if information obtained in confidence is too widely protected by the law. Moreover, is the press to be liable in damages for printing what is true? I express no view as to where or how the borderline should be drawn in such a case."[66]

He excused himself from this task on the basis that he was only dealing with an application to strike out and not the full trial. In the event the matter settled between the parties. However the answer to his question is as relevant then as now. Earlier in his judgment he had mentioned the unreported case of *M and N v Kelvin McKenzie and NGN*.[67] That case related to the homosexual conduct of the plaintiffs. Garland J had refused an injunction on the ground that there was no arguable case that this was confidential on the premise that the mere existence of a homosexual relationship between two parties did not raise a duty of confidence between them or as against third parties. The Vice Chancellor was not comfortable with that formulation and pointedly expressed "no view as to the correctness of that decision."[68] The tone of his judgment generally was unsympathetic to the defendants and there is the

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[62] *Stevens v Avery* [1988] Ch 449.

[63] The relationship—although the cause of the killing—was unknown to the police and Mrs Stevens did not give evidence at the trial.

[64] *Stevens v Avery* [1988] Ch 449, 456.

[65] *Stevens v Avery* [1988] Ch 456.

[66] *Stevens v Avery* [1988] Ch 457.

[67] *M and N v Kelvin McKenzie and NGN* (unreported), 18 January 1988.

[68] *Stevens v Avery* [1988] Ch 456, [E].

impression (albeit subjective) that if he had been dealing with the matter at trial he might well have found for the plaintiff. That may be why the matter settled.

Post-HRA *M and N v Kelvin McKenzie and NGN* would most likely be presented as a misuse of private information matter. Private information of a sexual nature now is routinely regarded as a protected area, Mrs Avery had been told the facts in confidence and was paid to breach Mrs Stephens' confidence. On the other hand there may have been a public interest in knowing that Mr Telling, who was convicted of manslaughter, had been telling the truth when he said that he killed only after finding his wife with another woman who he did not identify, who was not called as a witness at the trial, whose identity the police had been unable to discover and who had not gone to the police to assist them voluntarily. With the facts published—and they were clearly true facts—a proportionate result might now be a *Mosley v NGN* award of damages for that misuse of the private sexual information.[69] There is no *Campbell*-type hypocrisy in concealing sexual preferences and Mrs Avery was not a celebrity or public figure.

Barrymore v NGN,[70] which involved the attributed television celebrity Michael Barrymore and revelations published in *The Sun* from his former employee Paul Wincott about their homosexual relationship, related to letters sent between the two men. Barrymore relied on a "Trust and Confidence Agreement" made between them.[71] Jacob J, in granting the injunction and applying *Stevens v Avery*,[72] held that—irrespective of the agreement—there was a strongly arguable case that the details of the relationship between them should be treated as confidential. The information in the article relating to sexual conduct could be the subject of a duty of confidence, since information only ceased to be capable of protection as confidential when it was known to a substantial number of people. The information in the article was not known to a substantial number of people before *The Sun* published it.

> "The fact is that when people kiss and later one of them tells, that second person is almost certainly breaking a confidential arrangement. It all depends on precisely what they do. If they merely indicate there has been a relationship, that may not amount to a breach of confidence and that may well be the case here, because Mr Barrymore had already disclosed that he was homosexual, and merely to disclose that he had had a particular partner would be to add nothing new."

However, when it goes into detail (as in *The Sun* article), about what Mr Barrymore said about his relationship with his wife and so on, it crossed the line into breach of confidence.[73]

2–008 Then came two near-contemporary cases with achieved celebrity litigants able to use their financial resources to litigate to the highest level to

[69] As developed most recently in *Gulati & Ors v MGN* [2015] EWHC 1482 (Ch): see later in this chapter at 2.5.3.2

[70] *Barrymore v NGN* [1997] FSR 600.

[71] The agreement, which was by deed, included the obligation not to disclose or make use of any "confidential business information", which included "personal information". The agreement had been concluded after most of the matters referred to in the article.

[72] *Stevens v Avery* [1988] Ch 449.

[73] *Barrymore v NGN* [1997] FSR 600, 603–604.

explore and resolve the private information issues in their respective cases. In *Douglas v Hello! Ltd* [74] the magazine *OK!* contracted for the exclusive right to publish photographs of a celebrity wedding at which all other photography would be forbidden. Its rival, *Hello!* published photographs which it knew to have been surreptitiously taken by an unauthorised photographer pretending to be a waiter or guest. Lord Hoffman—at the end of serial litigation in respect of the issues arising out of this case—concluded that the original trial judge (Lindsay J) had been right. He found that *OK!*'s £1m payment was for the benefit of the obligation of confidence imposed upon all those present at the wedding in respect of any photographs of the wedding. "Provided that one keeps one's eye firmly on the money and why it was paid, the case is, as Lindsay J held, quite straightforward," he noted, before concluding:

> "The fact that the information happens to have been about the personal life of the Douglases is irrelevant. It could have been information about anything that a newspaper was willing to pay for. What matters is that the Douglases, by the way they arranged their wedding, were in a position to impose an obligation of confidence. They were in control of the information."[75]

There were no public interest issues successfully argued in that case, a distinction between *Douglas* and *Campbell v MGN*.[76]

The shift from the deployment of equitable principles to the aim of obtaining a proportionate result reflecting competing Convention rights continued in two other cases of note. In *Theakston v MGN*[77] an attributed celebrity presenter of BBC TV's *Top of the Pops* series had been surreptitiously photographed with prostitutes in a brothel in Mayfair. He had been drinking with friends that night, and could not remember much of what happened at the brothel. The prostitutes texted him warning him they would go to the press with the photographs unless he paid to stop them and, in the event, they did go to the press. The injunction sought to prevent publication both of the details of his activities in the brothel and the photographs which were taken there without his consent. He had previously placed certain aspects of his love and sexual life in the press. He had not, when he entered the brothel, stipulated that his activities there should be kept confidential. Ouseley J noted, in respect of the HRA:

> "It may very well be that Parliament intended section 12(4) to be given effect, not through the creation of direct "horizontal effects" in the form of a limited new privacy related cause of action applicable only in section 12 cases, but through the approach which the Courts would adopt to the scope of existing causes of action, in particular breach of confidence."[78]

He decided there was a public interest in publishing the fact that he had behaved in the manner he had, given his public role as a television presenter in

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[74] *Douglas v Hello! Ltd* [2006] QB 125.

[75] *Douglas v Hello* [2007] UKHL 21 on appeal from [2005] EWCA Civ 106; [2005] EWCA Civ 595; [2005] EWCA Civ 861.

[76] *Campbell v MGN* [2004] UKHL 22 and discussed later—on the breach of confidence/public interest interplay—at 2.3.2 in this chapter.

[77] *Theakston v MGN* [2002] EWHC 137(QB).

[78] *Theakston v MGN* [2002] EWHC [28].

programmes aimed at young people. He specifically used the law of confidence in respect of the photographs.[79] They contained intimate, personal and intrusive details (including apparent cocaine use) that meant his ECHR Article 8 privacy rights prevailed over the ECHR Article 10 rights of the paper's and the prostitutes' rights of freedom of expression.

2–009 There was also *A v B & C*.[80] A was a married Premier League footballer. B was a national newspaper. C was one of two women with whom A had affairs. At first instance Jack J had granted an injunction restraining the newspaper from publishing the stories which C and the other woman, D, had sold to it about their affairs with A. Lord Woolf CJ lifted the injunction and made a number of points about what had happened at first instance. In his view, a blizzard of authorities were being cited.[81] To prevent that he laid out a 15-point set of guidelines for the future.[82] Then he subjected Jack J's procedural approach on the facts—and the different iterations of the four hearings Jack J had allowed the case at first instance—to six points of criticism.[83] Finally, reflecting Ouseley's approach in *Theakston*,[84] he concluded:

> "We do not go so far as to say the relationships of the class being considered here can never be entitled to any confidentiality. We prefer to adopt Ouseley J's view that the situation is one at the outer limits of relationships which require the protection of the law. The fact that it attracts the protection of the law does not mean, however, that an injunction should be granted to provide that protection. In our view to grant an injunction would be an unjustified interference with the freedom of the press."[85]

By 2006 and *McKennitt v Ash*[86] the issues of breach of confidence were being addressed with a more confident articulation of proportionality, of the Article 8 and Article 10 balancing exercise and also by reference to the ECtHR jurisprudence of *Von Hannover 1*. Ms Ash had written a book about her former friend and employer, the Canadian singer and attributed celebrity Loreena McKennitt. Ms McKennitt, who guarded her private information zealously, successfully prevented publication of details about her personal and sexual relationships, her personal feelings—in particular in relation to her deceased fiancé and the circumstances of his death[87]—as well as matters relating to her health and diet and her emotional vulnerability.

The court confirmed that the information was protected as confidential because it was sufficiently private to engage Ms McKennitt's Article 8 rights and, in the circumstances, Ms Ash's right of freedom of expression under Article 10 had to yield to those of her former friend and employer. Ms Ash did not have the right she claimed to tell her own story. With echoes of *Stevens v Avery*, that story was "shared" only in the sense that Ms McKennitt had

[79] *Theakston v MGN* [2002] EWHC [78]: third sentence.
[80] *A v B & C* [2002] EWCA Civ 337.
[81] *A v B & C* [2002] EWCA Civ 337[10].
[82] *A v B & C* [2002] EWCA Civ 337 [11 – 12] but covering 13 pages of the judgement.
[83] *A v B & C* [2002] EWCA Civ 337 [43] which runs to four pages.
[84] Decided four weeks earlier.
[85] *A v B & C* [2002] EWCA Civ 337 [47].
[86] *McKennitt v Ash* [2006] EWCA Civ 1714.
[87] He, his brother and a friend had drowned in a boating accident in Canada in 1998.

admitted Ms Ash into her confidence.[88] Ms Ash had no story of her own to tell and what she sought to do was, in effect, a parasitic expression of claimed Article 10 rights. The information restrained was not already in the public domain and—when private information engaged Article 8—the question was whether the information was private, not whether it was true or false. The result in this case was greeted by the media (not for the first time) as the death-knell of the "kiss and tell" story.[89]

Similarly in *Gold v Cox*[90] Ann Summers, an attributed celebrity and successful lingerie businesswoman, had employed a nanny with an employment contract containing express provisions as to confidentiality. The nanny had pleaded guilty to attempting to poison Ms Summers and was sentenced to 12 months' imprisonment. After her release from prison there were fears that she and a friend (Leanne Bingham, who had also worked for Ms Summers) intended to write a book about Ms Summers. Tugendhat J granted the injunction on the basis that Ms Cox was subject to a written confidentiality agreement and, although Ms Bingham was not, there was a strong case that she was under an implied obligation of confidentiality.

From the range and span of the celebrity cases described here it is clear that breach of confidence has and continues to provide protection to personal information. What it does not do, however, is create the kind of thematic unity that groups and binds this area of law into something more potent in terms of the protection of privacy. It shows a growing recognition of the principle of unconscionability vis-à-vis disregard for individual celebrities' (or others) privacy. But unconscionability is a concept with its roots in equity and does not have the potency or rigour of the individual Article 8 and Article 10 proportionality assessments and the ultimate balancing test. Certainly it set up the platform to restrain forms of conduct which are likely to cause an invasion of privacy, protecting the secrecy of information confided by one person to another, but this is some way short of providing that protection to information that may never have been confided to anyone. This is the key contradistinction between breach of confidence as a celebrity privacy remedy and misuse of private information as a celebrity privacy tort.

2.2.2.2 Literary and artistic confidences

2–010 There are two broad categories in this area. The first is where information is intended for public performance, sale or display, as with the plot of a play.[91] The protection sought here is to prevent "spoilers" devaluing the information.[92] The other category, relating directly to celebrity cases and specifically to informational privacy, involves works created by their authors for private

[88] *Stevens v Avery* [1988] Ch 449.

[89] "Court deals blow to gossip titles": *Guardian* 14 December 2006 *http://www.guardian.co.uk/media/2006/dec/14/pressandpublishing.privacy*

[90] *Gold v Cox* [2012] EWHC 272 (QB).

[91] *Gilbert v Star Newspaper* (1894) 11 T.L.R. 4: injunction granted to prevent publication of the plot of W.S. Gilbert's comic opera *His Excellency* which was due to open a few days later.

[92] As in *Times Newspapers v MGN* [1993] E.M.L.R. 443.

use and enjoyment, as with the etchings in *Prince Albert v Strange*,[93] or the physician's diary in *Wilson v Wyatt*.[94]

A contemporary example is *HRH Prince of Wales v Associated Newspapers*.[95] Shortly after a state visit by the Chinese President to London, the *Mail on Sunday* published extracts from a journal written by the Prince of Wales about his official visit to Hong Kong in 1997. It had obtained the journal from a former employee of the Prince, together with seven other journals. The Prince brought an action for breach of confidence and copyright, and applied for summary judgment in respect of all eight journals. Dismissing the *Mail on Sunday's* appeal, the Court of Appeal concluded that the information was obviously both private and of a confidential nature, because of both the relationship within which it was disclosed and its nature. No-one receiving a copy of the journal would have felt entitled to publish it without permission. The fact that there was a breach of a contractual duty of confidence was "a significant element to be weighed in the balance" between Articles 8 and 10. The test was not simply whether publication was in the public interest but whether it was in the public interest that the duty of confidentiality should be breached. It was not. Publication was also an infringement of the Prince's copyright.

In terms of providing a proportionate result, summary judgment—as part of the procedure that may be deployed in this area—may certainly be in accordance with the law but the result is blunt and less nuanced than a full trial. If successful, it usually strikes out the action there and then. It allows the Court to make a decision on the basis of written witness statements that are not tested in cross-examination. It avoids the necessity of the Claimant (the Prince of Wales in this case) attending the court proceedings.[96] The witness statements from two of the Prince's Principal Private Secretaries[97] were met by a witness statement from Mark Bolland, on behalf of the *Mail on Sunday*. Mr Bolland had been Assistant Personal Secretary to the Prince from 1996 to 1997 and Deputy Private Secretary from 1997 to 2002.

Given that the limits of the public interest defences in the areas of confidence, privacy and copyright are complex—and at the time more novel

[93] *Prince Albert v Strange* (1849) 2 De Gex & Smale 652; 64 E.R. 293; (1849) 1 Mac & G 25, 41 E.R. 1171, CA.

[94] *Wilson v Wyatt* (1820): Unreported but mentioned in *Prince Albert* and *Argyll v A*. The diary entries related to the health of King George II.

[95] *HRH Prince of Wales v Associated Newspapers* [2006] EWHC 11 (Ch) and [2006] EWCA Civ 1776.

[96] The procedure under the (then) CPR Part 24.2. required Blackburne J (and the Court of Appeal on review) to be satisfied that the *Mail on Sunday* had no real prospect of successfully defending the claim and that there was no other compelling reason why it should proceed to trial.

[97] Sir Stephen Lamport (1996–2002) and Sir Michael Peat (2002–2012). Their evidence was that, over a 30 year period, the Prince had kept handwritten journals recording his personal impressions and private views on his overseas tours. Sir Stephen described them as "candid and very personal and intended as a private historical record". The journals were photocopied by his private office and circulated to members of his family, close friends and advisers. The Prince expected they would be placed in the Royal Archives after his death. Although the numbers vary according the maker of the witness statement, a minimum of 14 copies were sent out and they had probably been read by a total of 21 readers (husbands and wives were on the list).

and less developed than now in terms of private information—this may be regarded as a decision of its time, and limited to its particular facts even though only six years have passed. As Blackburne J remarked,[98] some of the evidence in the witness statements was third-stage hearsay: hardly the most robust evidence on which to deliver a summary judgment. The contents of the single journal that had gone into the public domain via the *Mail on Sunday* could not be stifled but the other seven journals remained protected.[99]

2–011 The cross-analysis between the Prince's Article 8 rights and the newspaper's Article 10 rights led to the Court rejecting the public interest arguments of the newspaper. However, public interest in this sphere, given the Prince's role and his previous statements, merited a more detailed analysis than was ever possible on a summary judgment application. In particular, the treatment of the "zone of privacy" argument set out in *A v B, C and D*,[100] in light of the Prince's pronouncements, receives very little attention or analysis in the judgment. The accommodation provided to the Prince's privacy interests evidenced in this case is substantial. Contractual issues[101] and the interplay with breach of confidence played an important part both in the first instance decision and in the Court of Appeal.

In the latter, the Chief Justice[102] noted[103] that the action was not a claim for breach of privacy that involved any extension of the old law of breach of confidence. The circumstances that involved the disclosure had been in breach of a "well-recognised relationship of confidence, that which exists between master and servant". He pointed out that the ECHR recognised that it may be

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[98] [2006] EWHC 522 (Ch) [79]: ". . . .against that vague and (triple) hearsay account. . .".

[99] The *MoS's* position was the information in the journal "was not intimate personal information but information relating to the claimant's public life and to a "zone of his life" which he had previously put in the public domain. . . .the information concerned the claimant's political opinions which the electorate had a right to know as being within the ambit of the Freedom of Information Act 2000. . . .the claimant has intervened in and lobbied on political issues. Alternatively. . . .there was a powerful public interest in the disclosure to the public of the information which outweighed any right of confidence the claimant might otherwise have": [2006] EWHC 522 (Ch) [7].

[100] *A v B, C and D* [2005] EWHC 1651 (QB): The Claimant sought an injunction against his former wife B, as well as C and D (UK and US publishers of a lifestyle magazine), to which she had given an interview about their relationship. The Claimant had previously placed into the public domain personal information about himself, B and their children including his past drug habit and rehabilitation. Although drafted in very wide terms, he was effectively seeking to restrain any publication of further details about these subjects; C and D stated that they did not intend to publish any information outside of these subjects. The court held—refusing the injunction—that, in assessing whether the Claimant had a reasonable expectation of privacy, his own conduct was an important consideration. He had voluntarily put personal information into the public domain and this was a highly relevant factor. The defendants were intending only to publish information within the same 'zone' as that already published by him. This case has to be contrasted with the later decision of *McKennitt v Ash*. In that case the Claimant successfully sued in relation to an invasion of privacy despite the fact that she had already released similar material into the public domain. *McKennitt* was a decision after full trial, whereas *A v B, C and D* concerned an interim injunction.

[101] Together with the "conscience" issues emphasised in most recently in *Vestergaarde Frandsen A/S & Ors v Bestnet Europe Ltd & Ors* [2013] UKSC 31.

[102] Lord Phillips of Worth Maltravers.

[103] *Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776 [28].

necessary in a democratic society to give effect to a duty of confidence "in the old sense" at the expense of freedom of expression. He concluded:

> "It seems to us that the case such as this requires consideration of the weight that should be given to the fact that the information in this case had been received by Ms Goodall in confidence, and, furthermore, under a contractual duty of confidence. This factor received little recognition in the submissions of counsel or, indeed, in Blackburn J's judgement."

Because the information in the Journal was disclosed to the *Mail on Sunday* by Ms Goodall—an employee in the Prince's Private Office—in circumstances and under a contract that placed her under a duty to keep the contents of the Journal confidential there was a strong public interest in preserving the confidentiality of private journals and communications within private offices. There was an important public interest in employees in the position of Ms Goodall respecting the obligations of confidence that they had assumed. "Both the nature of the information and the relationship of confidence under which it was received weigh heavily in the balance in favour of Prince Charles," he concluded.[104]

Although the Court stated the appropriate test was that of proportionality it seems that, in such celebrity cases, the existence of a duty of confidence—particularly of a contractual nature—will tip the balance in favour of Article 8 in all but the most exceptional cases.

2.2.2.3 Government Information

2–012 The case of *AG v Jonathan Cape* broadened the scope and reach of the action.[105] Lord Widgery CJ rejected the submission that the principles from *Prince Albert's* case and later authorities could only be applied to private situations.[106] At issue was the publication of the political diaries of Richard Crossman. He had been a cabinet minister under Harold Wilson and an editor of the *New Statesman*.[107] His three volume *Diaries of a Cabinet Minister*, which covered his time in government from 1964 to 1970, became the subject of a major attempt by the government of the day to suppress them on grounds of breach of confidence. He died on 5 April 1974 and his publisher, Jonathan Cape, wanted to run them in the *Sunday Times*. After significant delays in getting any clearance from the Cabinet Secretary[108] the *Sunday Times* went ahead and published.[109] After some preliminary injunctive sparring the matter was tried before Lord Widgery CJ. He noted:

> "I cannot see why the court should be powerless to restrain the publication of public secrets while enjoying the *Argyll* powers in relation to domestic secrets. . .. I conclude, therefore, that when a Cabinet Minister receives information in confidence the improper publication of such

[104] *Prince of Wales v Associated Newspapers Ltd* [2006] [71].
[105] *AG v Jonathan Cape* [1976] QB 752.
[106] *AG v Jonathan Cape* [1976] [769–770].
[107] At one stage he was a putative Prime Ministerial candidate.
[108] John Hunt (later Lord Hunt of Tanworth).
[109] See *Gurry* Chapter 2.143: governmental duties of confidentiality had previously been considered to be covered by the Official Secrets Act 1911.

> information can be restrained by the court, and his obligation is not merely to observe a gentleman's agreement to refrain from publication."[110]

The court decided, however, that personal and government secrets did not necessarily embody the same rights and values. With government secrecy it was necessary to show that the public interest in restraining disclosure outweighed other public interests such as freedom of expression.[111] That required a close examination of the circumstances and the information in question.

> "In these actions we are concerned with the publication of diaries at a time when 11 years have expired since the first recorded events. The Attorney-General must show (a) that such publication would be in breach of confidence; (b) that the public interest requires that the publication be restrained, and (c) that there are no other facts of the public interest contradictory of and more compelling than that relied upon. However, the court, when asked to restrain such a publication, must closely examine the extent to which relief is necessary to ensure that restrictions are not imposed beyond the strict requirement of public need."[112]

Lord Widgery concluded that the information in Crossman's diaries was too old to do any damage and refused the injunction. That is a clear example of the kind of proportionality assessment that becomes more evident as the case law progresses, balancing the need to restrict confidential information against the practical effect of the passage of time.[113] As a result of this case, politicians of all kinds (and their advisors) seek to keep historical diaries, both written and dictated, for publication at an appropriate period after they have left office.

In the *Spycatcher* case at issue were revelations about his work in a book of that name made by Peter Wright, a former MI5 employee with attributed celebrity notoriety.[114]The contents of the book had been disseminated worldwide. Copies were obtainable without difficulty in the UK. The UK government sought to restrain publication in Australia. *The Observer* sought to report those proceedings, which would inevitably involve publication of Peter Wright's revelations, and the Attorney General also sought to restrain that coverage. The House of Lords decided that the duty of confidence arose when confidential information came to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others. There would be no point in imposing a duty of confidence in respect of

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[110] *AG v Jonathan Cape* [1976] QB 752, 769–770.

[111] This is a prescient echo of the balancing exercise required within the Freedom of Information Act 2000 when government or Cabinet secrets are at issue. There is the inevitable argument about the "chilling effect" of any contemporary disclosure which might inhibit advisors or decision-makers which is often counter-balanced by arguments in relation to the passage of time. See most recently *DWP v IC, Slater and Collins* [2015] UKUT 535 (AAC).

[112] *AG v Jonathan Cape* [1976] QB 752, 770–771.

[113] The Supreme Court recently came to the opposite conclusion—in the context of a Freedom of Information Act 2000 request—in *Kennedy v The Charity Commission* [2014] UKSC 20. That decision did open up the possibility of a more positive and nuanced approach as to how *public authorities* might treat the passage of time that engaged Article 10 in general enquiries made to them outside FOIA. This case is awaiting a hearing in Strasbourg at the ECtHR.

[114] *AG v Observer Ltd* [1990] 1 AC 109.

the secrets of the marital bed if newspapers were free to publish those secrets when betrayed to them by the unfaithful partner. When trade secrets are betrayed by a confidant it is usually the third party who exploits the information and it is the activity of the third party that must be stopped.

2–013 In this pre-HRA world the court significantly, and untypically, was comfortable looking to Article 10 of the Convention for external support and justification of its domestic decision about how the common law should develop. Lord Griffiths' view was trenchant. He noted that the newspapers wanted to publish as much of *Spycatcher* as they could under the fair dealing exception in copyright law and to comment on the contents of the book. They had played no part in the publication of *Spycatcher* and wanted to draw only on what was in the public domain asserting that the information had lost the quality of confidentiality and that they were in no way "tainted" by Peter Wright's breach of confidence and should be free to publish.

> "In the context of a claim to protect a private confidence, this would be a conclusive answer to the claim. But we are not here dealing with a claim to protect a private confidence. We are dealing with an undoubted breach of confidence by a member of the Security Services and a claim that to continue that breach by further publication of *Spycatcher* in this country would damage the future operation of our Security and Intelligence Services and thus imperil national security. The court cannot brush aside such a claim supported as it is by the evidence of the Secretary to the Cabinet. This is the detriment to the public interest that the Attorney-General identifies as justifying a continuing ban on *Spycatcher*. It must be examined and weighed against the other countervailing public interest of freedom of speech and the right of the people in a democracy to be informed by a free press.
>
> Article 10 of the Convention. . . .identifies "the interests of national security" and "preventing the disclosure of information received in confidence" as separate grounds upon which the right to freedom of expression may, in some circumstances, have to be restricted. I see no reason why our law should take a different approach. . . .[115]

Of equal significance is that, when *Spycatcher* was taken to the ECtHR, Strasbourg's approach to the Article 10 issue came to a different conclusion.[116] The court found that the aims of the restriction to maintain the authority of the judiciary and to protect interests of national security were legitimate. However, the case turned on the requirement that restrictions should be necessary in a democratic society. The circumstances in which the initial interlocutory injunction was obtained were very different from those existing at the time it was continued.[117] Suppression could no longer be justified on the grounds of breach of confidentiality or detriment to the AG's case because any damage had already been done. The continuation of the interlocutory injunctions was not proportionate and represented a restriction of the media's freedom to inform its readers of a matter of legitimate public concern.

The comparisons between the domestic and the European result highlight the lack of appreciation of issues of proportionality in the House of Lords at this stage, 1990, 10 years away from the HRA coming into force. It was not enough to seek to pray in aid the analogy of Article 10 in its decision

[115] *AG v Observer Ltd* [1990] 1 AC 109, 272–273.

[116] *Observer v United Kingdom* (1992) 14 E.H.R.R. 153.

[117] In July 1986 the interlocutory relief granted was proportionate to objectives underlying the application. However, by 30 July 1987, the book had been published in the United States and no attempt had been made to suppress its importation to the UK.

making: for a proportionate result it should also have considered a wider, practical horizon and context, despite the margin of appreciation accorded to national law by Strasbourg.

Spycatcher's significance in terms of this book is not as a celebrity privacy case but in the way in which breaches of confidence were extended by the case to third parties into whose hands the confidential information came. This included situations where the media surreptitiously had acquired information that they knew or ought to have known was secret.[118]

2.3 Permitted Interference

2–014 The discussion above examined the nature and categorisation of the privacy rights protected in breach of confidence. This next section looks in greater detail at where the courts or legislation have considered arguments or expressions relating to interference with those rights. The focus is on attributed celebrity cases and seeks to identify any transposition of equitable principles into expressions of proportionality.

2.3.1 Equitable Roots: "Just Cause or Excuse"

2–015 The major permitted interference in this area relates to the public interest defence. One of the early cases in this area, *Gartside v Outram*[119] seemed to proceed on the basis that what amounted to "just cause or excuse" was really a mechanism for the defendant to argue that no confidence arose after the elements of the action had been made out.[120] The foundation of the just cause or excuse defence was clarified by Lord Denning MR.[121] He stated that it should

> "extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always – and this is essential – that the disclosure is justified in the public interest. The reason is because "no private obligations can dispense with the universal one which lies on every member of the society to discover every design which may be formed contrary to the laws of the society, to destroy the public welfare": *Annesely v Anglesey* (Earl)."[122]

[118] See also *Shelley Films Ltd v Rex Features Ltd* [1994] EMLR 134 and *Creation Records Ltd v NGN* [1997] E.M.L.R. 444.

[119] *Gartside v Outram* (1857) 26 LJ Ch 113, 114 (Wood V-C)

[120] This approach was categorised as "picturesque if somewhat imprecise" and "not so much a rule of law as an invitation to judicial idiosyncrasy by deciding each case on an ad hoc basis as to whether, on the facts overall, it is better to respect or override the obligation of confidence" by Gummow J in *Corrs Pavey Whiting & Byrne v Collector of Customs* (Vic) (1987) 14 FCR 434, 451–8 (FCA). In short, a random approach that did not recognise issues of proportionality or balance in achieving the final outcome.

[121] *Initial Services Ltd v Putterill* [1968] 1 QB 396.

[122] *Initial Services Ltd v Putterill* [1968] 405.

2.3.2 Lord Denning switches on truth and turns off "false light"

2–016 An example of permitted intrusion is the 1977 case of *Woodward v Hutchins*.[123] The pop singers Tom Jones, Englebert Humperdinck and Gilbert O'Sullivan parted company with Christopher Hutchins, their press agent, in 1976. His task had been to project their private and public lives in a favourable light and he had toured with them extensively. He then wrote a series of articles for the *Daily Mirror* seeking to correct "fallacies and half-truths" about their lives and careers. Litigation began after the first article was published about the lives and careers of the plaintiffs focusing on why Mrs Jones threw her jewellery from a car window, and how the pop star got high and what he did thereafter in a jumbo jet. It went on to preview detailed revelations of his infidelity.[124] Hutchins had originally signed a contract agreeing to respect all confidences obtained during his employment but stated that he had torn this up in the presence of the managing director of the celebrities' management company.

Lord Denning MR, in discharging the injunction, made it clear that he did not regard the case as an ordinary breach of confidence matter.

> "There is no doubt whatever that this pop group sought publicity. They wanted to have themselves presented to the public in a favourable light so that audiences would come to hear them and support them. Mr Hutchins was engaged so as to produce. . ..this favourable image, not only of their public lives but of their private lives also. If a group of this kind seek publicity which is to their advantage, it seems to me that they cannot complain if a servant or employee of theirs afterwards discloses the truth about them. If the image which they fostered was not a true image, it is in the public interest that it should be corrected. In these cases of confidential information it is a question of balancing the public interest in maintaining the confidence against the public interest in knowing the truth. . ..As there should be 'truth in advertising', so there should be truth in publicity. The public should not be misled."[125]

The reasoning Lord Denning offered—supported by his two colleagues—is relatively brief and under-developed. This is the general problem with the exploration of the public interest cases within breach of confidence. It is difficult to gauge exactly how far the defence goes beyond the disclosure of iniquity.[126] Lord Denning took the view that the incident on the Jumbo jet was in the public domain because it was known to all the passengers on the flight.[127] The reality, however, was that no accounts of what had happened on the flight had ever been published before the *Daily Mirror's* revelations.[128]

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[123] *Woodward v Hutchins* [1977] 2 All E.R. 751.

[124] The woman in question was Marjorie Wallace, a former Miss World. In 22 April 2012 Tom Jones admitted to the *Daily Telegraph* sleeping with 250 groupie in one year.

[125] *Woodward v Hutchins* 754.

[126] Another example comes from Ungoed-Thomas J in *Beloff v Pressdram* [1973] 1 All E.R. 241: "The defence of public interest clearly covers and, in the authorities does not extend beyond, disclosure, which as Lord Denning emphasised must be disclosure justified in the public interest, but matters, carried out or contemplated, in breach of the country's security, or its people, including matters medically dangerous to the public; and doubtless other misdeeds of similar gravity."

[127] *Woodward v Hutchins* 755.

[128] Now, doubtless, all the passengers on such a flight would have made *Twitter* posts about it and clearly put the information in the public domain.

Significantly he regarded the breach of confidence action as having been inserted in an attempt to obtain an injunction when, in libel, the injunction could have been resisted.[129] This is an early manifestation of the *John Terry* problem in this celebrity area.[130]

The following year Lord Denning declined to prevent John Lennon's first wife, Cynthia, telling her story to the *News of the World*. He distinguished *Argyll v Argyll*[131] on the basis that there was so much in the public domain already about their marriage including a 1972 article by their former chauffeur "which exposed the immorality and misdeeds of this couple and others in their goings on".[132]

2–017 It was this line of Lord Denning's reasoning that took away Naomi Campbell's breach of confidence claim as it moved to the Court of Appeal in 2003. Having been photographed coming out of a Narcotics Anonymous (NA) meeting, the headline alongside the photograph read "*Naomi: I'm a drug addict*". The article contained in very general terms information relating to her treatment for drug addiction, including the number of NA meetings she had attended. She had no option but to concede that there *was* a public interest justifying publication of the fact that she was a drug addict and was having therapy and her success in the case was limited to the misuse of private information about NA, the length and type of her treatment and the use of photographs of her leaving the NA meetings.[133]

The significance of *Campbell*—like the earlier case of *Woodward v Hutchins*[134]—is the way in which the public interest defence operated (belatedly it might be thought) to prevent the continuation of a false image. Naomi Campbell pretended she had not used drugs. Tom Jones and Englebert Humperdinck had pretended to be "clean living".

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[129] *Woodward v Hutchins* 755: "Just as in libel, the courts do not grant an interlocutory injunction to restrain publication of the truth or of fair comment. So also with confidential information. If there is a legitimate ground for supposing that it is in the public interest for it to be disclosed, the courts should not restrain it by an interlocutory injunction, but should leave the complainant to his remedy in damages. [If] the plaintiffs failed in. . ..libel on the ground that all that was said was true. . . .[it] would seem unlikely that there would be much damages awarded for breach of confidentiality. I cannot help feeling that the plaintiffs' real complaint here is that the words are defamatory; and as they cannot get an interlocutory injunction on that ground, nor should they on confidential information."

[130] *John Terry (formerly LNS) v Persons Unknown* [2010] EWHC 119 (QB). Misuse of private information injunction refused by Tugendhat J because the footballer was seeking to use the action to preserve his sponsorship image and avoid the defamation rule in *Bonnard v Perryman*.

[131] *Argyll v Argyll* [1967] Ch 302.

[132] *Lennon v NGN and Twist* [1978] FSR 573, 575 per Lord Denning: "One only has to read these articles all the way through to show that each of them is making money by publishing the most intimate details about one another and accusing one another of this, that and the other, and so forth. It is all in the public domain."

[133] Here s.13 Data Protection Act 1998 damages claim also succeeded.

[134] *Woodward v Hutchins* [1977] 1WLR 760: Tom Jones' and Englebert Humperdinck's press agent—whose job had been to generate favourable publicity for them when he worked for them—described an earlier version to the *Daily Mirror* after he had left involving episodes of drink, sex and other matters. The Court of Appeal discharged an injunction against him. Bridge LJ: "It seems to me that those who seek and welcome publicity of every kind bearing upon their private lives so long as it shows them in a favourable light are in no position to complain of an invasion of their privacy which shows them in an unfavourable light."

Naomi Campbell herself had faced an earlier *Woodward v Hutchins*-type situation in *Campbell v Frisbee*.[135] Her manager's contract included a clause agreeing to keep confidential any personal or professional matters learned during her employment with Ms Campbell. When their relationship disintegrated—because Vanessa Frisbee claimed she had been violently assaulted—Ms Frisbee took the assaults as repudiation of the contract. She then gave an interview to the *News of the World* about various sexual encounters between Ms Campbell and the actor Joseph Fiennes.[136] On appeal the court held it was at least arguable that Ms Frisbee had a public interest defence, as Ms Campbell had painted a false picture of herself to the public as a reformed and stable individual who was engaged to be married. Ms Frisbee's appeal against summary judgment was allowed. What the case did not clarify was the weight to be attached to a contractual term imposing confidentiality.[137] The issue in this case was whether, notwithstanding the alleged repudiation of the contract by the actions of Ms Campbell in attacking Ms Frisbee, the obligation of confidence could nevertheless be enforced. Lightman J at first instance had held that it could. The Court of Appeal held "reluctantly" that at the Summary Judgment stage that view was too robust.[138] Lord Phillips MR observed:

> "The courts are in the process of adapting the law of confidentiality in the light of the Human Rights Act 1998 in order to reflect the conflicting Convention rights of respect for private and family life and freedom of expression. In *Campbell v Mirror Group Newspapers* Miss Campbell largely resolved this conflict by conceding that the defendants were entitled to publish the fact that she was a drug addict in order to 'set the record straight'. It seems unlikely that any similar narrowing of the issues will occur in the present case."[139]

Another example of a breach of a confidence claim failing because the information corrected the attributed celebrities' false light presentation of their married life involved David and Victoria Beckham and their former nanny, Abbie Gibson.[140] The *News of the World* ran a seven-page article about their marriage having reached "breaking point": Mr Beckham wanted "to split" and that Mrs Beckham had been in tears over rumours of his affairs with other women. Ms Gibson was the source. There was a confidentiality clause in her original contract of employment. The injunction—seeking to prevent further revelations—was refused on the basis that the couple were seeking to present themselves as a couple without marital difficulties and, on balance, the matter should be resolved at trial and, if appropriate, with damages.[141]

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[135] *Campbell v Frisbee* [2002] EWCA Civ 1374.

[136] The significance of those was that Ms Campbell was engaged to Flavio Briatore, the Renault F1 team manager, at the time.

[137] Contrast Walker LJ in *London Regional Transport v Mayor of London* [2001] EWCA Civ 1491 at [46] and the previously referenced *AG v Barker* [1990] 3 All ER 257, 260.

[138] Ibid [35]: "We say 'reluctant' because, while this case may provide a valuable addition to the developing jurisprudence on the right to privacy if it proceeds to trial, the costs involved in the provision of that benefit are likely to be disproportionate to what is at stake in terms of damages or an account of profits."

[139] *Campbell v Frisbee* [2002] EWCA Civ 1374 [33].

[140] Unreported proceedings—save in *PA Media Lawyer* 25 April 2005—of proceedings in the High Court on 24 April 2005.

[141] The Professional Association of Nursery Nurses has a sample contract for Nannies which

2.3.3 . . .but "truth" has its limits if illegally obtained

2–018 A more rigorous approach from Sir John Donaldson MR, where the public interest defence did not prevail, is *Francome v MGN*.[142] The newspaper obtained from an undisclosed source a number of taped telephone conversations made by a well-known and very successful jockey—an attributed celebrity—and his wife.[143] The tapes revealed breaches by John Francome of certain Jockey Club regulations and possibly the commission by him of criminal offences and the newspaper put him on warning of publication. The action against MGN sought damages for trespass or breach of confidence and an injunction restraining the defendants from publishing material based on the tapes or any transcript made from them. MGN argued it had not been a party to the trespass, there was no right of action against it or its source for breach of confidence regarding telephone conversations since users had to accept the inherent risk of eavesdropping by reason of, inter alia, crossed lines and official telephone tapping, and because s.5 did not confer any private right in respect of illegal telephone tapping. MGN argued further it was entitled to rely on the "iniquity rule" that publication was justified as being in the public interest because it would expose conduct which involved a breach of the law or was contrary to the public interest.[144] The judge granted an injunction restraining publication and ordered the defendants to disclose the source from which they had obtained the tapes. The Court of Appeal held the Francomes were entitled to protect confidential material in their private telephone conversations. The illegal tapping of their telephone breached their right to the confidentiality.[145] Significantly, the fact that the plaintiffs' cause of action was for breach of confidence meant that the principles relating to justifiable publication of defamatory material did not apply.[146] This is a line of argument that has continued into the new action of misuse of private information, examined in the next chapter. Accordingly, in the exercise of its discretion to preserve the rights of the parties pending trial, the court would uphold the injunction restraining publication of the taped material, since the balance of justice or convenience lay in the plaintiffs' favour.[147] In a parliamentary democracy

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includes the statement: "It is a condition of employment that now and at all times in the future, save as may be lawfully required, the employee shall keep the affairs and concerns of the householder and its transaction and business confidential."

[142] *Francome v MGN* [1984] 2 All ER 408.

[143] The tapes had been made by illegal tapping of the plaintiffs' telephone in circumstances not involving the defendants but which constituted a criminal offence under s.5a of the Wireless Telegraphy Act 1949. Section 5 further provided that disclosure of any information obtained as a result of illegal telephone tapping was also an offence.

[144] MGN also argued that the injunction restraining it from committing a criminal offence under s.5 of the 1949 Act could only be granted by the Attorney General, that in reality the claim would lie in defamation after publication, in defence of which justification would be pleaded and—as a result—an injunction could not be issued. It also claimed that it was protected by s.10 of the Contempt of Court Act 1981 from disclosing its source.

[145] The plaintiffs also had an arguable case that they had private rights under s.5 of the 1949 Act and therefore they were entitled to an injunction to preserve their rights pending trial.

[146] This is a clear distinction between Lord Denning MR's approach in *Woodward v Hutchins* [1977] 2 All ER 751, 755.

[147] However, an order for the disclosure of the identity of MGN's source was inappropriate at

obedience to the law was not a question of choice, apart from the extremely rare exception of the moral imperative.

The proposition that citizens are free to commit a criminal offence where they have formed the view that it will further what they believe to be the public interest is inimical to the rule of law and parliamentary democracy.[148] This proposition has only been strengthened by the issues raised in the Leveson Report about media conduct and phone hacking generally. What remains latent and unresolved, however, is in the issues such as those posed by the effect of the Bribery Act 2011. Those are explored in more detail later in this chapter.[149]

2.4 A breach which failed to qualify for protection: *Kaye v Robertson* (1991)

2–019 In the example which follows it might have been thought that the law in relation to breach of confidence could have provided an effective remedy but in *Kaye v Robertson & Sport Newspapers Ltd*[150] the reality is that breach of confidence was never pleaded. That was because his counsel[151] took the view that there was no recognisable relationship between Gorden Kaye and the newspaper on which to found the breach.[152] Kaye was a well-known attributed celebrity television actor[153] recovering in hospital from a serious car crash and damage to his head. Two journalists had gained access to his private room in the hospital, took photographs and purported to conduct an interview with him.[154] This was despite his vulnerability and the breach of self-evident medical confidences.[155–156] The most the court managed was to continue an injunction preventing publication on the basis that publication could involve a malicious falsehood. That was on the basis that Kaye could not have given informed consent to the interview because of his injuries.

But between the matter being heard in the High Court by Potter J and in

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the interlocutory stage since once the source was disclosed there would be no point in having a trial on that issue.

148 *Francome v MGN* [1984] 2 All ER 408, per Sir John Donaldson MR 412–413 and Fox LJ 415.

149 See 2.6

150 *Kaye v Robertson & Sport Newspapers Ltd* [1991] F.S.R. 62.

151 Andrew Caldecott appeared for Mr Kaye against Patrick Milmo QC for the editor of the *Sunday Sport*. He was not able to pray in aid *Pollard v Photographic Co* (1888) 40 Ch D 345 because, in that case, the photograph had been commissioned and paid for.

152 Scott LJ, writing extra-judicially, asked "Why not?" in *Confidentiality and the Law* (London LLP, 1991) xxiii.

153 The star of *'Allo, 'Allo*.

154 Leggatt LJ's final paragraph is telling: "We do not need a First Amendment to preserve the freedom of the press, but the abuse of that freedom can be ensured only by the enforcement of a right to privacy. This right has so long been disregarded here that it can be recognised now only by the legislature. Especially since there is available in the United States a wealth of experience of the enforcement of this right both at common law and also under statute, it is to be hoped that the making good of this signal shortcoming in our law will not be long delayed."

155–156 Notices specifically restricting access to Gorden Kaye had been placed on the door of his private room at the Charing Cross Hospital by the hospital authorities and his agent.

the interlocutory matters in the Court of Appeal ahead of *that* court's final decision – the *Sunday Sport* had been permitted to use the illicitly-taken hospital pictures of the actor on its 4 March 1990 front page providing it made it clear that it had not been granted permission to take them. Hence the headline: "*Bedside shots taken without consent. TV Star Rene . . ..the photos he tried to ban. Amazing sneak pictures*."[157] The newspaper's activity—without the restraint of any privacy or image rights and only the fig-leaf of a generously-worded court order—was extreme with the benefit a broader historical picture of how this area then developed. In terms of the European civil codes in Germany and France at the time this English press activity must have seemed extraordinary because—when the pictures were taken—the images of Kaye could well have been the kind of "deathbed" images that led those countries to introduce protection for an individual's image rights.[158]

If the *Kaye* case occurred now the attributed celebrity actor would be given protection to prevent a misuse of his private information. He had a reasonable expectation of privacy, given the medical treatment being received. Adopting Lord Steyn's 2004 *Re S* formulation, although both Article 8 and Article 10 start with equal weighting the "intense focus" on the comparative rights being claimed reveals Article 8 private health issues with stronger clarity than the Article 10 right to know that the actor had suffered serious head injuries. Applying the "ultimate balancing test" of proportionality—it is contended—would have favoured the protection of the private information. In that admittedly unusual context, it reveals the severe limitations of the breach of confidence action.

2.5 Remedies

2–020 As the authors of *Gurry* have noted, the remedies reveal the flexibility of the action for breach of confidence while at the same time exposing the lingering problems raised by the action's jurisdictional basis.[159] While the courts have a formidable armoury of remedies available, the deployment of them can sometimes be complicated by this uncertainty. The remedies include injunctions, delivery up and monetary remedies whether termed equitable compensation or damages. The ECHR requires that the remedies available are practical and effective to support the rights granted under the Convention.[160]

Equally important, the legal basis for calculating the quantum of damages has recently (subject to permission to appeal being granted)[161] been

[157] [1991] F.S.R. 62.

[158] Lord Bingham, one of the three judges in the case, said as much in the opening paragraphs of his judgment: "Any reasonable and fair-minded person hearing the facts which Glidewell LJ has recited would conclude that these defendants had wronged the plaintiff. I am. . . .pleased. . . . that the plaintiff is able to establish. . . .a cause of action. . ..in malicious falsehood."

[159] Gurry *Breach of Confidence* 2nd edn 2012 [17.01].

[160] *Von Hannover v Germany 1* (2005) 40 EHRR 1 [71] and *Armonas v Lithuania* (2009) 48 E.H.R.R. 53 [38].

[161] Permission to appeal in *Gulati* was sought on 10 June 2015. The grounds were that (i) the awards are out of all proportion to the harm suffered when consideration was given to the

re-calibrated by Mann J in *Gulati v MGN*[162] in a manner—it is suggested—that reaches across the range of privacy regimes beyond Misuse of Private Information to include Breach of Confidence, Protection from Harassment and Data Protection.[163]

Historically the key equitable elements were the requirements that "he who comes into equity must do so with clean hands" and "he who seeks equity must do equity". These equitable maxims gave courts a discretion about how and when they might be exercised on behalf of one party or another. Other criteria which allowed courts to deny equitable relief on discretionary grounds were the doctrines of laches, acquiescence and delay, all of which could prevent claimants who sought to disadvantage other parties by failing to act with reasonable speed.

2.5.1 Injunctions

2–021 The primary remedy in breach of confidence cases (as with other privacy regimes such as misuse of private information dealt with in the next chapter) is the injunction—either interim or final—as has been seen in the discussion of most of the cases in the preceding sections of this chapter.

The principles governing the grant of interim injunctions are reflected by Lord Diplock's judgment for the House of Lords in *American Cyanamid Co v Ethicon*.[164] His remarks can be seen as pre-figuring the concept of proportionality in this area. He stated that the proper test was first to assess whether there was a serious question to be tried, secondly to consider whether damages would be an adequate remedy for the party injured by the grant of—or refusal to grant—an interim injunction and finally where the balance of convenience (or the balance of injustice) lay.[165]

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accepted scale of damages for personal injuries. The judge erred by proceeding on the basis that the global award did not need to be proportionate to that scale and that he could focus on compensation by adopting a "single wrong by single wrong" basis for compensation; (ii) the size of the awards was disproportionate by reference to awards by the ECHR for breaches of privacy; (iii) there has been double-counting in the awards of damages: first in awarding damages for the fact of hacking, having already made awards for published articles; second for awarding an additional sum for general upset and effect on relationships; and third for treating each article in isolation and (iv) Mann J was wrong to reject MGN's submission that damages for breach of privacy were compensation for injured feelings and were not intended to mark wrongdoing, such damages being vindicatory in effect and therefore contrary to the principles stated in *Lumba (WL) v Secretary of State for the Home Department* [2011] UKSC 12.

[162] *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch).

[163] This is explored in more detail in 2.5.3.1 and 2.5.3.2.

[164] *American Cyanamid Co v Ethicon* [1975] AC 396.

[165] See also *Cartier International and Others v BSkyB & Ors* [2014] EWHC 3354 (Ch), where the proportionality issues considered by Arnold J about whether a number of trade mark holders could be granted site-blocking injunctions against ISPs clearly have a broader, privacy resonance in terms of the potential for injunctions. In *Cartier* there was well-established authority that such injunctions could be granted to protect copyright under s.97A of the CDPA 1988 but there was no equivalent statutory provision in relation to online trade mark infringement. Arnold J found it in the general jurisdiction set out in s.37(1) of the Senior Courts Act 1981: "The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so". He held that gave the Court unlimited power to grant injunctions (relying on *Samsung Electronics (UK) Ltd v Apple Inc*

Since the HRA, special, more onerous rules under s.12 apply where Article 10 freedom of expression rights may be affected. These were enunciated by Lord Nicholls in *Cream Holdings v Banerjee* and come very close, in practice, to the high balance of probabilities standard that would be used in full trial. There is leeway, however, because an injunction with a short return date can be granted before fuller consideration is given to whether to maintain it or discharge it.[166] Section 12 (3) of the HRA states that

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

In *Browne v Associated Newspapers* the Court of Appeal set out the approach to be used when cases related to the right to privacy. The applicant first had to establish the engagement of an arguable Article 8 right. Then the respondent had to establish the engagement of an arguable Article 10 right. Only then would the merits of the respected cases to be considered in the light of s.12(3).[167] The governing principle in determining where the balance of convenience lay required an exploration of two contrary positions. Firstly, if the injunction was refused, would the claimant be adequately compensated in damages at full trial? If so then the interim injunction should not normally be granted. Secondly, if the injunction was granted would the defendant be adequately compensated by the claimants undertaking in damages for the loss sustained by the injunction.

In breach of confidence and misuse of private information cases the balance of convenience test has effectively been replaced by the concept of proportionality as expressed earlier by Lord Steyn in *Re S*:

> ". . .. First, neither article [8 nor 10] 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."[168]

([2012] EWCA Civ 1339). In that case the Court of Appeal upheld an order against Apple requiring it to publicise the court's decision by a notice and hyperlink on its website. This "publicity order" was a mandatory injunction which did not support any legal or equitable right and was not the result of any "unconscionable conduct" by Apple. For an injunction to be granted, the facts of the case and issues of proportionality had to be considered as well as the extent of the interference with the rights of others. The proportionality aspects he considered were "i) The comparative importance of the rights that are engaged and the justifications for interfering with those rights. ii) The availability of alternative measures which are less onerous. iii) The efficacy of the measures which the orders require to be adopted by the ISPs, and in particular whether they will seriously discourage the ISPs' subscribers from accessing the Target Websites. iv) The costs associated with those measures, and in particular the costs of implementing the measures. v) The dissuasiveness of those measures. vi) The impact of those measures on lawful users of the internet" [189]. See also the Canadian case of *Equuestek Solutions v Google Inc* (2015 BCCA 265) dismissing Google's appeal against a worldwide injunction ordering it to remove websites from search results (2014 BCSC 1063).

166 *Cream Holdings v Banerjee* [2004] UKHL 44 [15].

167 *Browne v Associated Newspapers* [2007] EWCA Civ 295 [23] (Clarke MR).

168 *Re S (A Child)* [2004] UKHL 47.

In this sense proportionality can be seen as a judicial tool, a compass, a discipline for navigating the competing currents between conflicting rights that was never available to pre-HRA judicial decision-making dealing with equitable or quasi-equitable principles. It is not as if proportionality had not been considered prior to the HRA. It had.[169] The absence of a fundamental rights document—subsequently enshrined in the HRA—had impeded its development. This required the Convention right(s) to be tested against the objective being pursued. The interaction between these two inputs and the values they represented in any specific case was then assessed to determine the legitimacy of the measure. In this sense proportionality was a "branch of reasonableness" or a "correctness" test.[170]

2.5.2 The unusual case of *James Rhodes v OPO*[171]

2–022 One of the several unusual features of this case—which involved the concert pianist, author and television filmmaker James Rhodes—was that it related to Mr Rhodes' Article 10 freedom of expression rights to publish his own autobiography. He was faced with a Court of Appeal decision agreeing with an injunction application by his former wife, the mother of their 12-year-old son, which would have prevented him from publishing *Instrumental*, a book about his life that contained certain passages which she considered risked causing psychological harm to their son who was aged 12.[172]

The Supreme Court had to resolve how injunctive actions based on the tort generally known as intentionally causing physical or psychological harm, derived from the late-19th century case of *Wilkinson v Downton*,[173] applied to this situation. What was the proper scope of the tort in the modern law and, in particular, could it ever be used to prevent a person from publishing true information about himself?

The Supreme Court judgment explained the context of the book.[174]

> ". . ..The author believes that 'music has, quite literally saved my life and, I believe, the lives of countless others. It has provided company where there is none, understanding where there is confusion, comfort where there is distress, and sheer, unpolluted energy where there is a hollow shell of brokenness and fatigue'. He wants to communicate some of what music can do, by providing a sound track to the story of his life. 'And woven throughout is going to be my life story. Because it's a story that provides proof that music is the answer to the unanswerable. The basis for my conviction about that is that I would not exist, let alone exist productively, solidly – and, on occasion, happily – without music.' So the book juxtaposes descriptions of particular pieces of music, why he has chosen them, what they mean to him, and the composers who wrote them, with episodes of autobiography. He wants the reader to listen to the 20 music tracks while reading the chapters to which they relate.

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169 *Council of Civil Service Unions v Minister of State for the Civil Service* [1985] AC 374. Also J. Jowell and A. Lester *Proportionality: Neither Novel Nor Dangerous* Stevens 1988.

170 A detailed exposition of the dynamics of proportionality in this area can be found in Alan D.P. Brady *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach* (Cambridge University Press, 2012).

171 *James Rhodes v OPO* [2015] UKSC 32.

172 The mother and son lived in the US, outside the jurisdiction of the Family Court in England and Wales to grant orders protecting the child's welfare.

173 *Wilkinson v Downton* [1897] 2 QB 57.

174 *James Rhodes v OPO* [2015] UKSC 32 [3 – 5].

Thus far, there would be nothing for anyone to worry about. But the author's life has been a shocking one. And this is because, as he explains in the first of the passages to which exception is taken, 'I was used, fucked, broken, toyed with and violated from the age of six. Over and over for years and years'. In the second of those passages, he explains how he was groomed and abused by Mr Lee, the boxing coach at his first prep school, and how wrong it is to call what happened to him 'abuse':

> 'Abuse. What a word. Rape is better. Abuse is when you tell a traffic warden to fuck off. It isn't abuse when a 40 year old man forces his cock inside a six-year-old boy's ass. That doesn't even come close to abuse. That is aggressive rape. It leads to multiple surgeries, scars (inside and out), tics, OCD, depression, suicidal ideation, vigorous self-harm, alcoholism, drug addiction, the most fucked-up of sexual hang-ups, gender confusion ('you look like a girl, are you sure you're not a little girl?'), sexuality confusion, paranoia, mistrust, compulsive lying, eating disorders, PTSD, DID (the shinier name for multiple personality disorder) and so on and on and on.
>
> I went, literally overnight, from a dancing, spinning, giggling alive kid who was enjoying the safety and adventure of a new school, to a walled-off, cement shoed, lights-out automaton. It was immediate and shocking, like happily walking down a sunny path and suddenly having a trapdoor open and dump you into a freezing cold lake.
>
> You want to know how to rip the child out of a child? Fuck him.
>
> Fuck him repeatedly. Hit him. Hold him down and shove things inside him. Tell him things about himself that can only be true in the youngest of minds before logic and reason are fully formed and they will take hold of him and become an integral, unquestioned part of his being.'

He describes how he learnt to dissociate himself from what was happening, to block it out of his memory, how when he moved to other schools he had learnt to offer sexual favours to older boys and teachers in return for sweets and other treats. He gives a searing account of the physical harms he suffered as a result of the years of rape and of the psychological effects, which made it hard for him to form relationships and left him with an enduring sense of shame and self loathing."

The Supreme Court considered the history of *Wilkinson v Downton*.[175] It noted that the order made by the Court of Appeal was novel in two respects. The material which Mr Rhodes was banned from publishing was not "deceptive or intimidatory but autobiographical" and the ban was principally directed, not to the substance of the autobiographical material, but to the "vivid form of language used to communicate it".[176] The conduct element of *Wilkinson v Downton* required

> ". . . .words or conduct directed towards the claimant for which there is no justification or reasonable excuse, and the burden of proof is on the claimant. We are concerned in this case with the curtailment of freedom of speech, which gives rise to its own particular considerations. We agree with the approach of the Court of Appeal in regarding the tort as confined to those towards whom the relevant words or conduct were directed, but they may be a group. A person who shouts 'fire' in a cinema, when there is no fire, is addressing himself to the audience. In the present case the Court of Appeal treated the publication of the book as conduct directed towards the claimant and considered that the question of justification had therefore to be judged vis-à-vis him. In this respect we consider that they erred."[177]

2–023 This was because the book was written for a wide audience and the question of justification had to be considered accordingly, not in relation to

[175] *James Rhodes v OPO* [2015] [55]: "There appear to have been no reported cases in this country on *Wilkinson v Downton* for. . ..70 years or so. In the last 25 years it has had a modest resurgence in the context of harassment: *Khorasandjian v Bush* [1993] QB 727; *Wong v Parkside Health NHS Trust* [2001] EWCA Civ 1721, *Wainwright v Home Office* [2003] UKHL 53."

[176] *Rhodes* [72].

[177] *Rhodes* [74].

the 12-year-old boy in isolation. His father's case was that, although the book was dedicated to his son, he would not expect him to see it until he was much older. In the Court of Appeal Arden LJ had held that there could be no justification for the publication if it was likely to cause psychiatric harm to him. That approach excluded consideration of the wider question of justification based on the legitimate interest of the defendant "in telling his story to the world at large in the way in which he wishes to tell it, and the corresponding interest of the public in hearing his story".[178]

The judgment disapproved with the Court of Appeal's attempt to "editorialise", particularly in relation to interlocutory injunctions.

> "The Court of Appeal recognised that the appellant had a right to tell his story, but they held for the purposes of an interlocutory injunction that it was arguably unjustifiable for him to do so in graphic language. The injunction permits publication of the book only in a bowdlerised version. This presents problems both as a matter of principle and in the form of the injunction. As to the former, the book's revelation of what it meant to the appellant to undergo his experience of abuse as a child, and how it has continued to affect him throughout his life, is communicated through the brutal language which he uses. His writing contains dark descriptions of emotional hell, self-hatred and rage, as can be seen in the extracts which we have set out. The reader gains an insight into his pain but also his resilience and achievements. To lighten the darkness would reduce its effect. The court has taken editorial control over the manner in which the appellant's story is expressed. A right to convey information to the public carries with it a right to choose the language in which it is expressed in order to convey the information most effectively."[179]

The Supreme Court—which had heard the appeal on an expedited basis because of the recognised importance of resolving the freedom of speech issues in a timely fashion—concluded that there was no basis for supposing that Mr Rhodes had an actual intention of causing psychiatric harm or severe mental or emotional distress to his son.[180] Also, that there was no arguable case that the publication of the book would constitute the requisite conduct element of *Wilkinson v Downton* or that the father had the requisite mental element.[181]

2.5.3 Damages

2.5.3.1. The Traditional Approach

2–024 The pre-*Gulati* view of damages in this area was that where personal information was concerned, damages were available for any pecuniary loss suffered because of the breach of confidence.[182] They could be awarded to cover hurt feelings,[183] mental distress,[184] loss of dignity[185] and a vindication of the

[178] *Rhodes* [75].
[179] *Rhodes* [78].
[180] *Rhodes* [89].
[181] *Rhodes* [90].
[182] *Douglas v Hello!* [2005] EWCA Civ 595 [243].
[183] *Archer v Williams* [2003] EWHC 1670 (QB) [76].
[184] *McKennitt v Ash* [2005] EWHC 3003 (QB) [165].
[185] *Mosley v NGN* [2008] EWHC 1777 (QB) [49].

right.[186] In terms of quantum, the damages for distress covered a general historical range between £2000 and £5000.

The exceptional case was the award of £60,000 made in the *Mosley* case in 2008.[187] Aggravated damages could be awarded where the defendant's motive was infected by a specific *animus* against the claimant.[188] Exemplary damages—to punish the defendant for what amounts to outrageous conduct—were not available because they were incompatible with Article 10 (2).[189] Eady J, noting that there was no existing authority to justify the extension of exemplary damage into breach of confidence, concluded that granting them in the *Mosley* case would not be proportionate. In effect, they can be accommodated within the general threshold of ordinary damages.

Parliament had considered, in the 2009 Civil Law Reform Bill, whether to put the issues within damages generally into statutory form.[190] It decided not to do this.[191] This decision was clearly influenced by the pre-legislative scrutiny the topic received from the House of Commons Justice Committee. The Justice Committee noted—in terms of exemplary, aggravated, additional and restitutionary damages—that such awards in civil courts were intended

> "to compensate the claimant for financial and non-financial loss following a wrong with the intention that the victim be put in as good a position as he or she would have been if the wrongful act had not been committed. Exemplary damages, however, are an exception to this rule as they are intended to punish the defendant for the wrongful act and consequently an award will 'overcompensate' the victim. Aggravated damages compensate the claimant for injury to feelings when his or her distress was exacerbated by the circumstances in which the injury was caused or by the conduct of the defendant after the wrongful act was committed."[192]

Exemplary damages had developed under the common law and—outside very limited statutory exceptions—a court could only award them in one of two situations. The first was in respect of oppressive, arbitrary or unconstitutional actions by a public servant. The second—with a particular resonance in terms of *Gulati*—was where the defendant's wrongful conduct was calculated to make a profit which might well exceed the compensation payable to the

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[186] *Ashley v Chief Constable of Sussex* [2008] UKHL 25 [21 – 22]: the damages here are to compensate for undermining another person's Convention right.

[187] See R. Jackson *Civil Litigation Costs Review – preliminary report* (The Judiciary, 2009) Appendix 17:2008 privacy awards were £35,000, £37,500, £20,000, £60,000, £10,000, £4000, £6000, £5500 and £1000.

[188] *Rookes v Barnard* [1964] HC 1129 and *Cassel v Broome* [1972] AC 1027.

[189] They are not "prescribed by law" nor "necessary in a democratic society" where compensatory damages are available.

[190] Several of the provisions in the Bill were derived from Law Commission reports. The damages provisions were derived from the following reports published in the late 1990s: "Claims for Wrongful Death" (Law Com No 263); "Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits" (Law Com No 262); and "Aggravated, Exemplary and Restitutionary Damages" (Law Com No 247). The provisions relating to interest derived in part from the Commission's 2004 report "Pre-judgment Interest on Debts and Damages" (Law Com No 295).

[191] HC Deb, 10 January 2011, c8WS.

[192] *http://www.publications.parliament.uk/pa/cm200910/cmselect/cmjust/300/30006.htm* [150].

claimant. The award of exemplary damages was always subject to the overriding discretion of the court not to award them in any particular case.[193]

> "Exemplary damages are controversial. Critics say that their punitive function does not belong in the civil courts and that matters of punishment and deterrence should be the concern of the criminal justice system. In 1997, the Law Commission examined the use issue and concluded that exemplary damages formed an effective deterrence against wrong-doing and that deterrence was a valid aim of the civil courts, separate from the role of the criminal justice system. Removing the profit of wrongdoing from the wrongdoer was, the Commission concluded, a particular deterrence. The Commission recommended the extension of exemplary damages for these reasons."[194]

In November 1999, although the Government accepted other recommendations from the Report, it rejected the proposals on exemplary damages on the grounds that:

> "The purpose of the civil law on damages is to provide compensation for loss, and not to punish. The function of exemplary damages is more appropriate to the criminal law, and their availability in civil proceedings blurs the distinctions between the civil and criminal law. The Government does not intend any further statutory extension of their availability."[195]

Also, it was clear from cases like *Attorney General v Blake* that a defendant who has benefited and profited from the misuse of confidential information could find that the claimant successfully sought an account of profits.[196]

2.5.3.2. The Formulation and Quantification of Privacy Damages in Gulati v MGN[197]

2–025 The case itself arose out of the phone-hacking of celebrities that had become a routine form of news gathering in the early and mid-2000s—among other newspaper titles—those in the Mirror Group. This involved illegally listening to voicemails left for celebrities and constructing news stories around such information. The case involved eight "test" defendant celebrities who had eventually been offered damages by MGN—who admitted liability and apologised for this misconduct[198]—but who believed that what they had been offered by MGN for these egregious wrongs fell significantly short of what they were prepared to accept.[199]

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193 *http://www.publications.parliament.uk/pa/cm200910/cmselect/cmjust/300/30006.htm* [151].
194 *http://www.publications.parliament.uk/pa/cm200910/cmselect/cmjust/300/30006.htm* [152].
195 *http://www.publications.parliament.uk/pa/cm200910/cmselect/cmjust/300/30006.htm* [153].
196 *AG v Blake* [2001] 1 AC 268.
197 *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch)AU [29].
198 Conduct MGN had denied before the Leveson Inquiry.
199 The eight claimants were: Lauren Alcorn (a flight attendant with Virgin Airways and a former girlfriend of footballer Rio Ferdinand), Robert Ashworth (a freelance TV producer of, among other programmes, *Coronation Street* and who had been married to one of its actresses Tracy Shaw), Sadie Frost (an actress and businesswoman formerly married to the actor Jude Law), Paul Gascoigne (a former English international footballer), Shobna Gulati (a former *Coronation Street* star), Shane Roche (stage name "Richie" and best known for his role as Alfie Moon in BBC's *EastEnders*), Lucy Taggart (stage name "Lucy Benjamin" who was Lisa Fowler in *EastEnders*) and Alan Yentob (Director of BBC Programmes in 1997, Director of BBC Television in 1998 and the Creative Director and a member of the BBC's Executive Board).

It fell to Mann J, therefore, to deliver his 712-paragraph judgment after hearing 13 days of evidence and submissions. Key portions of his judgment are quoted below because of the care the Judge took to set out the methodology and the reasons for how, what and why he found as he did.

Generally, he observed, MGN had failed initially to apologise for its actions.

> "Some of the claimants expressed the view, in various ways, that the apologies were triggered by the approach of court proceedings. No-one gave evidence about their genesis, but the timing suggests that they were. They came some months after admissions were made. Insofar as it matters, I find that the apologies were made at least partly as a tactical matter with an eye to the forthcoming trial. That does not mean that the apologies were not genuine, but the timing suggests a tactical element as well.[200]
>
> The defendant chose not to call any witnesses. The claimants deployed a large number of witness statements, but not all witnesses were cross-examined by the defendant. The defendant sought to cross-examine only the claimants, together with one witness lending support to a particular claimant, and the two journalists who gave evidence of the nature and extent of the phone hacking at the Mirror group. In fact, when called, one claimant (Mr Gascoigne) was not cross-examined (to his obvious disappointment)."[201]

He found that all the claimants' witnesses were reliable in the evidence they gave.[202] Importantly, he also had to consider the law in relation to situations where evidence had been lost or destroyed by one of the parties (in this case MGN). He applied the 1722 case of *Armory v Delamirie*.[203] There a defendant was held responsible for the non-production of a jewel where the claim to the value of that jewel was in issue. The jury had been directed to "presume the strongest case against him". Mann J was clear how he should apply that case to the facts before him.

> "The principles flowing from *Armoury v Delamirie* are principles relating to how the court should assess evidence and find facts. They are evidential points designed to govern and assist the process of finding facts when that process has been obstructed by the acts of one of the parties. The facts which might be found in that way and not, as a matter of principle, limited to any particular kinds of facts, or facts relating to any particular area of enquiry. They are facts. Accordingly the principles can be used to assess, for example, the scope and nature of the hacking that went on in terms of period and frequency, and they can be used to assist in assessing the likelihood of an article having its source in phone hacking in the few instances where that is in dispute in these cases. I have borne that in mind."[204]

He was also quite clear about where the difference between the parties lay in respect of the damages for which the claimants could and should be compensated. Several elements had been identified.

> "There is compensation for loss of privacy or 'autonomy' resulting from the hacking or blagging that went on; there is compensation for injury to feelings (including distress); there is

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[200] *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch) [29].
[201] *Gulati v MGN Ltd* [2015] EWHC 1482 [30].
[202] *Gulati v MGN Ltd* [2015] EWHC 1482 [33].
[203] Ibid [86 – 96]. In addition to *Armory v Delamirie* (1722) 1 Strange 505 Mann J also relied on *Indian Oil Corporation v Greenstone Shipping* [1988] QB 345 where Staughton J had commented: "The analogy with *Armory v Delamirie* is striking. If the wrongdoer prevents the innocent party proving how much of his property has been taken, then the wrongdoer is liable to the greatest extent that is possible in the circumstances."
[204] *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch) [96].

compensation for 'damage or affront to dignity or standing'. The defendant disputes this and submits that all that can be compensated for is distress or injury to feelings (I shall use 'distress' as a shorthand for this in this judgement). It is accepted that such things as loss of autonomy are relevant, but only as causes of the distress which is then compensated for. They are not capable of sustaining separate heads compensation. On the assumption that this is right, this takes the defendant into an argument that authority has laid down some bands of distress claims which impose serious limits on the claims in this case, and it is the starting point for its case on methodology for the computation of damages. If it is wrong then the claimants' position enables them to claim in relation to matters going beyond distress, and they have a starting point for a methodology which is said to be capable of getting to much greater damages. This difference of view as to what compensation is for in privacy cases is therefore central to the determination of this case."[205]

In looking at the nature of privacy rights Mann J concluded that **2–026**

"The tort is not a right to be prevented from upset in a particular way. It is a right to have one's privacy respected. Misappropriating (misusing) private information without causing "upset" is still a wrong. I fail to see why it should not, of itself, attract damages. Otherwise the right becomes empty, contrary to what the European jurisprudence requires. Upset adds another basis for damages; it does not provide the only basis."[206]

In terms of Mann J's approach to the consideration of quantum he decided that it should be on the footing that

"compensation can be given for things other than distress, and in particular can be given for the commission of the wrong itself so far as that commission impacts on the values protected by the right."[207]

He decided that it would not be appropriate to grant a global sum to compensate each claimant for the wrong sustained. "The wrongs have too great a degree of separation for that" and the articles published were, in most cases, spread out in time and not analogous to the situation where "the same libel is published in different media as part of a pattern of conduct".

"First there is the general hacking activity. Each of the individuals had their own voicemails (and some of those with whom they rang) hacked frequently (in their own cases daily), with most hacks not resulting directly in an article. The private information was thus acquired and the right to privacy infringed, irrespective of whether an article was published. That fact makes it appropriate to take the activity separately and assess its effect (in terms of compensation) separately from damage arising from publication. It is something in respect of which the claimants are entitled to be compensated and if it is not treated separately from the effect of the articles its real impact may be lost, or perhaps even exaggerated. The only sensible approach is to take it separately from the effect of the articles. It amounts to a separate category of wrong which has to be separately reflected in order to ensure that the objective of the damages award achieves its aim."[208]

This led him to conclude that at least two layers of damages were justified.

". . .. as a starting point, each article should be treated separately in terms of an award of damages. While some of them may have a common or repeated theme, they are not analogous to the repetition of the same libel which might justify a global award from more than

[205] *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch) [108].
[206] *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch) [143].
[207] *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch) [144].
[208] *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch) [155].

> one publication of the libel. Some articles are significantly removed in time from others, and that too makes it inappropriate to lump them all together as if they were part of the same overall damage flowing from a central wrong. They are each capable of giving rise to a separate privacy claim, with separate distress caused. Having said that, an eye must be kept on three things. Firstly, it may be appropriate to take two or more articles together in certain circumstances – perhaps if they are close in time, and/or seem to relate to the same thing or flow from closely related privacy infringements. I shall do that. Second, one must avoid double counting in the form of allowing a global sum for hacking generally, including hacks which gave rise to articles, and then allowing a further "per article" sum which counts again the hack or hacks which gave rise to the article. Third, I have to bear in mind that so far as distress or hurt feelings are concerned, the effect of the articles is likely to have been cumulative, so some later distress builds on that already caused and should not be assumed to have been caused completely anew by a new publication. One must avoid double counting here too."[209]

He had been referred to comparable cases and their awards.[210] He described them as "disparate judgments" from which he was able to observe the increasing seriousness being given to invasions of privacy, the fact that judges were generally not seeking guidance "from some other areas in the sense of drawing parallels which they followed" and, finally, that none of those cases "begin to approach" the sums claimed by these eight claimants.[211]

To summarise, MGN argued that the only determining factor in awards for damages should be the extent of the distress caused by the invasion of privacy. Mann J roundly disagreed. He believed that the awards should reflect infringement of the rights themselves. They should reflect the right of an individual to control information about his or her private life.

> ". . ..the defendant will have helped itself, over an extended period of time, to large amounts of personal and private information and treated it as its own to deal with as it thought fit. There is an infringement of a right which is sustained and serious. While it is not measurable in money terms, that is not necessarily a bar to compensation (distress is not measurable in that way either). Damages awarded to reflect the infringement are not vindicatory in the sense of *Lumba*. They are truly compensatory."[212]

2–027 The table which follows sets out the amounts sought in damages by the eight claimants and what they were awarded. Mann J set out in detail the variables in each of the individual awards. These figures suggest that he took into account the degrees of infringement. Alan Yentob, for example, had been hacked at least twice a day for a substantial part of seven years: Sadie Frost was hacked regularly for over four years.

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[209] *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch) [156].
[210] *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch) [167 – 183].
[211] *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch) [184].
[212] *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch) [132]. The reference to *R (Lumba) v SSHD* [2011] UKSC 12 is to a case where the Supreme Court rejected the idea of vindicatory damages designed to reflect the special nature of the right infringed (in the context of detention pending deportation of foreign national prisoners).

Damages claimed and awarded against MGN

Claimant	Claimant's Proposed Damages £	Damages Awarded £
Alan Yentob	250,000	85,000
Lauren Alcorn	366,000	72,500
Robert Ashworth	654,000	201,250
Lucy Taggart	652,000	157,250
Shobna Gulati	520,000	117,500
Shane Roche	520,000	155,000
Paul Gascoigne	886,000	188,250
Sadie Frost	1,059,000	260,250

The Judge explained that he had adopted a "layered" approach, building up the sum of damages awarded by way of separate layers as follows:

1. An award for each and every article that was either admitted or held to be the product of voicemail interception and/or blagging. Some of these awards were modest (£750), others much greater (£40,000). In addition, for certain claimants, a separate award in relation to the articles was made for any additional elements of distress that were held not to have been encapsulated by the single awards given for each individual article. These additional elements included additional anxiety or distress caused by the pattern of intrusion evidenced by the articles or the general and accumulating upset, suspicion and undermining of relationships to which the publications gave rise.
2. A separate award for the hacking to compensate generally for the relevant invasions of privacy. This head of damages was broken down further into sub-heads:
    (a) damages for frequency and longevity of hacking (which included a sum of £10,000 for each year of hacking); and
    (b) damages for general distress and the long-term effects of hacking (such as effect on relationships).
3. A separate award for the blagging of personal information via private investigators; and
4. An award for aggravated damages.

Despite the inherently overlapping nature of the various heads of damages Mann J had considered and avoided any double counting and also stated that a final review of the aggregated damages awards had been undertaken to ensure overall proportionality.

Given MGN's determination to appeal the result of this case it will be interesting to see what and how the Court of Appeal, deal with Mann J's

meticulous findings of fact and his reasoning.[212a] It is his forensic analysis of the nature and extent of the hacking in respect of each of the claimants—which runs from paragraphs 234–701 in the text of the judgment—which creates the weight and force behind the eventual sums he awarded.

There is one obvious area of potential disagreement and that is in his rejection—in the process of assessing damages—of the fairly modest awards made to the victims of workplace harassment. In *Vento v Chief Constable of West Yorkshire Police*,[213] an employee had been harassed and been caused clinical depression. An award of £74,000 was set aside,[214] and a top band of £15,000 to £25,000 established. In employment situations—and harassment—the wrongful activity is often sustained and damaging. As one commentator observed, it is very difficult to conceive of a harassment award in six figures, as six of the present awards were.[215]

Mann J anticipated this point within his judgment. He believed the *Vento* hypothesis, in the *Gulati* context, was false. This was because an award for privacy rights was capable of including other elements "and when those are added in the idea of a scale, let alone the *Vento* scale, becomes inappropriate".[216]

> "I therefore proceed on the basis that there are no other torts, or at least no decisions in relation to other torts, which provide decisions, amounts or criteria which can be directly transposed into privacy cases."[217]

Another commentator[218] noted that no general publication to the world had taken place in terms of one claimant (Alan Yentob) and that the element of distress had been considerably downplayed because the hacking had occurred surreptitiously, unknown to the claimants.[219] Descheemaeker's conclusion, given that the loss in all privacy actions was the loss of privacy, was that

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[212a] The case is listed for a two-day hearing in October 2015.

[213] *Vento v Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1871.

[214] Ibid [61]: per Mummery LJ: "The total award of £74,000 for non-pecuniary loss is, for example, in excess of the JSB [Judicial Studies Board] Guidelines for the award of general damages for moderate brain damage, involving epilepsy, for severe post-traumatic stress disorder having permanent effects and badly affecting all aspects of the life of the injured person, for the loss of sight in one eye, with reduced vision in the remaining eye, and the total deafness and loss of speech. No reasonable person would think that that access was a sensible result. The patent extravagance of the global sum is unjustifiable as an award of compensation. It is probably expectable by the understandable strength of feeling in the tribunal and is an expression of its condemnation of, and punishment for, the discriminatory treatment of Ms Vento."

[215] David Hart QC *http://ukhumanrightsblog.com/2015/05/22/phone-hacking-massive-privacy-damages/*.

[216] *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch) [190].

[217] *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch) [201].

[218] Eric Descheemaeker, Reader in European Private Law at the University of Edinburgh.

[219] A clash of two logics*: Gulati v MGN* on damages for breach of privacy *https://inforrm.wordpress.com/2015/06/02/a-clash-of-two-logics-gulati-v-mgn-ltd-on-damages-for-breach-of-privacy-eric-descheemaeker/.* He concentrates on the topic of damages (the sort of losses that were being compensated for) and does so from a mainly private law theory perspective. This was on the basis that *Gulati* exposed "the frontal clash between two models of understanding the relationship between tort and harm (or wrong and loss)—which, while not limited to breach of privacy, have found in this cause of action a fertile ground to compete on. The important thing, it is argued, is not to mix and match them (something that Mann J. only partially succeeded in doing)."

". . ..this breach of privacy will cause distress but this is irrelevant; it is a typical consequence not an analytical requirement, and the claimant should not get less if he is not distressed (or even incapable of emotions as in the case of juridical persons) and should not get more because he is in fact distressed, or distressed in a more-than-average way – unless and until a separate harm (i.e. the violation of another right) can be identified, which would rightly trigger aggravated damages. But there is no denying that such a view, rooted in a very broad understanding of loss as any violation ('diminution') of a right, is a minority position; and adopting it generally would have an enormous ripple effect on the rest of tort law. The important point for now is to identify and accept that there are two irreconcilable logics at play which should not be mixed and matched, even though this is the easy way out and therefore a constant temptation."[220]

2.5.4 Accounts of Profits, Delivery Up and Publication

2–028 An account of profits is a well-established equitable remedy to strip away profits where it would be "unconscionable" to allow someone to benefit from a breach of confidence. It is an alternative, not a parallel, remedy to damages where the claimant's interest in the performance of the obligation of confidence makes it just and equitable that the defendant should retain no benefit from his breach of the obligation.[221]

Delivery up can include a database or the elements of it that gave the key to the misuse of the confidential information to prevent further misuse. Court ordered publication of the judgment can only be made in intellectual property cases.

2.6 The effect of the Bribery Act 2010 on Breach of Confidence

2.6.1 Introduction

2–029 Those looking at breach of confidence without an understanding of how newspapers and the media news desks work practically would fail to see the "iceberg" effect caused by the existence of the Bribery Act 2010. The "icebergs" float—with their dangers and the consequent Article 10 chilling effect—particularly in relation to breach of confidence situations arising out of *confidantes*' employment.

The greatest effect may bear most heavily in relation to public sector revelations—where the public interest defence might have been used successfully[222]—but they are affecting[223] celebrity stories as well. It appears to be one of the reasons why a range of stories, that might have been published before the Bribery Act 2010 came into force, has diminished significantly. Celebrities (as well as public officials) are, in effect, benefiting from the "chilling" effect of the Act. Unless *confidantes* are prepared to be completely altruistic in the information they provide—and to risk simply losing their

[220] Ibid: final paragraph.

[221] *Vercoe v Rutland Fund* [2010] EWHC 44 (Ch) [339] (Sale J).

[222] In the equivalent of the faulty breath test equipment revelations in *Lion Laboratories Ltd v Evans* [1984] 2 All ER 417 or the "crimes, frauds and misdeeds" that Lord Denning would not have suppressed in *Initial Services Ltd v Putterill* [1968] 1QB 396.

[223] From observation, in practical media/legal situations, since 1 July 2011 when the Act came into force.

employment for providing the information free and gratis so that there is no danger of them or the media being prosecuted under the Act—the traditional routes and channels for acquiring many exclusive stories are no longer open.[224]

2.6.2 A summary of the key provisions of the Bribery Act 2010

2–030 The Bribery Act 2010 provided for a new consolidated scheme of bribery offences to cover bribery both in the UK and abroad.[225] Section 1 makes it an offence for a person directly or indirectly (a) to offer, promise or give a financial or other advantage to another person, intending the advantage to induce a person (who may or may not be the same person as the person offered, promised or given the advantage) to perform improperly a relevant function or activity or to reward a person for the improper performance of such a function or activity or (b) to offer, promise or give a financial or other advantage to another person, knowing or believing that an acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.

Section 2 makes a person guilty of an offence, whether an advantage is for his or another's benefit, where (a) he directly or indirectly requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly (whether by himself or another person (b) he directly or indirectly requests, agrees to receive or accepts a financial or other advantage where that request, agreement or acceptance itself constitutes the improper performance by him of a relevant function or activity (c) he directly or indirectly requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (whether by himself or another person) of a relevant function or activity or (d) in anticipation or in consequence of him directly or indirectly requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly by him or another person at his request or with his assent or acquiescence.

A relevant function or activity is defined in s.3 as being any function of a public nature and any activity connected with a business (including a trade or profession), or performed in the course of a person's employment or by or on behalf of a body of persons, provided that the person performing the function or activity is (a) expected to perform it in good faith, (b) expected to perform it impartially, and/ or (c) in a position of trust by virtue of performing it. A

[224] In a slightly different media climate the *Sun* broke the story of the Redbridge Magistrates' Court clerk who took bribes of up to £500 to help more than 50 offenders avoid penalty points on their driving licences that would have disqualified them from driving. Munir Patel, who had no previous convictions, was sentenced to three years for bribery and six years for misconduct in public office after pleading guilty at Southwark Crown Court. The latter sentence was reduced on appeal to four years on 24 May 2012, the *Sun* broke the story on 4 August 2011 having filmed him taking 10 £50 notes from an undercover reporter.

[225] It abolished the common law offences of bribery and embracery and existing statutory law in relation to corruption (including the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Acts 1906 and 1916) was repealed.

function or activity is relevant even if it has no connection with the UK and is performed in another country or territory. A relevant function or activity is performed improperly, or to be treated as being performed improperly, if it is performed in breach of a "relevant expectation" (i.e. the expectation of performance in good faith or impartially, and, in respect of condition (c), the expectation as to the manner in which, or the reasons for which, the function or activity will be performed that arises from the position of trust), or if there is a failure to perform the function or activity and the failure is itself a breach of the relevant expectation.

The test of "expectation" is what a reasonable person in the UK would expect in relation to the performance of the type of function or activity concerned;[226] where the performance of the function or activity is not subject to the law of any part of the UK, any local custom or practice is to be disregarded unless it is permitted or required by the written law applicable to the country concerned.[227]

2–031 There is no definition of "advantage". It would clearly include accepting an offer of the services of a prostitute. Whether it would catch an offer of sex where the offeror's intent is that the offeree will show the offeror favour in respect of his or her career, employment, business, is debatable. Similarly, the solicitation of sex where the soliciting party insinuates that he or she will show the other party favour in relation to his or her career, employment, business and the like: is this bad form, unethical or the criminal offence of bribery? Penalties include a maximum 10 years' imprisonment for offences under ss.1 and 2 for an individual convicted on indictment.

Section 7 of the Act represents a significant addition to the pre-existing law, placing much more of an onus on businesses to take pro-active steps to prevent bribery taking place on their behalf. The offence is committed by a commercial organisation—for instance newspaper publishers—when a "person associated" with it bribes another person intending to gain advantage for the organisation's business.[228]

The associated person need not have any connection with the UK and the act of bribery may have been performed anywhere in the world, and so it may not be possible to convict the associated person himself/itself of an offence.[229] As the liability of the commercial organisation depends upon bribery committed by "persons associated" with it, the question of who comes within the definition of "associated persons" is crucial. The Act defines them as persons who "perform services for or on behalf of" the organisation, including both individuals and companies. Employees are presumed to be associated persons, and then (depending upon the particular circumstances) a whole range of subsidiaries, agents, contractors and suppliers may be deemed to be "associated" depending upon whether they actually "perform services" for

[226] s.5 (1).

[227] s.5 (2).

[228] To increase or maintain the media's audience or a newspaper's readership.

[229] A call from an unauthorised contact within a Hollywood agency to a UK national newspaper confirming the death of the actor Larry Hagman (of *Dallas* fame) in November 2012—and requesting payment for the tip-off "on the usual terms"—left the caller disappointed, determined never to pass anything further on to the British media.

or on behalf of the organisation. The definition is deliberately broad so as to catch the full range of persons who may commit bribery on an organisation's behalf.[230]

There is an "adequate procedures" defence. While the offence of failing to prevent bribery is one of 'strict liability', a defence is available if the organisation can show that it had in place 'adequate procedures' designed to prevent associated persons from committing bribery offences on its behalf. In newspaper and media terms this has resulted in time-consuming and demanding audit trails and procedures being instituted and enforced. These can require editorial departments to evidence written permission to pursue stories, managing editors and in-house lawyers considering the requests and putting them out to specialist counsel for objective assessments of the public interest and the possible effect of the Act.[231] This is not a process which is easily accommodated in a fast-moving daily news cycle.

2.6.3 Absence of Public Interest Defence in Bribery Act 2010

2–032 The media's greatest concern with the Act is that there is no "public interest" defence.[232] The absence of this defence was highlighted during the period of the Coalition Government in 2014 by Nick Clegg MP.[233] Because of that, all of those involved in the pre-approval process—in terms of newspaper and media stories—are arguably committing criminal offences of conspiracy or attempted conspiracy to pervert the course of justice, particularly if the ultimate decision is to pay money for the story and then to take a principled stand (in the event of a prosecution) on the lack of a statutory public interest defence.[234]

The Act appears to be significantly flawed in terms of the Article 10 protection and that lays it open to legal argument requesting a declaration of incompatibility from the court under s.4 of the HRA 1998. That route is

[230] The types of organisation that the section 7 offence applies to are: (a) companies or partnerships incorporated or formed in the UK and carrying on business anywhere in the world; and (b) companies or partnerships wherever incorporated or formed that carry on business, or part of a business, in the UK.

[231] On some publications the written approval of corporate general counsel is required.

[232] Although the DPP issued guidance on 13 September 2012 on prosecutions involving the Act and the media, this situation is unsatisfactory because the ultimate decision to prosecute rests only on guidelines relating to the discretion of a senior Crown official—acting on behalf of the State—rather than clearly incorporating Article 10 protection for the media within the statutory wording of a defence of public interest. The guidelines ask prosecutors to consider what information was available to the journalist at the start of their investigation in relation to the motivation of the suspect, details about what might be considered as an "important matter of public debate" with examples of "serious impropriety", "significant unethical conduct" and "significant incompetence" and more detail on the section about privacy.

[233] "I think there should be a public interest defence put in law," Clegg said. "You probably need to put it in the Data Protection Act, the Bribery Act, maybe one or two other laws as well, where you enshrine a public interest defence for you, for the press. So that where you are going after information and you're being challenged, you can set out a public interest defence to do so." Also proposed was a public interest defence in the Computer Misuse Act 1998. *http://www.theguardian.com/technology/2014/oct/20/journalists-public-interest-defence-law-nick-clegg*

[234] See, generally, ATH Smith *Assessing the public interest in cases affecting the media—the prosecution guidelines* Crim L.R. 2013, 6, 449–464.

preferable—because it would require a more immediate concentration of remedying the deficiencies by the Government and Parliament—than any attempt judicially to review the DPP for failing to exercise the relevant discretion[235] or taking the fact of any conviction on appeal to Strasbourg on Article 10 grounds.

2.6.4 Examples

A number of hypothetical scenarios may assist in bringing the complex language of the Act to life. Its potential effect on the media seems not to have registered at all during the passage of the Act through its Parliamentary stages and the ECHR Article 10 "chilling effect" issues and the "impact assessment" of the Act concluded that it was "fully compatible" with the ECHR.[236] **2–033**

(i) A journalist on a celebrity magazine has a contact who is the PA at a leading PR firm that represents high profile celebrities. That PA has access to clients' private details including, for example, their holiday destinations. The journalist pays the PA for her tips about holiday destinations in cash and gets the money back through her expenses. The information allows the magazine to get exclusive photographs of celebrities at their destinations. The journalist will have committed a s.1 offence by giving a financial advantage to the PA so that the PA improperly performs "a relevant function or activity". The magazine may be liable for a s.7 offence if it does not have adequate procedures in place setting out the policies and guidance on when payment to sources may be justified. If the expenses claims have not been queried then the editor signing them off, and the magazine, may face prosecution under s.14 of the Act.

This example also reveals DPA 1998 breaches in terms of the misuse of personal data. Celebrities becoming aware of such activity may now consider that the potential for such prosecutions or complaints to be a particularly useful weapon in their armoury.

(ii) A journalist working on a political magazine has a source X who is a medium-ranking civil servant in the Ministry of Defence. The journalist pays X for information relating to the Minister who X believes is having an affair with a leading businessman whose company is pitching for a government arms contract. So far, the resulting criminal liabilities are likely to follow those in the first example. But if X

[235] *R v DPP, Ex p. C* [1995] 1 Cr App R 136; *R v DPP, Ex p. Manning* [2001] QB 330; *R v Chief Constable of Kent, Ex p. L; R v DPP, Eex p. B* (1991) 93 Cr App R 416); *R v DPP, Ex p. Jones (Timothy)* [2000] Crim LR 858 or because the decision has been arrived at because of an unlawful policy: *R v DPP, Ex p. C* [1995] 1 Cr App R 136.

[236] *http://www.justice.gov.uk/downloads/legislation/bills-acts/bribery-bill-ia.pdf* The only issue identified in the impact assessment related to ECHR Article 6 (2): "Case law has established that, while placing a legal burden in relation to a defence on the defendant may call into question that general proposition, that will be compatible with the Convention where the overall burden of establishing guilt remains with the prosecution and the burden is otherwise reasonable and proportionate. The Department considers that placing such a burden on the defendant in this case is reasonable and proportionate in the circumstances and is compatible with article 6(2)."

had overheard the Minister discussing other companies' tenders with the businessman to allow his company to gain an unfair advantage in the tender process is the situation altered? If X approaches the journalist stating that she was concerned about abuse of power in government and the journalist subsequently paid X for further details about the abuse, is the journalist still intending to induce improper conduct? Is whistleblowing on wrongdoing in government (or a public authority) enough to override duties of trust, impartiality and good faith? Arguably it does, but until tested in the courts it is difficult to predict. If X had access to a confidential whistleblowing line at work then her conduct might be less excusable.[237]

2.6.5 Bribery Act 2010: Conclusions

2–034 It is now four years since the Bribery Act 2010 came into force.[238] There have been no media prosecutions yet brought under it. However *Operation Elveden*, the Metropolitan Police's £20 million investigation in relation to prosecutions for alleged corrupt payments made by journalists to public officials (such as police officers), originally led to more than 60 arrests and two convictions under the common law offence of Misconduct in Public Office.

That situation unwound rapidly as a result of the decision of the Lord Chief Justice and two of his colleagues in *R v Sabey* [2015].[239] The Director of Public Prosecutions (DPP) reviewed the position on 17 April 2015 as a result of that decision.[240] The DPP concluded that no evidence would be offered against nine journalists—including Andy Coulson[241] and Clive Goodman[242]—who were then awaiting trial.

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[237] On this point DCI April Casburn—although not charged under the Bribery Act 2010 but for Misconduct in Public Office—was sentenced to 15 months imprisonment on 1 February 2013 by Fulford J. He said the sentence would have been three years but he had taken into account the fact that a "vulnerable child"—which Casburn and her husband were in the process of adopting—would be left without a mother while she served her sentence. She had tried to sell information to the *News of the World* about what she regarded as a misuse of resources that had been diverted from her counter-terrorism unit to *Operation Elveden*, the Metropolitan Police's phone hacking enquiry. Because she wanted payment for the information, Fulford J stated he was not prepared to accept that hers was a case of "understandable whistleblowing".

[238] On 1 July 2011.

[239] *R v Sabey & Ors* [2015] EWCA Crim 539. This was a joint decision of Lord Thomas of Cwmgiedd, Cranston and William Davis JJ deciding that there had been a material misdirection on the relevant law by the trial judge dealing with a series of Misconduct in Public Office trials. At [75] they stated: ". . ..there was a misdirection and [we] considered very carefully whether it affected the safety of the conviction; the considerations were finely balanced given the great care and the overall approach taken by the judge and the parties in the case to the public interest. We have nonetheless concluded that in all the circumstances we cannot say that the jury would necessarily have convicted these appellants had they been directed in accordance with what we have set out. We must therefore quash the convictions."

[240] *http://www.cps.gov.uk/news/latest_news/crown_prosecution_service_re_review_of_operation_elveden/*

[241] Former Editor of *The News of the World*.

[242] Former Royal Correspondent of *The News of the World*.

Inaction in respect of media activity and the Bribery Act 2010 led some to question whether it was a sentry or a scarecrow.[243] Would the Act lead to a prosecution, Pike and Walford asked, in a situation where a journalist is approached by a hotel receptionist, who wants payment in return for information he holds about a married politician who has booked a room with an unidentified female companion.

They point out that, applying s.1 of the Act

> "the receptionist, who is in a position of trust in relation to the politician, is performing an activity (communicating confidential customer information to a third party) in the course of employment, in breach of an expectation of trust. If the journalist agrees to give the receptionist financial advantage in return for his actions, regardless of the potential public interest of the story, strictly speaking the journalist would appear to be in violation of the Act and liable for prosecution. Assuming there was sufficient evidence for prosecution, would the DSFO or DPP feel it was in the public interest to prosecute the journalist in this scenario? More likely than not, they wouldn't—especially if it could also be shown that there was a strong public interest in the apparent breach of the politician's privacy. . ..But what if it was a minor celebrity instead of a politician, or if it was the journalist who had contacted the receptionist and it was a large sum of money that had been offered? Alternatively, what if the journalist had been regularly paying the receptionist a small amount of money over a period of time for information about any irregular guests staying at the hotel?"

Their conclusion is that the Act could be viewed as "a narrow rope bridge suspended over a gorge". At first glance, safe passage might seem precarious. If disrespected, the consequences would be severe. However, if approached sensibly, the Act should not put off those in the media industry from legitimately generating stories and operating within their conventional daily routine.

Without disagreeing with that general conclusion, however, the practical effect of news editors and news desk reporters having to warn telephone callers with "tips"—that could potentially breach the Act if not handled within the correct corporate procedural guidance—does create a negative climate relating to the exchange and publication of confidential information that may well be, in essence, of considerable general public interest.

2.7 1848–2015: The Bridge between *Prince Albert and The Sun*

2–035 After the final chapters of this book were completed *The Sun* ran its seven-page spread on the Queen and the "Nazi Salute" photographs.[244] It may lead to litigation and if that happens, will continue the 175-year cycle that lay at the start of this book: the case of *Prince Albert v Strange*.[245] Issues about publication to the public would inevitably feature in any court action.[246] *The Sun*

[243] Julian Pike and Hugo Walford *Sentry or scarecrow? The Bribery Act 2010 in relation to the media* Ent. L.R. 2014, 25(4) 149–152.

[244] *The Sun* Saturday 18 June 2015: *http://www.thesun.co.uk/sol/homepage/news/royals/6548665/Their-Royal-Heilnesses.html*

[245] *Prince Albert v Strange* [1849] EWHC Ch J20.

[246] This book argues that it is a copyright case re-crafted as a breach of confidence action to avoid the issues relating to the non-publication of the etchings made by Queen Victoria and Prince Albert. The pictures had been displayed at Windsor Castle to be viewed by selected visitors in private but never—the action averred—published or made public.

maintains that it acquired the material lawfully, as did William Strange. The then monarch's Court of Chancery in 1848—and her Chancellor—ruled in her Prince Albert's favour. In this 2015 example that is not the inevitable result now because of the Article 8 and Article 10 proportionality balancing exercise.

In this case it involves the Article 8 privacy of young children being filmed by (it seems) their father (later George VI) at an event that is clearly private. As such there would be a reasonable expectation of privacy—certainly for the children—within that closed group. It involves the royal family away from its public and ceremonial "stage" duties as much then as it does now. That confidence in and expectation of privacy—given the actions of the Queen and her sister Princess Margaret—is likely to have been bolstered and increased by the presence of not only their father but their mother and their uncle. The generation of the privately-shot home cine-camera footage was—by analogy—the 1930s equivalent to Victoria and her consort enjoying their private lives sketching and drawing together in the mid-19th century and sharing the results privately with their friends. Without permission from the royal family—something which did not occur—the publication may involve issues including breach of confidence, copyright, misuse of private information and potential breaches of the DPA 1998.

What may be the public interest elements in the Article 10 freedom of speech and right to inform side of the equation? *The Sun* seems to reduce these itself when it states

> "there is clearly no suggestion that the Queen or Queen Mother were ever Nazi sympathisers, Edward's links with Hitler and fascism are very well documented".

And also

> "Elizabeth and Margaret are kids. Families of all kinds, all over Britain, larked around apeing the stiff-armed antics of the faintly comic character with the Charlie Chaplin moustache who had won power in Germany."

That leaves an "historical significance" argument. Namely, that this was an early indication that their future short-reigning uncle King Edward VIII was a "fan of Hitler" despite the fact that his links to the dictator and his regime are now well-known and documented.

An approach that might have respected the privacy of the children in a demonstrably proportionate manner, while exercising the Article 10 rights of *The Sun* to inform its readership, would have been to use only the adults in the pictures—the Queen Mother and Edward, Prince of Wales—and either excising or pixelating the children. That could have demonstrated the point in an arresting manner because the text with the copy could have described the apparent actions of the children.[247] That would, however, have been visually unsightly and anathema to the precision of the layout of any tabloid newspaper.

In terms of the Bribery Act 2010—and all the points already made about the ways in which offences can be committed by newspapers in respect of it—the

[247] An approach *The Sun* had wanted, unsuccessfully, to use with the pictures in *Edward RockNRoll v NGN* [2013] EWHC 24.

newspaper claims to have acquired the material "lawfully". That assertion seems at odds with the lack of permission from the royal family for its use. Without a statutory public interest defence to face down a Bribery Act prosecution then, if money was proved to have been paid for its acquisition without authority and in breach of confidence, the newspaper could find itself testing the Article 10 and HRA deficiencies of this legislation to the fullest extent.

2.8 Summary

2–036 Breach of confidence as a celebrity privacy remedy managed passably in the more respectful, sedate and structured world of the 19th century and for a great deal of the 20th century. It could fall back on equitable maxims overlaid with contractual and property concepts as well as a pragmatic judiciary so that it preserved social norms and reflected a more stratified society's sensibilities. The combined effect of *Prince Albert v Strange* and *Argyll v Argyll* cast a potently protective shadow into the 1970s. It was only with attributed celebrity cases like *Woodward v Hutchins* that breach of confidence began to show where some of its fault lines might be found.

What then took away some of its flexibility was the kind of formulaic requirement of the key element of a pre-existing relationship that left Gorden Kaye having to rely on a different area of law than the one that—on the face of it—best fitted his predicament. Even when English courts tried to introduce references to ECHR principles and proportionality—as in *Spycatcher* in 1990—the result was not the proportionate one arrived at on appeal to Strasbourg in 1992.

The impact of the HRA on this area forced judicial reasoning to apply itself both vertically and horizontally to the celebrity situations which then presented themselves from 2000 onwards leading, in *Campbell*, to the recognition of a new tort which will be examined in the next chapter. However, as Michael Douglas and Catherine Zeta Jones found (eventually), the Prince of Wales and Loreena McKennitt found in 2006, and Ann Summers found in 2012, the straightforward classical form of breach of confidence still works within the new, structured search for a proportionate result within the balancing of Article 8 and Article 10 rights.

Initially it looked as if breach of confidence, post-*Campbell* would become a poor relation in celebrity privacy litigation but—considering the cases above—its very existence adds weight to ways in which all categories of celebrity can seek to prevent intrusive or unauthorised private and confidential information becoming public.

The development of the public interest defence within breach of confidence laid the foundations for many of the balancing factors that still need to be considered in the post-HRA world of proportionality. At root, after all, there is a fundamental difference between "confidence" and "privacy" and a wrongful disclosure of confidential information is not necessarily a misuse of private information.

CHAPTER 3

MISUSE OF PRIVATE INFORMATION AS A PRIVACY REMEDY

3.1 Introduction

3–001 The previous chapter dealt with the development, significance and limitations of breach of confidence as a celebrity privacy regime. The baton passes, in this chapter, to the recognition of the new, nominate tort of Misuse of Private Information and the procedures surrounding it.[1] Since its outlines emerged in 2000 the key elements are still twofold: there must be a reasonable expectation of privacy in relation to the information itself which can only be over-ridden if the public interest elements in the balancing exercise prevail. It has an almost exclusively celebrity-driven pedigree.

It ushered in a distinct change in how such cases were reported and cited. A key battle ground examined in this chapter relates to the actual identity of the celebrities or, often, their concealment behind a variety of initials for anonymity. Many of the celebrities who went to court to assert that publication or proposed publication of information about them should be restrained maintained that their identities should remain private as well. To reveal who they were would suggest that they had something to hide. That anonymity, if granted by the court until trial of the issue (and beyond), became a matter for external internet and social media speculation fuelled, on occasions, by a general media fury about "secrecy" and the stifling of media's ability to run celebrity stories with impunity subject only to having to pay damages if the facts were not correct or if it was judged to have over-stepped the mark. As portrayed by the media this was "judge-made" law created by a coterie of unelected, out-of-control and overpaid specialists—without a Parliamentary mandate or specific legislation—which struck at the heart of the media's right to inform the public about what it needed to know about celebrities and their indiscreet and sometimes hypocritical lives.

Breach of confidence had allowed courts, as Sedley LJ noted, to do what they could using the tools available, to "stop the more outrageous invasions

[1] This book maintains that it is a tort and adopts Tugendhat J's careful review of its history: *Vidal-Hall & Ors v Google Inc* [2014] EWHC 13 (QB), [68] as affirmed, on appeal, in *Google v Vidal-Hall* [2015] EWCA Civ 311. The Supreme Court, in granting Google limited permission to appeal the Data Protection Act 1998 element affirmed the Court of Appeal's view on this.

of individuals' privacy". Judges "had felt unable to articulate their measures as a discrete principle of law".[2] He continued:

> "Nevertheless, we have reached a point at which it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy . . .The reasons are twofold. First, equity and the common law are today in a position to respond to an increasingly invasive social environment by affirming that everybody has a right to some private space. Secondly. . . .the Human Rights Act 1998 requires the courts of this country to give appropriate effect to the right to respect for private and family life set out in Article 8 [ECHR]. The difficulty with the first proposition resides in the common law's perennial need (for the best of reasons, that of legal certainty) to appear not to be doing anything for the first time. The difficulty with the second lies in the word 'appropriate'."[3]

Now the two sources of law ran "in a single channel" as a result of the combined effects of s.2 and s.6 HRA. UK courts had to take into account EU and ECtHR jurisprudence which pointed to a "positive institutional obligation to respect privacy". Courts had to act compatibly with that and the other Convention rights, giving the "final impetus to the recognition of a right of privacy in English law".[4] Not everyone wanted to join the privacy party.[5]

It was Lord Nicholls, however, in *Campbell v MGN*[6] who gave the new tort its name. He characterised a formulation derived from breach of confidence as "awkward" and the use of "duty of confidence" and "confidential" as "not altogether comfortable" on the basis that information about an individual's private life would not ordinarily be called "confidential".

> "The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information. In the case of individuals this tort, however labelled, affords respect for one aspect of an individual's privacy. That is the value underlying this cause of action. An individual's privacy can be invaded in ways not involving publication of information. Strip-searches are an example."[7]

The procedure and law for obtaining injunctions was discussed in detail in the previous chapter and will not be repeated here. The need for speed in taking action is paramount. If the defendant cannot be identified then the court can exercise its power to grant an injunction against persons unknown.[8]

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[2] *Douglas v Hello!* [2000] EWCA Civ 353, [110].

[3] *Douglas v Hello!* [2000] [110–111].

[4] *Douglas v Hello!* [2000] [111].

[5] Raymond Wacks *Privacy and Media Freedom* 109, footnote 15, summarises Lord Hoffman's HRA-based dissent in both *Campbell* and *Wainwright*. In essence, Lord Hoffman's argument was that the HRA weakened the argument for saying that a general tort of invasion of privacy was needed to fill the gaps in existing remedies because s.6 and s.7 HRA were themselves "substantial gap-fillers".

[6] *Campbell v MGN* [2004] UKHL 22, [14].

[7] *Campbell v MGN* [2004] [14–15].

[8] *Bloomsbury Publishing Group and JK Rowling v NGN* [2003] EWHC 1205 (Ch). Also, recently, *Kerner v WX & YZ* [2015] EWHC 1247 (QB)—in the context of harassment—to restrain two unknown photographers from harassing the claimant and her 9-year-old son following the conviction and sentence of her teacher husband for sexual activity with a 16-year-old student. He had received a suspended prison sentence and media interest extended to his family.

3.2 THE PROTECTED RIGHT: *CAMPBELL*,[9] *MOSLEY*[10] AND *VON HANNOVER 1*[11]

3–002 This trio of cases mapped out the initial parameters of the action of misuse of private information against the backcloth of the HRA and issues of proportionality. It can be seen from the footnoted biographical information below that the first two individuals are achieved celebrities—in terms of the taxonomy of this outlined at the beginning of this book—Naomi Campbell having earlier in her modelling career been an attributed celebrity while the third, described as a celebrity *par excellence* in Germany, is (by virtue of both royal lineage and marriage) an ascribed celebrity.[12] It is of particular note that each of these three cases related to well-known, wealthy celebrities who were prepared to invest in defining, protecting, or vindicating their privacy rights by engaging in the entirety of the appeals process.[13] They pitted themselves against well-resourced publishers. All of the parties were able to have access to the best advocates to explore their respective Article 8 and Article 10 positions. Although the first two were originally English cases, both went to Strasbourg. The third, although originally a German case that went to Strasbourg on appeal, played a significant role in the further development of UK domestic law in terms of misuse of private information.

The core elements in misuse of private information exist when the

[9] Naomi Campbell began work as a model in 1985 as a 15-year-old from Streatham, London. By 1998 *Time* magazine had declared her one of the six top "supermodels" in the world. Her relationships with prominent men, including boxer Mike Tyson and actor Robert De Niro, have been widely reported as have her highly publicised convictions for assault.

[10] From 1993–2009 Max Mosley was President of the Fédération Internationale de l'Automobile (FIA) which is the governing body for Formula One (F1). The youngest son of Sir Oswald Mosley (former leader of the British Union of Fascists from 1932 until interned 1940/1943) and the Hon Diana Mitford, he is a former F1 driver/team owner (March) and barrister who practised at the Patents Bar after graduating from Christ Church College, Oxford, with a physics degree in 1961. He served as a member of the 44th Independent Parachute Brigade Group (TA), formerly part of the 16th Airborne Division. His parents' marriage in 1936 took place in Germany in Joseph Goebbels' house with Adolph Hitler as guest of honour. The author, before starting his legal studies at QMUL, spent an afternoon interviewing Sir Oswald and Lady Diana in August 1970 at their home at the *Temple de la Gloire* on the outskirts of Paris. The link to Lady Diana's obituary tells her own extraordinary story: *http://www.telegraph.co.uk/news/obituaries/celebrity-obituaries/1438660/Lady-Mosley.html*. Max Mosley has recently published his autobiography *Formula One and Beyond* Simon & Schuster 2015.

[11] Princess Caroline of Hannover (*née* Grimaldi) is the eldest child of Rainier III, Prince of Monaco, and his wife, the actress Grace Kelly. She is the elder sister of Prince Albert II of Monaco and Princess Stéphanie. She has been heiress presumptive to the throne of Monaco since 2005 and is married to Ernst August, Prince of Hannover, the pretender to the former throne of the Kingdom of Hannover as well as the genealogical male heir of George III of the United Kingdom.

[12] It could be argued that Max Mosley, although not born of or into royalty, has the kind of background that makes him an ascribed celebrity from birth because of the celebrity notoriety of each of his parents. A more limited view has been taken, however, in terms of his categorisation within the taxonomy of this book. The classification of the children of celebrities is discussed in 3.3.3 of this chapter.

[13] Despite Naomi Campbell's personal wealth her legal team also ensured that there was a contingency fee agreement (CFA) with the benefit of after-the-event insurance (ATE), when the matter went to the House of Lords, the effect of which presented itself at the ECtHR in *MGN v UK* 39401/04 [2011] ECHR 66.

information in question engages Article 8 ECHR because it is within the scope of the claimant's private or family life, home, or correspondence and what the defendant is about to do or has done—on analysis of the proportionality of interfering with the competing rights under Article 8 and Article 10—results in a conclusion that protecting the rights of others requires freedom of expression to give way.[14]

3.2.1 Identified in *Campbell*

3–003 It was Baroness Hale in *Campbell* who, perhaps, best characterised the conduct that created the liability in terms of the elements which had to be weighed and balanced.[15] She noted that the case involved "a prima donna celebrity against a celebrity-exploiting tabloid newspaper", each with its set of separate interests.[16]

In terms of the proportionality test she noted that it was

> ". . ..much less straightforward when two Convention rights are in play, and the proportionality of interfering with one has to be balanced against the proportionality of restricting the other. As each is a fundamental right, there is evidently a "pressing social need" to protect it. . .. the problem of balancing two rights of equal importance arises most acutely in the context of disputes between private persons."[17]

By themselves, the photographs were unobjectionable. Covert photography, of itself, did not make the information contained in the photograph confidential. The activity photographed had to be private. Out-and-about pictures of Naomi Campbell would have been unexceptionable. She made a substantial part of her living out of "being photographed looking stunning in designer clothing". Readers would be interested to see how she looked if and when she popped out to the shops for a bottle of milk.[18]

> "But here the accompanying text made it plain that these photographs were different. They showed her coming either to or from the NA meeting. They showed her in the company of others, some of whom were undoubtedly part of the group. They showed the place where the meeting was taking place. . ..A picture is 'worth a thousand words' because it.. . .adds to the information given in those words. . ..In context, it also added to the potential harm, by making

[14] Ibid [19–20] Lord Nicholls, [92] Lord Hope, [134, 137 and 140] Baroness Hale and [166–167] Lord Carswell. Lord Hoffman, despite his dissent, agreed with the general principle [36].

[15] Each of the five judges in the House of Lords gave different reasons. There was a 3:2 majority in Ms Campbell's favour and Morland J's decision was upheld with an award of £2,500 general damages.

[16] Ibid [143].

[17] Ibid [140]. Of note, however, is that Lord Steyn's proportionality test in *Re S* produced a series of different results in respect of the Article 8/Article 10 balance as the case moved through its different stages resulting in an aggregated 5:4 majority against Ms Campbell (Lord Phillips MR, Chadwick and Keene LJJ, Lord Nicholls and Lord Hoffman against Morland J, Lord Hope, Baroness Hale and Lord Carswell. Proportionality should not be confused with predictability. It would be unfair to compare it, however, with John Selden's 17th century aphorism in the context of equity: 'Equity is a roguish thing. . ..equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. . ..One Chancellor has a long foot, another a short foot, a third an indifferent foot: 'tis the same thing in a Chancellor's conscience'.

[18] Ibid [154].

> her think that she was being followed or betrayed, and deterring her from going back to the same place again."[19]

That was where Baroness Hale determined that the line had been crossed. The editor had accepted that, even without the photographs, it would have been a front page story. A generic picture of Naomi Campbell could have been used. The photographs could have been used to prove the truth of the story had it been challenged "but there was no need to publish them for this purpose".[20]

3.2.2 Explored in *Mosley*

3–004 Max Mosley sued the *News of the World* for copy and pictures headed *F1 Boss has sick Nazi Orgy with 5 Hookers* accompanied by a subheading *Son of Hitler-loving fascist in sex shame*. He also sued over the same information and images on the newspaper's website, which contained video footage relating to the same event. There was a follow-up article headed *Exclusive: Mosley Hooker tells all: My Nazi orgy with F1 boss*.[21] Eady J's starting point was that, since the HRA

> "The law now affords protection to information in respect of which there is a reasonable expectation of privacy, even in circumstances where there is no pre-existing relationship giving rise to an enforceable duty of confidence. That is because the law is concerned to prevent the violation of a citizen's autonomy, dignity and self-esteem. It is not simply a matter of 'unaccountable' judges running amok. Parliament enacted the 1998 statute which requires these values to be acknowledged and enforced by the courts."[22]

In any event, he pointed out, the courts had been increasingly taking them into account because of the need to interpret domestic law consistently with the U K's international obligations having signed up to the ECHR more than 50 years ago.

However it is his remarks in terms of proportionality, clarifying why Mr Mosley should succeed, which are illuminating. Many missed their enduring significance. Firstly he noted that the post-HRA approach of applying an "intense focus" was obviously incompatible with making broad generalisations "of the kind to which the media often resorted in the past". It was not enough to say that public figures must expect to have less privacy or that people in positions of responsibility must be seen as "role models" and "set us all an example of how to live upstanding lives". Sometimes such factors might have a legitimate role to play when the "ultimate balancing exercise" came to be carried out, but "generalisations can never be determinative". In every case it depended upon what was revealed by the intense focus on the individual circumstances.[23] Judges had to ask whether the intrusion or the degree of the intrusion, into the celebrity's privacy was proportionate to the public

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[19] Ibid [155].
[20] Ibid [156].
[21] For a fuller treatment of the issues in the trial see R. Callender Smith "Freddie Starr ate my Privacy, OK!" (2011) *Queen Mary Journal of Intellectual Property* Vol. 1, No. 1 (Apr) 53–72, 59.
[22] *Mosley v NGN* [2008] EWHC 1777 (QB) [7].
[23] *Mosley v NGN* [2008] [12].

interest supposedly being served by it.[24] The balancing process which had to be carried out on the facts before judges necessarily involved an evaluation of the use to which the relevant defendant had put—or intended to put—Article 10 freedom of expression rights. In this context "political speech" merited greater value than gossip or "tittle tattle".[25] He decided that the only possible element of public interest in relation to misuse of private information would have been "if the Nazi role-play and mockery of Holocaust victims" were true.[26] After a careful factual analysis he had found that was not the case. He noted, in passing that, in the defamation context,[27] it seemed clear that it was for the court to decide whether the story as a whole was a matter of public interest, but there was scope for "editorial judgment" as to what details should be included within a story and how it was expressed. In this case the journalists' perception was that the story was about Nazi role-play and, because the court had to decide whether that was reasonable, on the facts he dismissed that conclusion.

> "I consider that this willingness to believe in the Nazi element and the mocking of Holocaust victims was not based on enquiries or analysis consistent with 'responsible journalism'. Returning to the terminology used . . ..in *Jameel*. . .. the judgment was made in a manner that could be characterised, at least, as 'casual' and 'cavalier'."[28]

3–005 The practical key to the future direction of travel within this case—both in terms of proportionality and the way in which media lawyers' checklists would now have to be constructed—is revealed in this observation:

> "There may be a case for saying, when 'public interest' has to be considered in the field of privacy, that a judge should enquire whether the relevant journalist's decision prior to publication was reached as a result of carrying out enquiries and checks consistent with 'responsible journalism'. In making a judgment about that, with the benefit of hindsight, a judge could no doubt have regard to considerations of that kind, as well as to the broad principles set out in the PCC Code as reflecting acceptable practice. Yet I must not disregard the remarks of Lord Phillips MR in *Campbell*. . . to the effect that the same test of public interest should not be applied in the 'two very different torts'."[29]

This took the misuse of private information—sketched in outline in *Douglas* and *Campbell*—to the more clearly delineated territory of an active, new and individual tort. In short, if the media failed to put the substance—the "sting"—of the story that involved the publication of private information (as opposed to confidential information) to the celebrity target ahead of publication it would be likely to find itself stranded on the reef of its own lack of proportionality if it then sought the shelter of a public interest argument to resist injunctive or trial relief. As a result

> "It has to be recognised that no amount of damages can fully compensate the Claimant for the damage done. He is hardly exaggerating when he says that his life was ruined. What can be achieved by a monetary award in the circumstances is limited. Any award must be

[24] *Mosley v NGN* [2008] [14].
[25] *Mosley v NGN* [2008] [15].
[26] *Mosley v NGN* [2008] [136].
[27] He reminded himself this was not a defamation case.
[28] *Mosley v NGN* [2008] [170].
[29] *Mosley v NGN* [2008] [141].

> proportionate and avoid the appearance of arbitrariness. I have come to the conclusion that the right award, taking all these considerations into account, is £60,000."[30]

When the case moved into its European iteration at Strasbourg, it was argued on his behalf that the UK had violated its positive obligations under Article 8 of the Convention—taken alone and together with Article 13—by failing to impose a legal duty on the *News of the World* to notify him in advance to give him a chance to seek an interim injunction preventing publication of material that breached his Article 8 rights. The UK's position was that he was no longer the victim of any violation of the Convention. He had successfully pursued his domestic remedy, recovered damages and costs. That remedy vitiated the damage. Proceedings he had taken in Germany had settled for €250,000. He had since sought and gained a high profile in the UK as a champion of privacy rights and, in that context, had submitted evidence to Parliament and had participated in a number of press and media interviews. The UK's position was that the effect of the publication was not as detrimental to him as he claimed.[31] The ECtHR found that the UK was entitled to a wide margin of appreciation and had chosen to put in place a system for balancing the competing rights and interests which excluded a pre-notification requirement.[32] The ECtHR, rejecting his claim, concluded by emphasising[33]

> "the need to look beyond the facts of the present case and to consider the broader impact of a pre-notification requirement. The limited scope under Article 10 for restrictions on the freedom of the press to publish material which contributes to debate on matters of general public interest must be borne in mind. Thus, having regard to the chilling effect to which a pre-notification requirement risks giving rise, to the significant doubts as to the effectiveness of any pre-notification requirement and to the wide margin of appreciation in this area, the Court is of the view that Article 8 does not require a legally binding pre-notification requirement."

In terms of issues of proportionality the ECtHR identified that Eady J had considered in terms of the balancing exercise between Article 8 and Article 10,[34] that any exemplary damages award against the *News of the World* would have to have been so large that it would fail the test of proportionality and would risk having a chilling effect on freedom of expression.[35] Also that the nature and severity of any sanction imposed on the press in respect of a publication

[30] *Mosley v NGN* [2008] [236] together with costs of £420,000 (revealed subsequently in the ECtHR action).

[31] *Mosley v UK* (Application no. 48009/08) [2011] ECHR 774, [67–69]. His rebuttal was that damages were not an adequate remedy where private and embarrassing personal facts and intimate photographs were deliberately exposed to the public in print and on the internet. It was information that could never be erased from the minds of the millions of people who had read or seen the material. Privacy could not be restored to him by an award of damages. The only effective remedy would have been an injunction, something he was denied by the failure of the newspaper to notify him in advance. Similarly, actions taken in other jurisdictions did not remove his victim status.

[32] *Mosley v UK* (Application no. 48009/08) [2011] [122]. Also, a parliamentary committee had subsequently reported and rejected the argument that a pre-notification requirement was necessary in order to ensure effective protection of respect for private life.

[33] *Mosley v UK* (Application no. 48009/08) [2011] [132].

[34] *Mosley v UK* (Application no. 48009/08) [2011] ECHR 774, [15].

[35] *Mosley v UK* [26].

was relevant to any assessment of the proportionality of an interference with the right to freedom of expression.[36] This meant the ECtHR itself had to exercise "the utmost caution" where measures taken or sanctions imposed by the national authorities could dissuade the press from taking part in the discussion of matters of legitimate public concern.[37] It did not believe that prior notification was the "cure" for the problem.

In February 2010 the House of Commons Culture, Media and Sport Committee rejected the introduction of a legal requirement for prior notification in advance of press publication, recommending instead that the PCC's Editors' Code be amended to incorporate it.[38] Many of Mr Mosley's arguments were subsequently considered by Leveson LJ in his inquiry.[39]

3.2.3 Strasbourg and *Von Hannover 1*

3–006 *Campbell* and the breach of confidence case of *Douglas* were English precursors of what became a broader European view with the first of the *Von Hannover* cases.[40] All three were soon part of the fabric of English celebrity litigation[41] and it is commonplace for all three to be cited in claimants' solicitors warning letters to the media. *Von Hannover (1)* helped set the legal stage for a major examination of the issues in this area. Photographs of Princess Caroline of Monaco had been published in *Bunte* and *Neue Post* between 1993 and 1997, showing her in scenes from her daily life engaged in activities of a purely private nature such as practising sport, out walking, leaving a restaurant or on holiday.[42] The ECtHR pointed out that the photos in which she appeared sometimes alone and sometimes in company

> ". . ..illustrate a series of articles with such anodyne titles as 'Pure Happiness', 'Caroline . . . a woman returning to life', 'Out and about with Princess Caroline in Paris' and 'The kiss. Or: they are not hiding anymore?'"[43]

The ECtHR found a fundamental distinction between reporting facts—even controversial ones—which were capable of contributing to a debate in a

[36] A proportionality issue, in relation to the stifling Article 10 effects of Conditional Fee Agreements (CFAs) in the newspaper's House of Lords litigation, was successfully taken to Strasbourg in *MGN Ltd v United Kingdom* [2011] ECHR 66.
[37] *MGN Ltd v United Kingdom* [2011] [116].
[38] *Press Standards, Privacy and Libel* (Second Report of Session 2009–10, HC 362-I) [92–93]. The amended provision in the Editors' Code was also recommended to be subject to a public interest exception.
[39] Leveson Vol. 2 Ch 3, 2.46, 3.8 and 11.11 and Vol. 4 Ch 4, 3.8, 4.11, 7.20 and 8.9.
[40] *Von Hannover (1)* (2005) 40 EHRR 1.
[41] There is, however, an apparent conflict between *Campbell* and the chronologically later decision of *von Hannover*. If *Campbell* is applied as setting a threshold of "expectation of privacy" to deny protection for aspects of a person's private life which are considered too insubstantial to warrant protection, then this has the potential to introduce an imbalance in approach because no such "threshold" criterion was applied to Article 10 rights. Such an approach would appear to conflict with the clear statements that neither right has presumptive priority—see *In Re S* [17].
[42] See generally R. Callender Smith "From von Hannover (1) to von Hannover (2) and Axel Springer AG: do competing ECHR proportionality factors ever add up to certainty?" 2012 *Queen Mary Journal of Intellectual Property*, Vol. 2 No. 4, 388–392
[43] *Von Hannover (1)* (2005) 40 EHRR 1 [61].

democratic society relating to politicians in the exercise of their functions, and the reporting of details of the private life of an individual who did not exercise official functions.[44] Regard was given to the context in which the photographs had been taken—without Princess Caroline's knowledge or consent—and the harassment endured by many public figures.[45] Photos of one particular incident (which the Court singled out for adverse comment)—Princess Caroline tripping over an obstacle at the Monte Carlo Beach Club and falling over—had been taken "secretly at a distance of several hundred metres, probably from a neighbouring house, whereas journalists' and photographers' access to the club was strictly regulated".[46] The court commented that the distinction drawn between figures of contemporary society "par excellence"[47] and "relatively" public figures had to be clear and obvious so that an individual had precise indications about the behaviour he or she should adopt. In the taxonomy suggested in this book it is the difference between both ascribed and achieved celebrities on the one hand and attributed celebrities on the other. Individuals needed to know exactly when and where they were in a protected sphere and when they were in a sphere in which they must expect interference from the tabloid press. It decided that the German criterion of spatial isolation[48] was

> "in reality too vague and difficult for the person concerned to determine in advance. In the present case merely classifying the applicant as a figure of contemporary society 'par excellence' did not suffice to justify such an intrusion into her private life."[49]

In terms of the proportionality balancing exercise, the Court considered the decisive factor in balancing Article 8 against Article 10 lay in the contribution that the published photos and articles made to "a debate of general interest". Here they made no such contribution because Princess Caroline exercised no official function. The photographs and articles related exclusively to details of her private life.[50] There was no legitimate interest in knowing where she was and how she behaved generally in her private life even if she appeared in places that could not always be described as "secluded" and despite the fact that she was well known to the public.[51] Even if there was a public interest, within the commercial interest of the magazines publishing the photographs

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[44] *Von Hannover (1)* (2005) [63].
[45] *Von Hannover (1)* (2005) [68].
[46] *Von Hannover (1)* (2005) [68].
[47] *Von Hannover (1)* (2005) [54]: The German Federal Constitutional Court (*Bundesverfassungsgericht*) had interpreted s.22 and s.23 of the Copyright (Arts Domain) Act in such a way that Princess Caroline was characterised as a figure of contemporary society '*par excellence*', enjoying the protection of her private life even outside her home but only if she was in a secluded place out of the public eye (*in eine örtliche Abgeschiedenheit*) 'to which the person concerned retires with the objectively reasonable aim of being alone and where, confident of being alone, behaves in a manner in which he or she would not behave in public'.
[48] The court, in the footnote above, took account of two criteria: one was functional and the other spatial (seclusional).
[49] *Von Hannover (1)* (2005) [75].
[50] *Von Hannover (1)* (2005) [76].
[51] *Von Hannover (1)* (2005) [77].

and articles, that interest had to give way to Princess Caroline's right to the effective protection of her private life.[52]

3.3 The Protected Right Develops. . . . Proportionately

3–007 None of the cases discussed so far resulted in pre-publication injunction applications, anonymised or otherwise. Mr Mosley—as was quite clear from his position at Strasbourg—believed he should have had the opportunity to take this course. As things developed in the cases examined next, issues of anonymity became a dominant theme. The parameters of what was expected of any party seeking an injunction in this area became clearer and more rigorous.[53]

The starting point for many claimants when seeking a privacy injunction, then but much less now, was suppression of the fact that an injunction was being sought at all by anyone and against anyone. The tactic was for claimants to apply *ex parte*, seeking no public judgment, without notice to anyone (often in the form "a person unknown") seeking to serve the resulting injunction on media third parties so that they were bound in accordance with the *Spycatcher* principle.[54] This was the area of the much-derided and now rarely applied-for "super-injunction". The true nature of such injunctions restrained publication of information concerning the applicant which was claimed to be confidential or private *as well as* restraining publication of the existence of the application or order. Given the adverse publicity that occurred with the *Trafigura*[55] saga—with later (non-super) injunctive revelations[56] under the protection of Parliamentary Privilege[57]—there was the inevitable potential for a clash in the future on this issue between Parliament and the courts if a member of either House sought to use such privilege to identify celebrities. This issue, and its current resolution, is discussed later.[57a]

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[52] See Chapter 1.2.3.3.

[53] This was thanks largely—even in cases of total anonymity—to the combined efforts of Tugendhat J and Eady J and their colleagues. They maintained and developed a reportable and open dialogue giving their reasons for allowing what they were or were not doing. They used transparent and proportionate reasoning to describe how they arrived at their conclusions. As will be seen, *JIH v News Group* [2010] EWHC 2818 (QB) demonstrated that first-instance conclusions favouring identifying the claimant which, when it found no favour on appeal in *JIH v News Group* [2011] EWCA Civ 42, did not jeopardise the claimant's identity because of the process used.

[54] *AG v Newspaper Publishing* (1988) 1 Ch 333.

[55] *RJW and SWJ v Guardian News and Media* [2009] EWHC 2540 (QB).

[56] See, in particular, *Goodwin v NGN* [2011] EWHC 1309 (QB) and Tugendhat J's remarks to the media on the nature of super-injunctions [9–18].

[57] In March 2011 John Hemming MP revealed that Fred Goodwin had obtained an injunction. In April 2011 Mr Hemming named Vicky Haigh as the subject of an injunction which had been granted by the Family Division of the High Court and which prevented the names of the parties being identified. In May 2011 further details about Fred Goodwin's injunction were revealed in the House of Lords by Lord Stoneham of Droxford.

[57a] At 3.3.1 and 3.3.2.

3.3.1 Celebrity identification and anonymity: proportionality in action

3–008 Proportionality and anonymity in this area of preliminary injunctions, became a major feature. The Court of Appeal, in *Ntuli v Donald*,[58] lifted an anonymity order and publicity ban granted to a pop star to stop a former girlfriend selling her story about their relationship.[59] The media were free to identify Howard Donald—an attributed celebrity and member of *Take That* (a "Boy Band")—as the claimant, and report the fact that he had obtained an injunction, but the court kept in place an order banning singer Adakini Ntuli from publicising what had happened during their nine-year relationship. Maurice Kay LJ, delivering the judgment, said he was "simply unpersuaded"[60] that any greater restriction was necessary. In terms of proportionality he noted that Eady J had found there was a conflict about how "private" the relationship actually was. Eady J had been reluctant, in injunctive proceedings, to resolve that because

> ". . ..the Applicant has failed to persuade me that he is 'likely' to establish at trial that the relationship between them had been kept so private that he retained a reasonable expectation of privacy in respect of the mere fact that it existed. To put it another way, it has not been demonstrated that it is necessary and proportionate to extend the injunction so far as to restrict the Defendant's freedom of expression in this respect."[61]

In *JIH v News Group Newspapers*[62] Tugendhat J decided that issues relating to JIH's private life were engaged with no suggestion of any public interest in disclosure of the information. JIH was an attributed celebrity footballer. He said that it was not possible "to do perfect justice to all parties and to the public at the same time", but an order which identified *JIH* but kept information about the subject matter confidential would be effective to achieve justice and give all necessary protection to the private lives of those concerned.[63] The Court of Appeal changed its *Ntuli* stance[64] and disagreed.[65] Lord Neuberger MR,[66]who had been part of the *Ntuli* court, pointed out that if the claimant remained anonymous then it would almost always be appropriate to permit more details of the proceedings to be published than if the claimant was identified.

> "At least on the face of it, there is obvious force in the contention that the public interest would be better served by publication of the fact that the court has granted an injunction to an

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[58] *Ntuli v Donald* [2010] EWCA Civ 1276: an appeal against a decision by Eady J allowing Howard Donald initial anonymity.

[59] Ms Ntulli had sent Mr Donald a text: "Why shud I continue 2 suffer financially 4 the sake of loyalty when selling my story will sort my life out?"

[60] *Ntuli* [54].

[61] *Ntuli* [36].

[62] *JIH v News Group Newspapers* [2010] EWHC 2979 QB.

[63] Almost immediately contempt proceedings were considered by Tugendhat J on 12 November 2010 against the *Daily Telegraph* and another newspaper. They had inadvertently breached the terms of the original order—identifying the "well-known sportsman" and their apologies were accepted.

[64] *Ntuli* was decided on 16 November 2010 and *JIH* was decided on 31 January 2011.

[65] *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42.

[66] He subsequently issued the Practice Guidance (Interim Non-disclosure Orders) [2012] 1 WLR 1003 in August 2011.

> anonymous well known sportsman. . ..than by being told that it has granted an injunction to an identified person to restrain publication of unspecified information of an allegedly private nature."[67]

He approved a 10-point list,[68] originally developed by Tugendhat J earlier in the case, which set out the principles relating to requests for anonymity. The *JIH* principles now operate generally.[69] In terms of proportionality, privacy is better protected by shielding the identity of the individual(s) engaged in conduct that can be disclosed rather than identifying them and giving no detail of the conduct or activity in issue.

In *Gray v UVW* Tugenhat J noted that requests for anonymity coupled with the derogation from open justice and the need for "intense factual analysis" and "justification" led to a range of measures the court could use to protect Article 8 rights. These included a

> "variety of measures to prohibit or prevent the disclosure of the information sought to be protected, and an order prohibiting disclosure of the identity of one or both parties. But each measure is cumulative. The fact that one such measure may be necessary is not a reason for concluding that they are all necessary. On the contrary, the measures as a whole must be no more than is necessary and proportionate, and if one measure is adopted, then that may mean that an additional measure is not necessary."[70]

3–009 In the second half of 2012 *JIH* returned to the High Court.[71] All the joined cases were discharged by consent, with anonymity retained except for Fred Goodwin (formerly *MNB*).[72] In discharging the injunctions Tugendhat J remarked that this did not mean "that it would be lawful for anyone to publish the information disclosure of which had been prohibited. . .". Injunctions may be discharged because there is no longer a threat of publication, or because the claimant has decided not to proceed with the action. Those who think they know the information cannot use it. Tugendhat J explained:[73]

> "It follows that no reader of this judgment or of the orders can know simply from reading the judgment or order whether or not it would be lawful for someone other than the defendant to disclose the information in question now or in the future. If anyone knows, or believes that they know, what the information in question in any given case may be, then they would need to take advice as to whether publication of that information in the future would be lawful or not."

A significant practical factor to all elements of anonymity orders is that the in-house legal teams and duty lawyers on all media need to know about the existence of such orders to make certain that their publications do not infringe the terms of any injunction. In addition, editorial staff on all such publications are circulated with the information, for the same reason. This creates an unusually well-informed collection of individuals with greater knowledge than the rest of the public, with all the attendant risks.

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[67] *JIH v NGN* [2011] EWCA Civ 42 [33].
[68] *JIH v NGN* [2011] [21].
[69] Particularly since the Practice Guidance was issued.
[70] *Gray v UVW* [2010] EWHC 2367 (QB) [56].
[71] *JIH v NGN* [2012] EWHC 2179 (QB): six other cases were also involved, one of which did not involve anonymity, and all related to News Group Newspapers as the Defendant.
[72] Identification was permitted on 23 May 2011: [2011] EWHC 1309 (QB).
[73] *JIH v NGN* [2012] EWHC 2179 (QB) [25].

The fact that one publication may have revealed the identity of a claimant who has been given anonymity will not, without more, be enough to open the floodgates of general media identification. This issue was considered in *NEJ v BDZ*[74] which subsequently became *NEJ v Helen Wood*.[75] The *Daily Mail* and the *Daily Telegraph* had briefly identified the actor who had paid £195 to Helen Wood for her sexual services. She had gone to *The Sun* with a "kiss and tell" account which included additional detail about him being a "disgusting kisser" and having "eagerly agreed" to her using sex toys on him. She did not seek anonymity. King J was unimpressed by the argument that, with the actor's identity in the public domain, the *Spy Catcher* principle meant that the information was available to everyone. King J decided that

> "there has not been such widespread publication of that which appears in the *Daily Mail* today as to lead to the inevitable conclusion that there is no justification either in law or in terms of practicality in continuing the order of Mr Justice Blake. I much prefer to approach this case on the basis I have, which is to assess and weigh against each other the competing rights of the applicant to privacy (and indeed those of his family), and those of the respondent and the media in freedom of expression."[76]

He decided that the media should be allowed to publish the fact that he was a leading actor and world famous celebrity who had paid for sex with Ms Wood[77] and that he was a married man who was also a father.[78] Similar "floodgates" reasoning was used by Eady J and Tugendhat J to maintain the anonymity of *CTB*[79] despite the fact that he[80] had been identified in Parliament and on the internet.

It is internet publication and the subsequent searchable availability of the private information that causes the greatest damage in terms of the loss of the individual's original reasonable expectation of privacy. In these circumstances it was quite reasonable for Ryan Giggs, as *CTB*, to want assurances in his injunctive proceedings that NGN had "clean hands" and had not leaked the identification information about him. Eady J[81] said he was concerned that, for NGN to demonstrate that, it might "suggest that one or more employees of NGN was committing contempt of court". He then anticipated the Supreme Court decision in *Mulcaire v Phillips*[82] by remarking

> "Although the law relating to self-incrimination in this context cannot be said to be crystal clear, it would seem that the modern approach adopted by the courts is that such a risk cannot be regarded as an absolute bar when the court is invited, as a matter of discretion, to order disclosure, but it remains a factor to be taken carefully into account: see e.g. *Cobra Golf Inc v Rata* [1996] FSR 819, 830–832; *Dendron GmbH v University of California* [2005] 1 WLR 200; *C Plc v P (Att.-Gen. intervening)* [2008] Ch 1."

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74 *NEJ v BDZ* unreported injunction granted by Blake J on 9 April 2011.
75 *NEJ v Helen Wood* [2011] EWHC 1972 (QB) on the return day of 13 April 2011.
76 *NEJ v Helen Wood* [2011] [22].
77 Ms Wood had earlier sold a similar story about paid sex with the footballer Wayne Rooney.
78 See also Robin Callender Smith *Privacy Law is Madness* Sunday Express 17 April 2011.
79 *CTB v NGN* [2011] EWHC 1326 (QB) and *CTB v NGN* [2011] EWHC 1334 (QB).
80 Ryan Giggs as in *Giggs v NGN* [2012] EWHC 431 (QB).
81 *CTB* v *NGN* [2011] EWHC 1326 (QB) [11–13].
82 *Mulcaire v Phillips* [2012] UKSC 28.

Eady J added that, if Mr Giggs had specific information about leaks, he should give it to the Attorney General or the Solicitor General because it was their responsibility to represent the public interest in such matters, particularly criminal contempt.[83] Tugendhat J then had to address the problem which played out a few hours later[84] following John Hemming MP's naming of Mr Giggs in the House of Commons.[85] The newspaper wanted Mr Giggs' anonymity removed on the basis that everyone now knew that he was *CTB* and that "as it has been repeated thousands of times on the internet, NGN now wanted to join in". The judge rejected this argument. He accepted that, if the object of the injunction was to preserve a secret, it had failed. But that was only one of two purposes of the injunction: the other was to prevent intrusion or harassment.

> "The fact that tens of thousands of people have named the claimant on the internet confirms that the claimant and his family need protection from intrusion into their private and family life. The fact that a question has been asked in Parliament seems to me to increase, and not to diminish the strength of his case that he and his family need that protection. The order has not protected the claimant and his family from taunting on the Internet. It is still effective to protect them from taunting and other intrusion and harassment in the print media."

Prior to this hearing,[86] a suit had been filed against Twitter in California.[87] Twitter brushed the attempt aside on the basis that the High Court's powers did not extend to the immediate enforcement of injunctions on US territory.[88] Almost immediately it became apparent that Twitter would, in fact, reveal identities of account holders as the result of action taken by South Tyneside councillors seeking the identity of a "whistle-blower" tweeting under the identity of "Mr Monkey" in the context of defamatory material.[89]

3.3.2 Two Conundrums: Parliamentary Privilege and Internet/Social Media Identification

Despite English court orders granting claimants anonymity in misuse of private information claims there are two leakage points where identification may occur and subvert the whole process. The first, identification of claimants **3–010**

[83] Shortly afterward the Attorney General—dealing with identification on *Twitter* and other social media—said, in respect of overseas enforcement: "Those who take an idea that modern methods of communication mean that they can act with impunity may well find themselves in for a rude shock": *Hansard* 23 May 2011 Col 637.

[84] Sitting at 1730, after Eady J had concluded his judgement at 1600.

[85] *CTB* [2011] EWHC 1334 (QB) [2–3].

[86] On 23 May 2011.

[87] On 18 May 2011, issued out of the High Court in London: *An athlete known as CTB v. Twitter Inc and others*, QBD HQ11X01814 18 May 2011.

[88] See also *Eldrick Tont (Tiger Woods) v X & Y* (Persons unknown who have taken or obtained or offered for publication photographs of the intended claimant in circumstances described in the confidential schedule to this order) *http://www.scribd.com/doc/23989817/Tiger-Woods-Injunction-2009*.

[89] *http://www.telegraph.co.uk/technology/twitter/8544350/Twitter-reveals-secrets-Details-of-British-users-handed-over-in-landmark-case-that-could-help-Ryan-Giggs.html*: the case was brought in the 9th Circuit Court in California, gave the whistle-blower 21 days to respond before disclosing his details and reportedly cost the Council around £75,000.

under the protection of Parliamentary Privilege became a vogue for a while with interesting constitutional questions that had not properly been considered in a contemporary context. Namely, in a battle between the Supreme Court of Parliament and the Courts themselves, who had the last word? The second, drawing on identification which may have occurred in Parliament but also elsewhere in terms of general rumour and speculation, has proved more intractable.

3.3.2.1 Parliamentary Privilege

3–011 It is clear that court orders do not inhibit Parliamentary debate although both Houses of Parliament are subject to *sub judice* rules.[90] The rules are not absolute and are aimed at two areas. The first is to strike a balance between the principle that the rights of parties in legal proceedings should not be prejudiced by discussion of their case in Parliament and that Parliament should not prevent the courts from exercising their functions. The second is the principal that Parliament has a constitutional right to discuss any matter it pleases.[91] It is still unclear whether any court order could prohibit the reporting of what was said in Parliament, particularly in the context of information that breaches super injunctions.[92]

The Parliamentary Joint Committee on Privacy and Injunctions considered the matter and concluded on 12 March 2012:[93]

> "[230] We regard freedom of speech in Parliament as a fundamental constitutional principle. Over the last couple of years a few members have revealed in Parliament information covered by injunctions. We have considered carefully proposals for each House to instigate procedures to prevent members from revealing information subject to privacy injunctions. The threshold for restricting what members can say during parliamentary proceedings should be high. We do not believe that the threshold has yet been crossed.
>
> [231] If the revelation of injuncted information becomes more commonplace, if injunctions are being breached gratuitously, or if there is evidence that parliamentarians are routinely being 'fed' injuncted material with the intention of it being revealed in Parliament, then we recommend that the Procedure Committees in each House should examine the proposals made to us for new restrictions with a view to implementing them."

This led Lord Judge, commenting on that report, to ask the media to consider whether it was

> "a very good idea for our lawmakers to be in effect flouting a court order because they disagree with the order or, for that matter, because they disagree with the law of privacy which parliament has created.[94]

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[90] See Erskine May *Parliamentary Practice* 24th edn LexisNexis 2011 441–443 (House of Commons) and 518 (House of Lords).

[91] *Report of the 1999 Joint Committee on Parliamentary Privilege* [191].

[92] The *Report on the Committee on Super-Injunctions* concluded at [6.33]: "It therefore appears to be an open question whether. . .. the common law protects media reporting of Parliamentary proceedings where such reporting appears to breach the terms of the court order and is not covered by the protection provided by the Parliamentary Papers Act 1840. . .. What is clear is that unfettered reporting of Parliamentary proceedings (in apparent breach of court orders) has not been established as a clear right)."

[93] *http://www.publications.parliament.uk/pa/jt201012/jtselect/jtprivinj/273/27309.htm*

[94] *http://www.theguardian.com/politics/2011/may/21/judges-challenge-use-parliamentary-privilege*.

There were two particular celebrity situations which had crystallised this issue. On 10 March 2011 John Hemming MP used Parliamentary Privilege to name Sir Fred Goodwin, Chief Executive of RBS, as the banker who had obtained an anonymised injunction preventing *The Sun* revealing details of an extra-marital affair he had been having with another individual at the bank.[95] Lord Stoneham used the similar privilege in the House of Lords to name him two months later.[96] John Hemming then named Ryan Giggs as the footballer *CTB* who had obtained an injunction against *The Sun* preventing it revealing his affair with Imogen Thomas.[97] He did so in the context of this question:

> "With about 75,000 people having named Ryan Giggs on *Twitter* it is obviously impracticable to imprison them all and with reports that Giles Coren also faces imprisonment. . .the question is what the Government's view is on the enforceability of a law which clearly does not have public consent?"

3–012 There have been no recent examples of the privilege being used in quite the manner described above. However Jim Hood MP used a House of Commons debate in October 2014 on the miners' strike of 1984–85 to name the late Lord Brittan (a former Home Secretary) as being "associated with improper conduct with children". This was in the context of the historic sex crimes inquiry relating to child abuse.[98]

There is one ascribed celebrity situation for the future that could bring the courts and Parliament into conflict: mental capacity issues relating to the Queen. If an application was made to the Court of Protection in respect of her then the matter is likely to be treated under the provisions of an anonymity order.[99] The press and the media might want to be present for any court hearing.[100] The general issue of anonymity might be raised in Parliament, in a way that breached any anonymity order that had been granted by the court, on the basis that Parliament was entitled to debate the issues consequent on a Regency.

It would create a complex constitutional battle for supremacy between the effectiveness, enforcement and proportionality of orders of Her Majesty's judges and the competing free speech and privilege issues latent within the Court of Parliament.[101] However the Duke of Edinburgh's episodes of ill-health over Christmas 2011 and during the 60th Jubilee celebrations were dealt with openly and publicly and may be a pointer to how such things would be dealt with, even in terms of the Queen, in the future.[102]

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[95] *MNB v NGN* [2011] EWHC 528 (QB).

[96] On 19 May 2011.

[97] On 23 May 2011. He was warned by the Speaker, John Bercow, not to misuse the privilege but no action was taken against him.

[98] *http://www.dailymail.co.uk/news/article-2811776/Labour-MP-links-Leon-Brittan-80s-child-abuse-claims-Amid-row-historic-sex-crimes-inquiry-former-Home-Secretary-named-Commons.html*

[99] Under rule 91 of the Court of Protection Rules 2007.

[100] The President of the Family Division and Court of Protection, Sir James Munby, announced new guidelines in January 2014 encouraging a greater media presence at such proceedings: *https://inforrm.wordpress.com/2014/01/16/new-guidance-transparency-in-the-family-courts-and-the-court-of-protection-publication-of-judgments/*

[101] See generally Erskine May *Parliamentary Practice* 24th edn (LexisNexis 2011) 251–270.

[102] A detailed discussion of the inflexibility of the Regency Act 1937—and its potential pitfalls

3.3.2.2 Internet/Social Media Identification

3–013 The *Goodwin* and *Giggs* cases led the Lord Chief Justice, Lord Judge, to suggest that ways would be found to curtail the "misuse of modern technology" in the same way that those involved with online child pornography were pursued by the police.

> "Are you really going to say that someone who has a true claim for protection perfectly well made has to be at the mercy of modern technology? I'm not giving up on the possibility that people who peddle lies about others through using technology may one day be brought under control, maybe through damages, very substantial damages, maybe even injunctions to stop them peddling lies."[103]

Two other senior judicial figures have also considered the practicalities and problems in this area. Lord Leveson[104] said he understood why celebrities might not want to take enforcement action against bloggers breaching injunctions. It was time-consuming and expensive, individuals were difficult to track down and it could add to the *Streisand* effect where

> "further attempts to stop the publication of the information on the internet might well have simply inflamed the situation and led to even greater dissemination."[105]

He characterised bloggers and tweeters as "no more than electronic versions of pub gossip" compared to the established media and established journalists who had a "powerful reputation for accuracy" and for acting within the law. The established media conformed to the law, and when they did not they were liable to the law. Web-based publications could be faced with "take down" notices and to pay damages. He was concerned, however, that the lawlessness of bloggers and tweeters could infect the standards of the established media. It might lead to journalists adopting an approach which was "less than scrupulous" in the pursuit of stories.

> "In order to steal a march on bloggers and tweeters, they might be tempted to cut corners, to break or at least bend the law to obtain information for stories or to infringe privacy improperly to the same end."

What worried him was that the media might attempt to compete with bloggers by providing information in breach of injunctions by established newspapers moving entirely online and out of the jurisdiction in which the target readership was based.[106] He accepted that States all had different approaches to freedom of expression across the world which could make the reciprocal enforcement of judgments difficult. The solution he suggested was to "establish cross-border recognition and enforcement of judgments". Accepting that the

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in contemporary terms—can be found in Rodney Brazier *Royal incapacity and constitutional continuity: the Regent and Counsellors of State* CLJ 2005, 64(2), 352–387.

[103] *http://www.theguardian.com/law/2011/may/20/superinjunction-modern-technology-lord-judge*

[104] Lord Leveson *Hold the front page: News-gathering in a time of change* University of Melbourne 12 December 2012.

[105] Ibid [49].

[106] Ibid [55].

"mainstream, professional media" was moving towards a business model based around the internet it followed that

> "in the not-too-distant future a large percentage, if not the majority, of the print media will be entirely online: that it will no longer be a print media. [That would] require us to. . ..develop a cosmopolitan approach and one which supports the rule of law through a fair and effective international framework. It might be said that if we facilitate or condone breaches of the law, and thereby weaken the rule of law by failing to act and to recognise judgments and court orders which emanate from other countries, we encourage the weakening of the rule of law at home too."[107]

Significantly, although he identified the problem, he did not suggest the mechanism or the outlines of the framework through which any of this could be progressed towards a solution. **3–014**

Then came the response—on behalf of the judiciary to the Law Commission consultation on contempt of court—from Tugendhat J and Treacy LJ.[108] Although the focus of this was in relation to prejudice to fair trials in criminal proceedings, in terms of published material and material that might be accessible to jurors on the internet, it considered s.12(3) HRA and Article 10 issues, particularly in terms of archived news reports. It observed that courts were "generally unlikely" to be satisfied that archive material would create the substantial risk of serious prejudice unless the court has first considered whether the risk could satisfactorily be overcome by some less restrictive means than an interference with freedom of expression. One such measure would involve asking prospective jurors whether they had read the material, and, if they had, then standing them down. The matter would depend on the facts of the case, and whether there is a practical solution which would avoid an interference with the right of freedom of expression.[109]

Experience from the defamation and privacy injunction area showed that

> "applications and enforcement, while generally trouble free, can in some cases be very costly, time consuming and uncertain as to outcome. With the financial constraints that exist for parties in the Crown Court it is difficult to envisage how a procedure for orders that material be removed from the internet can work fairly".

In *R v Harwood* [110] Fulford J had ordered the removal of two articles from the internet. He described the UK based publishers as "co-operative" and the circumstances as "straightforward", and said that injunctions to remove archive material "are rarely appropriate". Even so, one blog with inadmissible material remained accessible. Fulford J did not seem to have considered asking jurors in waiting if they had read the material, and empanelling only those who had not which, it is suggested, would have been a proportionate approach.

With Tugendhat J's experience evident in the drafting, the judicial response noted there was a

> "small but significant number of individuals who are so convinced of their right to publish what they want to publish that coercive measures against them will either be ineffective, or

[107] Ibid [59–61].
[108] A judicial response to Law Commission Consultation Paper 209.
[109] Ibid [40].
[110] *R v Harwood* [2012] EW Misc 27 (CC).

> effective only following the expenditure of time and money which is not available. . .. Some such people are motivated by a conviction that they are right (and everyone else wrong), others by a desire to inflict injury at almost any price".[111]

In *Contostavlos v Mendahun*[112] the injunction to remove indecent images of the claimant from the internet had been wholly effective but "at a cost in time and money so vast that only the very richest" could afford.[113] This underlines the fact that access to justice in this area of private information favours well-resourced celebrities.

As far as contempt and the internet is concerned, the Attorney General's expressed view is that it—and the social media in particular—poses continuing challenges for enforcement.

3–015 Characterising the major news organisations as, on the whole, acting responsibly and in a measured manner

> "the inhabitants of the internet often feel themselves to be unconstrained by the laws of the land. There is a certain belief that so long as something is published in cyberspace there is no need to respect the laws of contempt or libel. This is mistaken. And it does not follow that because law enforcement cannot be perfect, consistent and universal, that there is no point in doing anything at all. I have to consider each case on its merits. Just because in one case I might consider that a tweet, however improper, is unlikely to seriously prejudice or impede the course of justice, it would be wrong to assume that another tweet about another case could not engage the law".[114]

None of this alters the fact that, domestically and in terms of overseas media platforms, publication of private information or information which a UK court or UK law believes should not be made public can only be punished after the event. It cannot prevent it but only discourage the consequences of it.[115] This creates significant problems in terms of prosecution choosing how to proceed against an evolving background[116] and of potential inequalities in sentencing policy. The "tweeters" who identified a rape victim[117] were

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[111] A judicial response to Law Commission Consultation Paper 209, [46] referencing *Cruddas v Adams* [2013] EWHC 145; *McCann v Bennett* [2012] EWHC 2876 and *ZAM v CFW* [2011] EWHC 476 (QB). In *McCann* and *ZAM* the injunction had been ineffective or only partly effective, and contempt proceedings have since been brought in *McCann:* [2013] EWHC 283 (QB) and [2013] EWHC 332 (QB) resulting in a 3-month prison sentence suspended for one year. In *ZAM* the contempt proceedings had been brought only against the English based defendant and not the foreign based defendant. See also *ZAM* and the *Streisand* effect: *http://www.pressgazette.co.uk/node/47205?qt-most_read_most_commentedt=0*

[112] *Contostavlos v Mendahun* [2012] EWHC 850 (QB).

[113] A judicial response to Law Commission Consultation Paper 209, [47].

[114] 8 February 2012: *http://www.theguardian.com/commentisfree/2012/feb/08/contempt-of-court-act-internet*

[115] *AG v Associated Newspapers and MGN* [2012] EWHC B19 (QB): each fined £10,000 (plus Attorney General's costs of £25,000).

[116] The current CPS policy was announced by the DPP on 20 June 2013: *http://www.cps.gov.uk/news/latest_news/dpp_publishes_final_guidelines_for_prosecutions_involving_social_media_communications*

[117] Prosecution under s.5 of the Sexual Offences (Amendment) Act 1992 requires the consent of the Attorney General in any event. In July 2015 a Doncaster man was charged with the s.5 offence after he named the victim of a sexual offence on the South Yorkshire Police's *Facebook* page: *http://www.theguardian.com/technology/2015/jul/09/man-charged-naming-sex-attack-victim-police-facebook-page*

prosecuted for a summary-only offence and other recent cases have presented a litany of anomalies.[118]

Within sentencing policy the same anomalies are apparent. The most extreme example of this is in the disparities disclosed within the ultimately successful appeal against conviction of the man originally convicted of the "Robin Hood airport" tweets.[119] As different modalities of social media develop—with the potential for User Generated Content (UGC) platforms and corporate headquarters to be sited or re-located to less process-amenable jurisdictions—the difficulties in this area may become more complex, less enforceable and a greater encouragement to those who wish to distribute private information, act unlawfully and ignore their responsibilities.[120]

As identified above, the determined "breachers" of anonymity orders who convince themselves they can act with impunity or who can feed the prohibited information to those who can publish it out of the jurisdiction on the internet and via the social media are an intractable and, for the near-term, unsolvable problem. If the route toward the solution is in reciprocal enforcement provisions it takes the law into areas where the law of unintended consequences can produce more problems than it solves.[121] The UK experience of the European Arrest Warrant is but one example. For different reasons the Australian attributed celebrity and internet cause célèbre Julian Assange—currently a political refugee in the Ecuadorian Embassy in London—is there because he does not want to be sent to Sweden by the UK because of what he fears the US could then do to him.

3.3.3 Children of Celebrities

3–016 It might be suggested that the privacy issues relating to the children of celebrities, in the context of the taxonomy of the book, straddles two celebrity categories. In Malvolio's terms they are born famous—simply by the association with a celebrity parent—and as such are ascribed celebrities as well as being attributed celebrities. That is to categorise most of them incorrectly: their parents are only either attributed celebrities or (at best) achieved celebrities. Prince George and Princess Charlotte however, can properly claim to be ascribed celebrity children within the taxonomy.

[118] See Lilian Edwards *Section 127 of the Communications Act 2003: Threat or Menace? http://blogs.lse.ac.uk/mediapolicyproject/2012/10/19/section-127-of-the-communications-act-2003- threat-or-menace/*

[119] *Paul Chambers v DPP* [2012] EWHC 2157 (Admin). See also the author's decision in *Sittampalam v IC and CPS* (EA/2014/0001), an FOIA appeal related to how the case came to be prosecuted and why the matter had to go before the Administrative Court for the law to be clarified.

[120] For a less apocalyptic view, see Jacob Rowbottom *To rant, vent and converse: protecting low level digital speech* CLJ 2012, 71(2), 355–383.

[121] See also Elaine Fahey *How to be a third pillar guardian of fundamental rights? The Irish Supreme Court and the European arrest warrant* Ent.L. Rev. 2008, 33(4), 563–576.

3.3.3.1 Starting Point: Images of Children

3–017 The first case involving a child and the misuse of private information was *Murray v Express Newspapers & Big Pictures*.[122] A covert, long-lens photograph of the writer J K Rowling's infant sonbeing pushed by his father down an Edinburgh street in a buggy with his mother walking alongside—was published in the *Sunday Express*. His parents took action on their child's behalf and the *Sunday Express* paid £800 to settle the action. Patten J, the first instance judge, struck out the claim. He said that he had to consider:

> "whether and to what extent the application of the principles set out by the House of Lords in *Campbell v MGN Limited* [2004] 2 AC 457 need to be re-considered or amended in the light of the more recent Strasbourg jurisprudence and in particular the decisions of the ECHR in *Von Hannover v Germany* [2004] EMLR 21 and *Sciacca v Italy* (2006) 43 EHRR 20.

He concluded:

> I propose to strike out or dismiss the claim based on breach of confidence or invasion of privacy for two reasons: firstly, that on my understanding of the law including *Von Hannover* there remains an area of innocuous conduct in a public place which does not raise a reasonable expectation of privacy; and secondly, that even if the ECtHR in *Von Hannover* has extended the scope of protection into areas which conflict with the principles and the decision in *Campbell*, I am bound to follow *Campbell* in preference. Because I regard this case as materially indistinguishable from the facts in *Hosking v Runting*[123] I am satisfied that on that test it has no realistic prospects of success. In these circumstances it is not necessary for me to consider the wider issues of freedom of expression or to perform the balancing exercise required by reason of Art. 10."

In the Court of Appeal Patten J's decision was overturned and a trial on the issues was ordered.[124] The Court noted in particular[125] (in connection with a PCC complaint made by former Prime Minister Tony Blair and his wife about pictures of their children) that the PCC stated that

> "the acid test to be applied by newspapers in writing about the children of public figures who are not famous in their own right (unlike the Royal Princes) is whether a newspaper would write such a story if it was about an ordinary person".

The Court decided it was at least arguable that a similar approach should be adopted in respect of photographs. If a child of parents who were *not* in the public eye could reasonably expect not to have photographs of their child published in the media then so too should the child of a famous parent. The

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[122] *Murray v Express Newspapers & Big Pictures* [2007] EWHC 1908 (Ch).

[123] *Hosking v Runting* [2004] NZCA 34. Extended, most recently in the sphere of intrusion into an adult's privacy, in *C v Holland* [2012] NZHC 2155.

[124] *Murray v Big Pictures* [2008] EWCA Civ 446. Sir Anthony Clarke MR at [36] stated that 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." The fact that a child was involved was clearly additionally significant: [45]. The re-trial never took place because *Big Pictures* settled the case.

[125] *Murray v Big Pictures* [2008] [46].

only reason David Murray had his picture taken was because he was the son of J K Rowling. This reasoning has set up a specific line of celebrities-and-their-children settlements typified by the resolution of a complaint made by Coleen Rooney, the wife of footballer Wayne Rooney, after a picture of their five-month-old son Kia being held in her arms at Aintree Grand National 2009 was published in the *Sunday Express*.[126] This was notwithstanding the fact that Ms Rooney had been paid a £50,000 celebrity attendance fee to be at the event and had held Kia up for the public to take pictures of him.[127] Complaints about other pictures of Kia have been made in May 2014 despite Wayne Rooney posting a video of him on Facebook playing football with his father.[128]

3.3.3.2 Anonymity for indiscreet adult celebrities to prevent "playground bullying" of their (anonymous) children

3–018 The development of case law in relation to the children of celebrities was inevitable as the effects of the tide of senior court decisions in respect of ECHR Article 8 private life rights were given effect particularly by Baroness Hale. Her judgments in a series of key immigration decisions in the House of Lords and the Supreme Court involving children followed a logical and inexorable line.[129] Her phrase in the 2011 decision of *ZN (Tanzania)* that the "*best interests of the child must be a primary consideration. This means that they must be considered first*" is now woven into the fabric of all decisions about children, celebrity or otherwise. It would be going too far to suggest that the children of celebrities have now become litigation "accessories". It is clear, however, that it helps to be able to draw on their existence—and the effect on them of an adverse presentation of their adult parents' private lives—in the proportionality balancing exercise.

In *ETK v NGN*—a case involving an affair which had turned sour between two actors in a well-known television drama—Ward LJ felt that it could tip the balance "where the adverse publicity arises because of the way the children's father has behaved".[130] The rights of children were not confined to their Article 8 rights.[131] While it was clear that the interests of children did not

[126] £10,000 settlement and apology: unreported.

[127] Presumably for the public's private—rather than commercial—use.

[128] *http://www.pressgazette.co.uk/wayne-rooney-condemns-disgusting-uk-press-after-pics-published-young-sons-playing-golf*

[129] *Beoku-Betts v SSHD* [2008] UKHL 39 at [4] reaffirmed in *Chikwamba v SSHD* [2008] UKHL 40 at [8] and reaching its apotheosis in her leading judgement in *ZN (Tanzania) v SSHD* [2011] UKSC 4 at [33], pointing out that children could not be blamed for the deficiencies of their parents.

[130] *ETK v NGN* [2011] EWCA Civ 439, [13] Ward LJ: "Then there are the children. The purpose of the injunction is both to preserve the stability of the family while the appellant and his wife pursue a reconciliation and to save the children the ordeal of playground ridicule when that would inevitably follow publicity. They are bound to be harmed by immediate publicity, both because it would undermine the family as a whole and because the playground is a cruel place where the bullies feed on personal discomfort and embarrassment."

[131] *ETK v NGN* [2011] Civ 439[18]. He cited *Neulinger v Switzerland* (2010) 28 EHRC 706 and article 3(1) of the Convention of the Rights of the Child 1989 (UNCRC) and from article 24 of

automatically take precedence over the Convention rights of others, particular weight should be accorded to the Article 8 rights of any children likely to be affected by the publication, if that would be likely to harm their interests.

> "Where a tangible and objective public interest tends to favour publication, the balance may be difficult to strike. The force of the public interest will be highly material, and the interests of affected children cannot be treated as a trump card."

He followed *Re S* but added to it significantly because *Neulinger v Switzerland* post-dated Lord Steyn's analysis. The "intense focus" on the comparative importance of the specific rights being claimed also required the privacy rights of children to be reflected in the Article 8 side of the scale. In terms of the weight of the Article 10 considerations there was no "political edge" to the publication, and nothing "so crucial to democracy" was enhanced by the publication.[132]

> "The intellectual, artistic or personal development of members of society is not stunted by ignorance of the sexual frolics of figures known to the public. . ..the benefits to be achieved by publication in the interests of free speech are wholly outweighed by the harm that would be done through the interference with the rights to privacy of all those affected, especially where the rights of the children are in play."[133]

He asked whether there was really a debate of public interest into why the woman had left the series and concluded this was not the case. While "publication may satisfy public prurience" that was not a sufficient justification for interfering with the private rights of those affected.[134]

3–019 This careful and proportionate articulation of the issues in relation to children of celebrities was followed in a less obvious example in *Edward RockNRoll v NGN*.[135] The Claimant[136] married Kate Winslet, the actress, in circumstances of some novelty in December 2012. Both had recently divorced their previous spouses. *The Sun* came into possession of pictures of Mr RockNRoll taken in July 2010 at a relative's private fancy dress party at a private estate. The photographs were taken by another guest at the party. Some of them showed him partially naked from the waist down. The guest posted them on his Facebook page. They had subsequently been viewed by around 1,500 of his friends, but not by the general public, until taken off the Facebook site.[137] *The Sun* put Mr RockNRoll on notice that it was about to publish one of the pictures with pixilation obscuring the lower half of his body in the photograph but with descriptive text of what, apart from obvious genitalia, had been there.

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the European Union's Charter of Fundamental Rights. Article 3(1) UNCRC provided: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

[132] *ETK v NGN* [2011] EWCA Civ 439, [20].

[133] *ETK v NGN* [2011] EWCA Civ 439, [21–22].

[134] *ETK v NGN* [2011] EWCA Civ 439, [23].

[135] *Edward RockNRoll v NGN* [2013] EWHC 24 (Ch) [43–46].

[136] A nephew of Sir Richard Branson who had changed his name by Deed Poll.

[137] The copyright was assigned from James Pope, who had taken the photographs, to the Claimant before the injunction was sought.

Briggs J went through a careful, judicially well-trodden catechism, referring to another case the result of which turned on the Article 8 rights of children of the celebrity actors involved.[138] Despite the extensive—but arguably restricted—Facebook viewing by 1,500 people over an 18-month period it was the decisive factor in the decision related to protecting the Article 8 interests of Kate Winslet's children. He stated:[139]

> "there is in my view good reason to suppose that, if the Photographs or a description of their content were published in a national newspaper with the circulation of the *Sun*, there is real reason to think that a grave risk would arise as to Miss Winslet's children being subjected to teasing or ridicule at school about the behaviour of their newly acquired step-father, within a short period after his arrival within their family, and that such teasing or ridicule could be seriously damaging to the caring relationship which, on the evidence, the claimant is seeking to establish with them".

He had reminded himself about the importance of the Article 10 rights in the context of the proportionality test.[140] He noted that, in *Axel Springer AG v Germany*,[141] additional factors such as the public profile of the claimant, his conduct prior to the threatened publication, the manner in which the information about his private affairs was obtained, the content, form and potential for harm of the publication, and the severity of the sanction proposed were all matters to be taken into account, in addition to the contribution which the publication might make to genuine public debate.[142] He saw nothing

> "disproportionate in permitting a derogation from the defendant's Article 10 rights by enforcing the claimant's Article 8 rights in the present case. This appears likely to be a case where at trial it will be shown that the defendant's Article 10 rights are at the weakest end of the hierarchy to which I have referred, whereas the claimant's Article 8 rights are powerfully engaged."[143]

The Sun had sought unsuccessfully to persuade him from pictures available on the internet of Miss Winslet's appearances "scantily clad, in films, that this would not be a new or therefore particularly upsetting experience for her children."[144] The fact that the children in question might be subject to "teasing or ridicule at school" because their mother had just begun her third marriage to someone with the self-devised surname of RockNRoll clearly did

[138] Set out in *ETK v News Group Newspapers Ltd* [2011] EWCA Civ 439 at [10].
[139] *Edward RockNRoll* [2013] EWHC 24 (Ch) [36].
[140] *Edward RockNRoll* [2013] EWHC 24 (Ch) [31].
[141] *Axel Springer AG v Germany* [2012] EMLR 15, [89–95].
[142] See also R Callender Smith "From von Hannover (1) to von Hannover (2) and Axel Springer AG: do competing ECHR proportionality factors ever add up to certainty?" 2012 *Queen Mary Journal of Intellectual Property*, Vol. 2 No. 4, 388–392.
[143] *Edward RockNRoll* [2013] EWHC 24 (Ch) [40].
[144] *Edward RockNRoll* [2013] EWHC 24 [37]: "I am entirely unpersuaded by that submission. Whatever may be the difficulties facing a mother in bringing up children while, at the same time, pursuing a career as an actress, whether on stage or in film, that provides no possible reason for exposing her children to a real risk to additional embarrassment or upset from the nationwide publication of photographs (or their contents) depicting their other carer behaving in a foolish and immature manner when half naked." And, at [39]: ". . ..If I had concluded that. . ..the balance between the parties' respective Article 8 and Article 10 rights was even, I would have concluded that the real risk of harm to those children was sufficient to tip it in the claimant's favour."

not alter matters. As Baroness Hale had, in effect, observed in *ZN (Tanzania)* children cannot be blamed for their parents' actions when their Article 8 rights are in play. The argument that 1,500 people had already viewed the picture on Facebook—which on a common-sense view destroyed its private nature—was discounted by the Judge on the basis that consent to them being viewed in these circumstances did not imply consent to widespread newspaper publication. Outside the judgment—but as a matter of fact—*The Sun* made it clear that it was the textual description of the pixelated lower half of the picture which made the proposed story because of the bizarre nature of the private information it disclosed. Editorially it was never considered that the whole picture could have been used.[145]

3–020 The 2013 Court of Appeal decision relating to the Article 8 rights of celebrity children demonstrates, however, just how fact-sensitive the publication of photographs, and the private information they represent, is in the judicial analysis. *AAA v Associated Newspapers*[146] relates to pictures of the illegitimate child of Boris Johnson,[147] the Mayor of London, being wheeled in a buggy by her mother Helen Macintyre, an unmarried professional art consultant.[148] The *Daily Mail* published a series of articles,[149] three of which included that photograph and all of which referred to the private information. Nicola Davies J awarded £15,000 damages for breach of the child's right of privacy by the repeated publication of the photographs. She refused to grant an injunction or award damages for publication of the private information but accepted an undertaking from the newspaper restricting future publication of the photographs of the claimant.

The Court of Appeal reviewed in considerable detail the Judge's carefully structured reasoning.[150] It concluded that the core information in the story—that Boris Johnson had an adulterous affair with the mother, deceiving both his wife and the mother's partner, and resulting in the child being born nine months later—was a matter of public interest which the electorate was entitled to know when considering his fitness for high public office. This Article 10 conclusion outweighed the Article 8 current and prospective private life interests of the child.[151]

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[145] Set in the context not of the picture *per se* but the text describing the picture this seems to be a particularly strict view of the private information in question. See also the "Tulisa Sex Tape" litigation: *Contostavlos v Mendahun* [2012] All ER (D) 152 (Apr).

[146] *AAA v Associated Newspapers* [2013] EWCA Civ 554.

[147] An achieved celebrity.

[148] An attributed celebrity: *http://www.theguardian.com/politics/davehillblog/2010/jul/15/boris-johnson-daily-mirror-olympic-tower-helen-mcintyre*

[149] Beginning on 16 July 2010: *http://www.dailymail.co.uk/news/article-1295403/Why-DO-classy-women-falling-Mayor-Boris-bumbling-cad.html*

[150] This included a description of Mr Johnson. "As to his private life, he is a man who has achieved a level of notoriety as the result of extramarital adulterous liaisons. . .. The claimant is alleged to be the second such child conceived as a result of an extramarital affair of the supposed father. It is said that such information goes to the issue of recklessness on the part of the supposed father, relevant both to his private and professional character, in particular his fitness for public office. I find that the identified issue of recklessness is one which is relevant. . .. Specifically, I find that it goes beyond fame and notoriety." Ibid [118].

[151] *AAA v Associated Newspapers* [2013] EWCA Civ 554 [55].

The Court of Appeal judgment also made it clear that the "fade factor" argued on behalf of the child carried little weight. Much of the information published by the media in relation to her paternity remained available online. The permanent injunction sought by the child would only restrain the *Daily Mail* from referring to the information while many other media organisations had published it. It was fanciful to expect the public to forget the fact that Boris Johnson, a major public figure, had fathered a second illegitimate child. The child's mother had accepted in cross-examination that any woman who embarked on an affair with him was "playing with fire" and that such an affair was bound to attract "a very considerable media attention in both the national media and the London press".[152]

The Court of Appeal decision in *AAA* came out on 20 May 2013 after Briggs J's decision in *RockNRoll* on 17 January 2013. The first instance decision *AAA* of Nicola Sharpe J was published on 25 July 2012. There are two oddities. The first is that the first-instance decision of *AAA* six months earlier was not cited to Briggs J by Desmond Browne QC (who had also been leading counsel for Associated Newspapers there and in the Court of Appeal). The second is that *RockNRoll* was not drawn to the attention of the Court of Appeal by Desmond Browne QC or James Price QC who was acting for the litigation friend of *AAA*.[153] It may have been thought to be irrelevant because, although Nicola Sharpe J refused to grant an injunction or award damages for publication of the private information, she did accept an undertaking from Associated Newspapers that they would not be republished. Reading the Court of Appeal judgment in *AAA* against *RockNRoll* leaves a distinct impression that one judgment should have—but did not—helped inform the other.

3.3.3.3 Style over Substance? Weller v Associated Newspapers[154]

3–021 The celebrity musician Paul Weller[155] brought misuse of private information and Data Protection Act claims,[156] on behalf of three of his children, in respect of photographs of them published online. He contended that their faces should have been pixelated. The pictures, taken by an unnamed photographer in Santa Monica, showed the Weller family out shopping and relaxing at a cafe on the edge of the street. Dylan Weller was 16 years old at the time: the other two children were 10 months old twins. Dingemans J reviewed all the relevant legal principles.[157] Having stated categorically that English law did not recognise "image rights"[158] he found that the children had a

[152] *AAA v Associated Newspapers* [2013] [54].

[153] This analysis was made by comparing the information in the official transcripts of each judgement on *Westlaw*.

[154] Ibid [182], commenting also that his approach was consistent with the PCC's Editor's Code which recognized that "private activities can take place in public and that editors should not use a parent's position as sole justification for the publication of details of a child's private life".

[155] A former member the bands *Style Council* and *The Jam*.

[156] The parties agreed that the Data Protection Act claim stood or fell with the misuse of information claim.

[157] Ibid [15–79].

[158] Ibid [19]. However at [60–63] he relied on the ECtHR "image rights" decisions in *Reklos v*

reasonable expectation of privacy. Applying the balancing test, their Article 8 rights overrode the Article 10 rights engaged.

> "These were photographs showing the expression on faces of children, on a family afternoon out with their father. Publishing photographs of the children's faces, and the range of emotions that were displayed, and identifying them by surname, was an important engagement of their Article 8 rights, even though such publication would have been lawful in California. There was no relevant debate of public interest to which the publication of the photographs contributed. The balance of the general interest of having a vigorous and flourishing newspaper industry does not outweigh the interests of the children in this case."[159]

The two sides approached the quantification of damages from completely opposite perspectives. For the children it was argued that they were entitled to "vindicatory damages" applying *Mosley* and at least £15,000 based on *AAA*. The newspaper argued for nominal or minimal damages. The judge held that "vindicatory damages" were inappropriate and "unhelpful" for misuse of private information claims.[160] This was because of the risk of overcompensation (because of double counting) or under-compensation (because factors could be missed). The principles to be followed in this area were twofold: damages should compensate the children for the misuse of their private information and aggravated damages could be awarded where appropriate.[161] Dylan was awarded £5,000 and the twins John Paul and Bowie received £2,500 each with "nothing in the case" to suggest that aggravated damages were appropriate.[162] The newspaper undertook not to publish the photographs again.[163]

3–022 On one view the result of this case is what could be expected from *Murray*, updated by the case law of the intervening eight years. There are, however, some significant differences. The photographs of the Wellers were taken lawfully according to US law—it was a fact that Dylan had modelled for *Teen Vogue*, that images of the twins' naked bottoms had been tweeted by their mother and that their father had discussed the children in promotional media interviews.

Despite Dingemans J's declaration that "image rights" do not exist in

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Greece [2009] EMLR 16 (where taking a photograph for sale of a new born child without parental consent at a clinic breached the child's Article 8 rights) and the words from that judgment at [40] "a person's image constitutes one of the chief attributes of his or her as it reveals the person's unique characteristics and distinguishes the person from his or her peers" repeated again in *Von Hannover 2* at [95] to conclude that the "particular importance attached to photographs in the decided cases" demonstrated the difference between simply seeing someone and "the publication of a permanent photographic record" of them.

[159] Ibid [182], commenting also that his approach was consistent with the PCC's Editor's Code which recognized that "private activities can take place in public and that editors should not use a parent's position as sole justification for the publication of details of a child's private life".

[160] Ibid [190] applying *R (Lumba) v SSDH* [2011] UKSC 12.

[161] Ibid [192–193]: he noted, citing the review of such damages in Northern Ireland by McCloskey J in *McGaughey v Sunday Newspapers Ltd* [2010] NICh 7, that *Mosley* was the exception not the rule. In *Campbell* the award was £2,500 (with £1,000 aggravated damages), £3,500 in *Archer v Williams* [2003] EWHC 1670 (QB) for medical information, £3,500 for each claimant in *Douglas v Hello* (No.3) and £2,000 in *Applause Store Productions v Raphael* [2008] EWHC 1781.

[162] Ibid [196–197], limiting the awards only to the children's facial features.

[163] Associated Newspapers has appealed this decision.

England—and the next section of this chapter challenges that vis-à-vis actions within all the other EU member states—he was not referred to the CJEU decision in *Martinez*.[164] He did, however, rely specifically on statements from ECtHR case law identified above in *Reklos* and *Von Hannover 2* relating to images of children and individuals. It is difficult to read this decision in a way that does not grant general image rights to children.[165] Rather like earlier judicial denials about a law of privacy this case demonstrates that, providing judges focus only on the image and photographs in the context of misuse of private information (and data protection) actions, English law achieves the protection of image rights by the style of the legal packaging rather than the substance of the legal action. Hannah Weller is now campaigning to have the publication, without parental consent, of pictures of children made a criminal offence.[166]

Associated Newspapers' appeal in the *Weller* case may also be influenced by the Supreme Court decision in *JR38 (Northern Ireland)*.[167] In 2010 two newspapers in Northern Ireland carried photographs of a 14-year-old youth taken from CCTV images as part of a police publicity operation following rioting in Londonderry. The aim was to combat sectarian rioting in the City. The youth claimed that, by publicising photographs of him, his ECHR Article 8 private life rights had been breached. Here—unlike *Weller*—was a youth who had been given celebrity notoriety not only by his involvement in the rioting but by the subsequent publication of photographs of him.[168] What was his expectation of privacy?

While all the individual decisions in the Supreme Court were unanimous in dismissing the appeal, Lord Kerr (with whom Lord Wilson agreed) held that Article 8 was engaged but, in the circumstances of this appeal, the interference with the privacy right was correct and proportionate.[169]

> "[55] If reasonable expectation of privacy was to be treated as the be all and end all of whether article 8 was engaged, it might be supposed that only one answer was possible. For the reasons that I have given, a more nuanced approach is warranted. The fact that the appellant was a child; the fact that the mooted interference with his article 8 right involved not only the taking

[164] C-509/09 and C161/10 *eDate Advertising GmbH v X and Martinez v MGN Ltd.*

[165] See also Judith Janna Märten "The Weller Case: England and Germany getting closer by protecting children in the media" *http://inforrm.wordpress.com/2014/06/08/the-weller-case-england-and-germany-getting-closer-by-protecting-children-in-the-media-judith-janna-marten/* and Hugh Tomlinson QC *Paul Weller, Article 8 and the recognition of "image rights" http://inforrm.wordpress.com/2014/04/30/weller-article-8-and-the-recognition-of-image-rights-hugh-tomlinson-qc/*

[166] On 12 June 2014 Mrs Hannah Weller called for a specific change in the law to "give children better protection from the prying eyes of the press. It should be a criminal offence to violate any child's right to grow up free from media intrusion," she said *http://www.bbc.co.uk/news/uk-27810069*. On 30 July 2014 the *Daily Mail* website took down pictures of the infant son of David Walliams and Lara Stone—taken in France—following a complaint from the parents. That complaint was on the basis that there should be no pictures of the child published "even if his face was pixelated", suggesting that the totality of image of the child has its own integrity requiring protection.

[167] *JR38 (Northern Ireland)* [2015] UKSC 42.

[168] There are factual peculiarities in this case that should be born in mind and which are set out at [6 –10] of the Supreme Court judgment.

[169] Lord Toulson and Lord Hodge held that Article 8 was *not* engaged but if it had been, the publication of the images of the Appellant would be appropriate in the circumstances. Lord Clarke agreed with Lord Toulson.

of his photograph but also its publication, with the consequent risk of stigmatisation; and the fact that the consent of the appellant and his parents was neither sought nor given, combine to more than offset the importance of the reasonable expectation of privacy test in his case.

[56] The test for whether article 8 is engaged is, essentially, a contextual one, involving not merely an examination of what was reasonable for the person who asserts the right to expect, but also a myriad of other possible factors such as the age of the person involved; whether he or she has consented to publication; whether the publication is likely to criminalise or stigmatise the individual concerned; the context in which the activity portrayed in the publication took place; the use to which the published material is to be put; and any other circumstance peculiar to the particular conditions in which publication is proposed. To elevate reasonable expectation of privacy to a position of unique and inviolable influence is to exclude all such factors from consideration and I cannot accept that this is a proper approach. As I have said, reasonable expectation of privacy will often be a factor of considerable weight; it might even be described as "a rule of thumb" but to make it an inflexible, wholly determinative test is, in my opinion, to fundamentally misunderstand the proper approach to the application of article 8 and to unwarrantably proscribe the breadth of its possible scope."

He went on to point out that when the focus was on the publication of the photographs of the youth, rather than the activity on which he was engaged, and when the potential effect was considered in the context that their publication might have on the life of the child

". . ..it was not difficult to understand that article 8 must be engaged. It would be facile to say that, because he was rioting, he cannot have expected that a right to respect for private life would be engaged and, on that account alone, it was not engaged. A child's need for protection can go beyond what, if he was an adult, he would be reasonably entitled to expect.[170]

Whether, therefore, one approaches the question of whether article 8 was engaged on the basis that reasonable expectation of privacy is but one factor in the equation or that that concept should be adjusted to take into account what the effect would be on the child, irrespective of his personal expectation, I am satisfied that there was an interference with his Convention right and that the essential issue in this case is whether that interference was justified."[171]

He also noted that the Police could, under the Data Protection Act 1998, publicise the image of the youth in pursuance of prevention of crime, arrest and prosecution of those committing criminal acts. Sectarian violence in areas of Londonderry made this a priority for the Police in order to prevent any further escalation of trouble.[172]

Lord Kerr applied[173] the four-fold proportionality test enunciated by Lord Reid in *Bank Mellat* and concluded:

"Striking the balance between the rights of the individual and the interests of the community should not, in this instance, be viewed solely as a competition between two opposing benefits. The appellant himself stood to gain by the opportunities afforded him to be diverted from the criminal activity in which he had been engaged. It was very much in his long term interests that he should become a law-abiding and useful member of his community.[174]

The interests to the community generally are obvious. Quite apart from the deep unpleasantness and, indeed, danger to which those who lived in the area were subjected by these recurring riots, the peril in which they placed inter-community harmony is undeniable. The fact that the Operation was so successful in reducing the number of interface confrontations cannot be left out of account either. For these reasons and for the reasons given by the Lord Chief

[170] JR38 Northern Ireland [65].
[171] JR38 Northern Ireland [66].
[172] JR38 Northern Ireland [70].
[173] JR38 Northern Ireland [75–78].
[174] JR38 Northern Ireland [79].

> Justice in para 37 of his judgment, the balance fell firmly on the side of pursuing the option of publication of the appellant's photographs and those of others involved. The way in which he and others who were thus identified have been dealt with is testament to the benefit that was available to them by following that course. The benefit to the community is as unquestionable as it is considerable."[175]

Lord Kerr, in effect, approached and delivered his decision the hard way. He faced up to and cleared all the difficult and demanding hurdles—both factual and legal—recognising both domestic and ECtHR jurisprudence with rigour, precision and a more than a smattering of common-sense, practicality and humanity.

The Court of Appeal in the *Weller* case have been set a demanding standard in terms of Lord Kerr's analysis when they come to consider Dingemans J's first instance findings. The issue of children and the publication of pictures which clearly identify them—particularly the children of celebrities who are being pictured only because of their parents' status—needs to be settled.[175a] It is likely to favour the privacy rights of children generally unless there is, as with *JR38*, many other substantial public interest factors that tip the balancing exercise in favour of publication. Then, of course, there is the question of where television news or sports pictures from which still picture "grabs" are taken sit within the child privacy equation.[176]

3.4 THE PROTECTED RIGHT SCRUTINISED AND CONFIRMED: *GOOGLE V VIDAL-HALL*[177]

3.4.1 Necessary Caveat

Google v Vidal-Hall may be only a preliminary legal skirmish. Despite the fact that the decision which will be considered here is a Court of Appeal judgment, a full trial of the issues has not (and may never) taken place. There are two reasons to make this caveat. **3–023**

The first reason is that there have been recent similar preliminary skirmishes in respect of litigation in England against Google which have—without risking the finality and reasoning of judgments—settled between the parties. They are, sequentially, *Hegglin v Persons Unknown*[178] (where the issue involved, among other things, permission to serve Google outside the jurisdiction) and *Mosley v Google*[179] where the DPA s.13 damages claim for Google's linking to inaccurate information was stayed pending the Court of

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[175] JR38 Northern Ireland [80].

[175a] See also the Kensington Palace warning on paparazzi pictures of Prince George on 14 August 2015 *http://www.princeofwales.gov.uk/media/our-view/letter-kensington-palace* as well as the proceedings issued by Ashton Kutcher and Mila Kunis against Associated Newspapers in July 2015 *http://www.theguardian.com/film/2015/jul/28/ashton-kutcher-mila-kunis-sue-daily-mail-baby-photo-paparazzi*

[176] A "screenshot" in IT/PC terms.

[177] *Google v Vidal-Hall* [2015] EWCA Civ 311. Google's appeal from Tugendhat J's decision in Vidal-Hall & Ors v Google [2014] EWHC 13 (QB).

[178] *Hegglin v Persons Unknown* [2014] EWHC 2808 (QB).

[179] *Mosley v Google* [2015] EWHC 59 (QB).

Appeal's decision in this *Vidal-Hall* case. These two other cases are examined further in the Data Protection chapter.

The second reason is an observation. Google, in its English, EU state and CJEU litigation, has accumulated a series of negative judgments which have signally failed to support a litigation strategy than appeared to seek to test to the limits the rights involved. The most significant of these is *Google Spain*. Google may have considered, as a result of that last case, that litigation that reaches the level of the final appeal court in the relevant jurisdiction which it then ultimately loses actually casts a longer and more commercially dangerous shadow in terms of that senior court judgment than settling litigation on confidential terms—after testing the water—and resolving matters between the parties without answering all the questions.[180]

The elements of *Google v Vidal-Hall* that are explored here, however, are the ones which relate to the new tort on misuse of private information rather than the data protection aspects of that case.

3.4.2 The Court of Appeal's conclusions about the new tort of Misuse of Private Information

3–024 Judith Vidal-Hall and the other claimants brought their action against Google because they had used Apple computers between the summer of 2011 and February 2012, accessing the internet using their Apple Safari browser.

Unknown to them there was a "work-around", the effect of which allowed Google to collect private information about their internet usage without them knowing or consenting to this. The information was aggregated and used by Google to allow advertisers to select and tailor advertisements targeted at them. It revealed private information about them, which was, or might have been seen by third parties. This tracking and aggregation of personal information was contrary to Google's publicly stated position that such activity could not be conducted for Safari users unless they had expressly allowed it to happen. These claimants had not given any such permission.

The claimants were based in the UK. Google was registered in Delaware and had its principal place of business in California. The claimants therefore had to obtain the permission of the court[181] to serve the proceedings on the defendant in California.[182] For the purposes of this portion of the judgment, the Court of Appeal had to establish whether misuse of private information

[180] See generally Anya Proops *Mosley v Google: RIP http://www.panopticonblog.com/2015/05/18/mosley-v-google-rip/*

[181] Pursuant to CPR 6.36 and Practice Direction (PD) 6B.

[182] *Google v Vidal-Hall* [2015] EWCA Civ 311 [7]: "To obtain that permission, the claimants had to establish (i) that there was a serious issue to be tried on the merits of their claims i.e. that the claims raised substantial issues of fact or law or both; (ii) that there was a good arguable case that their claims came within one of the jurisdictional 'gateways' set out in CPR PD 6B; (iii) that in all the circumstances, England was clearly or distinctly the appropriate forum for the trial of the dispute, and (iv) that in all the circumstances, the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction (see *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804)."

was a tort for the purposes of CPR PD 6B para 3.1(9). At first instance Tugendhat J had decided that it was.[183] The Master of the Rolls (Lord Dyson) and Sharp LJ (with whom McFarlane LJ agreed) upheld his decision on this point.[184] They concluded

> "Against the background we have described, and in the absence of any sound reasons of policy or principle to suggest otherwise, we have concluded in agreement with the judge that misuse of private information should now be recognised as a tort for the purposes of service out of the jurisdiction. This does not create a new cause of action. In our view, it simply gives the correct legal label to one that already exists. We are conscious of the fact that there may be broader implications from our conclusions, for example as to remedies, limitation and vicarious liability, but these were not the subject of submissions, and such points will need to be considered as and when they arise."[185]

Given the repeated rigour of the examination about the existence of this new tort it clearly confirms the new protected right on which there can be litigation to secure its principles together with damages and injunctions as appropriate.

3.5 Permitted Interference

3–025 Unsurprisingly the permitted interferences evidenced in this tort come from the celebrity cases that fall on the other side of Article 8 and Article 10 balancing exercise. However the fact that celebrities may court or allow publicity does not mean that they have given up all rights to their intimate private lives. The Leveson Inquiry noted there was

> "ample evidence that parts of the press have taken the view that actors, footballers, writers, pop-stars – anyone in whom the public might take an interest – are fair game, public property with little, if any, entitlement to any sort of private life or respect for dignity, whether or not there is a true public interest in knowing how they spend their lives. Their families, including their children, are pursued and important personal moments are destroyed. Where there is a genuine public interest in what they are doing, that is one thing; too often, there is not."[186]

The fine line in this area is emphasised by dissenting voices of Lord Hoffmann and Lord Nicholls in *Campbell* held that the Article 10 issues in the case prevailed over Ms Campbell's Article 8 rights. In particular, Lord Hoffmann pointed to the "practical exigencies of journalism" which required that editorial decisions "be made quickly and with less information than is available to a court which afterwards reviews the matters at leisure".[187]

The permitted interferences will be examined in two groups. Firstly, the cases involving private information that the court decided contained sufficient public interest to warrant an Article 10 freedom of speech conclusion and,

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[183] *Vidal-Hall v Google* [2014] EWHC 13 (QB) [53–70].

[184] *Google v Vidal-Hall* [2015] EWCA Civ 311 [17–50] provides the Judges' *tour d'horizon* of the relevant case law on the generation of, and justification for, the new tort of misuse of private information reflecting that of Tugendhat J and his finding in the footnote reference above.

[185] *Google v Vidal-Hall* [2015] [51].

[186] *An Inquiry into the Culture, Practice and Ethics of the Press* (HC 780–1, 2012) Executive Summary [33].

[187] *Campbell v MGN* [2004] UKHL 22, [62].

secondly, the cases involving pictures which—in the *Campbell* sense—had been claimed to be unwarranted intrusions and, therefore, a misuse of private information.

3.5.1 Disclosable Private Information

3–026 One of the first cases in this category started its life anonymised as *KGM v NGN*[188]. At first instance Eady J described the factual background of the claimant thus:

> "In 1968 he married a lady with whom he had four children, who are now grown up. The marriage still subsists. In the meantime, from about 1976 he developed a relationship with another woman with whom, in 1979 and 1981 respectively, he had two children. Obviously, they too are now adults. For many years, however, the Claimant managed to keep the information about his "second" family secret, to a greater or lesser extent. How far he succeeded in this intention has been a matter of debate in the light of the limited evidence available. The position now is that, finally, all members of the Claimant's "first" family are aware of the situation, although I am told that one of his daughters was only informed two or three weeks ago. She was told by her husband, who himself had known of the "second" family only since the beginning of last year."[189]

The claimant's case was that knowledge of this information was confined to his two families and that it was not public knowledge. He claimed to have a reasonable expectation of keeping his "second" family secret, in the sense that he should not be identified as being the father of the two children in question or as having had a relationship with their mother. One of his daughters had only recently found out about the "second" family and her husband was the chef, businessman and attributed celebrity Gordon Ramsay. The claimant had been—but was no longer—chief executive of the Gordon Ramsay Group. Gordon Ramsay, in a series of public exchanges about his father-in-law (the claimant) and their business disputes had referred to the claimant's "complex" lifestyle in the *Evening Standard*.[190]

It was put to Eady J that, although newspapers like the *Mirror* and the *Daily Mail* were aware of this background, they had no immediate intention of publishing anything about it. Counsel for the claimant wanted an injunction to cover them as well. On grounds of proportionality, Eady J declined on the basis that it was a requirement to show

> "that it is necessary and proportionate to impose restraint on MGN Ltd and Associated Newspapers Ltd because of evidence of an apprehended wrong on their parts. It would be a new, and rather retrograde, development if one could obtain an injunction against someone merely because he claimed the right to exercise his freedom of speech. In that context, the jurisdiction to grant an injunction has always been regarded as 'delicate'."[191]

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[188] *KGM v NGN* [2010] EWHC 3145 (QB).

[189] *KGM v NGN* [2010] [10].

[190] The parallel universe of second, hidden families was also explored in *SKA and PLM v CRH and Persons Unknown who have threatened to reveal private information about the Claimants* [2012] EWHC 2236 (QB). There, a wealthy 70-year-old EU businessman claimant's mistress was about to give birth to twins and his grown-up children from his first marriage – working in the same business – along with his second wife were likely to be told of this situation if £150,000 was not paid. Nicola Davies J found the information was private and that "no good grounds have been advanced which could justify disclosure pursuant to Article 10".

[191] Ibid [8].

On the generalities of the claim itself he also declined to make the anonymity order sought. This was on the basis that it was "not necessary or proportionate" either in the interests of the administration of justice or "for the protection of the claimant's legitimate expectations in respect of Article 8" to restrict the freedom of expression of any of the newspapers. He did, however, grant an interim anonymity order to give the claimant time to consider whether he wanted to appeal. In due course, he did and the Court of Appeal in *Hutcheson v NGN*[192] upheld Eady J's decision, particularly in respect of his proportionality assessment of the issues.[193] **3–027**

In *Rio Ferdinand v MGN*[194] the issue was the attributed celebrity footballer's status as a "role model" and the "false light" cast on this by his extra-marital sexual exploits. The *Sunday Mirror* published an article, repeated on its website, under the headline *My Affair with England Captain Rio*. It had not put him on warning about the publication. It described his relationship with Ms Carly Storey. They had met in 1996 or 1997 when he was a teenager and she was 17. They drifted apart from 2000, when he moved to Leeds United, until 2002. Thereafter they had an on-off relationship consisting of occasional meetings, texts and telephone calls and messages. The last time they had met was May 2005. When he was appointed as captain of the England football team, replacing John Terry, Ms Storey had sent him a congratulatory text to which he responded on 6 February 2010.

Nichol J determined that the issue he had to decide was whether the *Sunday Mirror's* article, in Article 10 terms, reasonably contributed to the debate about Rio Ferdinand's suitability for the role of captain of the England football team.[195] The footballer claimed to have reformed and was no longer the "boozer, love cheat and drug-test dodger", an earlier characterisation of him in other newspapers. Nichol J noted that the qualifications needed to be the England captain had a "perennial interest" and that the suitability of the "captain of the moment" had been debated in an article in another paper where seven former England captains discussed their views of the role.[196] Ms Storey's account allowed for the correction of a false image and the suitability of him to be England captain

> "namely the Claimant's admission that on occasions he either did, or tried to, sneak Ms Storey into a hotel where he and the other members of his team were staying. He acknowledged that this was against the rules set by the team's management."[197]

A picture of the couple together had been used to illustrate the article. They were clothed and Rio Ferdinand was speaking on a mobile phone. It was an "unexceptionable picture". It was taken in a private room but its publication

[192] *Hutcheson v NGN* [2011] EWCA Civ 808.
[193] *Hutcheson v NGN* [2011] [10], [23], [44] and [50].
[194] *Rio Ferdinand v MGN* [2011] EWHC 2454 (QB).
[195] *Hutcheson v NGN* [2011] [92]: Also, "During the course of the hearing I asked the parties whether it was incumbent on me to decide whether the Claimant was fit to be England captain. Thankfully they agreed that it was not."
[196] *Hutcheson v NGN* [2011] [94].
[197] *Hutcheson v NGN* [2011] [96].

"could have caused nothing comparable to the additional harm that was referred to in *Campbell*".[198]

In finding that the newspaper's Article 10 rights prevailed over Rio Ferdinand's Article 8 rights Nichol J did not place the lack of prior notice to him anywhere in the proportionality balancing exercise.

> "[The] emphasis on the absence of prior notice . . ..was in my view, with respect, a red herring. [It was] suggested that this was only explicable on the basis that the Defendant feared being subject to an interim injunction if notice had been given and this fear betrayed a lack of confidence in the reliance that they now placed on freedom of expression. I do not find this line of argument helpful. Partly, that is because it is entirely speculative as to why no notice was given to the Claimant. More importantly, I have to decide where the balance lies between these competing rights as an objective matter. The arguments which the Defendant now advances will either succeed or fail. The Defendant's internal assessment of their merits at some earlier stage is neither here nor there."

This decision was not appealed. However, what was published concerned a "relationship" which had begun when the parties were teenagers and, at the time of the article, they had not met for nearly 5 years. The "false image" of being a "family man" who had cast aside his past wild ways was, on any view, rather stale. It related only to text messages initiated by Ms Storey which the newspaper then dressed up as a "kiss and tell" piece. The "role model" element was used as the platform to maintain that anyone who accepted that kind of job permitted a greater degree of intrusion into his private life, allowing a contribution to a debate as to his suitability to be this kind of role model. That seems less like a strong Article 10 element and more like what Baroness Hale once called "vapid tittle tattle about the activities of footballers' wives and girlfriends".[199]

3–028 In *McClaren v NGN*[200] there were three children of the McClaren's family—two adult and one aged 15—but that did not prevent publication of surreptitiously taken pictures of the former England football team manager Steve McLaren that had been set up by the "kiss-and-teller". A significant factor was that he had sold a story seven years earlier to *The Sun* for £12,500 about an earlier marital infidelity while his children had been much younger. In essence, their Article 8 rights in respect of having a father who was unfaithful to their mother were already impaired.

And, in case it is thought that the only permitted intrusions occur because of sexual activity, *Spelman v Express Newspapers*[201] extended matters into performance-enhancing and pain-relieving drugs and young sportsmen. Jonathan Spelman was a 17-year-old who had played rugby for the England under-16 team and for Harlequins RFU. He was injured and had not been able to play since then. His mother, Caroline Spelman MP, was a Cabinet Minister. Initially Lindblom J granted the injunction although the *Daily Star Sunday* was able to run a story headlined *We are gagged by Cabinet MP: Minister wins injunction* with a photograph of Jonathan, the fact that he was at

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198 *Hutcheson v NGN* [2011] [102].

199 *Jameel v Wall Street Journal* [2006] UKHL 44, [147].

200 *McClaren v NGN* [2012] EWHC 2466 (QB).

201 *Spelman v Express Newspapers* [2012] EWHC 239 (QB) before Lindblom J and *Spelman v Express Newspapers* [2012] EWHC 355 (QB) before Tugendhat J.

a boarding school and had two siblings without breaching it.[202] Tugendhat J had more information when the matter came back before him. Jonathan was nearly 18 and was a sportsman who had played, and wanted to play again, at national and international level. Tugendhat J observed that

> "Children (other than heirs to a throne) rarely appear as public figures in politics. But in sport and the performing arts they appear very frequently. Some athletes win an Olympic Gold Medal or a Tennis Championship while aged 16 or under. Some sports are dominated by competitors under 18. Even in sports where peak performance is reached in a person's 20s or 30s, it is necessary for aspiring performers to start their dedication to the sport as children. Much the same is true in many of the performing arts. Children can be world class performing artists, and performing artists often are children."[203]

He pointed out that the material benefits to those few children who succeeded at the highest level "can be fabulous" but they could come at a high price. The effort to achieve the highest honours in sport could damage a person's health and family life, lead to an early death "or even to a life of misery when careers end early and in disappointment". The public interest was engaged in this area and it also had a relevance in terms of his reasonable expectation of privacy.

> ". . ..those engaged in sport at the national and international level are subject to many requirements which are not imposed on other members of the public. Matters relating to their health have to be disclosed and monitored, and they may have little if any control over the extent to which such information is disseminated. It is a condition of participating in high level sport that the participant gives up control over many aspects of private life. There is no, or at best a low, expectation of privacy if an issue of health relates to the ability of the person to participate in the very public activity of national and international sport."[204]

Before his injury he had spent 30 to 40 hours each week in training in addition to his school studies. He had little social life with his contemporaries outside his sport. If he could not train he would lose "both the main interest in his life, and most of his friends at the same time, because they are boys who train as he does".[205]

> "He is nearly 18. And even if he were still under 16, as he was when he first played for England, his status as an international player means that discussion of his sporting life, and the effect that it may have upon him, is discussion that contributes to a debate of general interest about a person who is to be regarded as exercising a public function."[206]

He decided that each party had an equal chance of success at trial and that he would not continue the injunction as requested. He warned, however, that this was not a licence to publish whatever the *Daily Star Sunday* chose.

The matter never came to trial. The Spelman family decided it could not afford more than the £61,000 it had cost to reach the stage it had. Subsequently Jonathan, who was then suspended from playing rugby for taking anabolic

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[202] In terms of *JIH* this is an example of the opposite—Article 10 balance—allowing initial identification without specifying the conduct and then, as the case progressed, allowing further details of the conduct in question to be discussed for the reasons given by Tugendhat J.

[203] *Spelman v Express Newspapers* [2012] EWHC 355 (QB), [67–68].

[204] *Spelman v Express Newspapers* [2012] [69].

[205] *Spelman v Express Newspapers* [2012] [71].

[206] *Spelman v Express Newspapers* [2012] [72].

steroids, made an internet appeal for people to support him to keep him "fed". His parents were "not happy" about his subsequent decision to become a bodybuilder and had warned him he would have to leave home.[207]

Sometimes the permitted intrusion results from self-revelation. Andrew Marr had obtained an anonymity injunction in 2008 in respect of an affair he had with a female journalist. By 2011, after two challenges by *Private Eye* in respect of it, he admitted the facts in an interview with the *Daily Mail*.[208] Also Jeremy Clarkson, who had featured as AMM in *AMM v HXW*,[209] accepted that he was the claimant who had prevented his former wife Alex Hall revealing they had an affair after he had divorced her and married someone else. Memorably he stated:

> ". . ..injunctions don't work. You take out an injunction against somebody or some organisation and immediately news of that injunction and the people involved and the story behind the injunction is in a legal-free world on Twitter and the internet. It's pointless. . . . .you used to be able to take out an injunction and then just sit on it. But as a result of a recent court case you are now ultimately forced by the courts to go to trial – which is unbelievably expensive. If you win, news leaks out on the internet. If you lose, you then get raped by your opponent's legal fees."[210]

3.5.2 *John Terry*: reputation alone will not be protected

3–029 Tugendhat J in *RST v UVW* [211] identified a problem that finally manifested itself, four months later, in the *John Terry* case.[212] A court could grant an interim injunction to prevent a threatened misuse of private information on Lord Nicholls' "more likely than not" test in *Cream Holdings Ltd v Banerjee*.[213] However the rule in *Bonnard v Perryman*[214] presented an equal and opposite principle: interim injunctions in defamation cases would not be granted if the truth of what was to be stated would be relied on by the Defendant at full trial of the action. Judges needed to decide which one of the two types of action was before them.

John Terry was captain of Chelsea FC and, at the time, also the England football team captain. A married man, he applied for an interim injunction—without giving prior notice to any Respondent—seeking to prohibit "persons unknown" from publishing "information or purported information" about him having had an intimate personal relationship with a woman who was not his wife (VP).[215] Also that VP had become pregnant and that he had contributed to the cost of terminating the pregnancy.

Tugendhat J refused to continue an interim injunction granted earlier,

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[207] *http://www.telegraph.co.uk/news/9337691/MP-Caroline-Spelmans-son-claims-parents-are-not-happy-after-he-chose-bodybuilding-as-my-life.html*

[208] *http://www.bbc.co.uk/news/uk-13190424*

[209] *AMM v HXW* [2010] EWHC 2457 (QB).

[210] *http://www.dailymail.co.uk/news/article-2053800/Jeremy-Clarkson-injunction-Top-Gear-star-lifts-gag-ex-wife-Alex-Hall.html*

[211] *RST v UVW* [2009] EWHC 2448 (QB).

[212] *Terry (formerly LNS) v Persons Unknown* [2010] EWHC 119 (QB).

[213] *Cream Holdings v Banerjee* [2004] UKHL 44, [22].

[214] *Bonnard v Perryman* [1891] 2 Ch 269 (CA).

[215] Vanessa Perroncel, the ex-girlfriend of an England and former Chelsea FC team mate.

noting that John Terry accepted the truth of some of the information.[216] He set out his reasons in eight specific points.[217] The eighth, relating to proportionality, determined that

> ". . ..an interim injunction [was not] necessary or proportionate having regard to the level of gravity of the interference with the private life of the applicant that would occur in the event that there is a publication of the fact of the relationship, or that LNS can rely in this case on the interference with the private life of anyone else".

He decided that the claim was actually a reputational claim in defamation and not a seclusional claim, as it had been presented, rooted in breach of confidence and private information. In essence, John Terry appeared to be more worried about losing sponsorship deals in the light of the news, an impression not aided by the way his supporting affidavits had been drafted. Tugendhat J regarded himself as bound by the rule in *Bonnard v Perryman*, affirmed in *Greene v Associated Newspapers*.[218] Since then nearly every judge has had no difficulty in deciding the difference between misuse of private information and defamation claims.[219]

3.5.3 The Importance of Honesty and Candour when seeking Injunctions

3–030 The case that began its life as *YXB v TNO*[220] is a reminder of the importance of honesty in respect of the contents of affidavits filed in support of any celebrity misuse of private information injunction. Tugendhat J had emphasised this point in the *John Terry* case. Some five years later that was re-emphasised and reinforced.

YXB, it later became apparent, was the Manchester United footballer Marcos Rojo. He had a brief sexual encounter involving oral sex with a woman at a party over the Christmas 2014 period. They then exchanged sexually-charged text messages. He sent her sexually explicit pictures and video clips of his body. She sold her story to *The Sun on Sunday,* initially, for £15,000. Rojo was alerted to this and there was then a meeting between the woman and his representatives. The accounts of the meeting differed. Rojo's case was that she demanded money not to publish the story. She said that she was offered money by his representative. Rojo sought an injunction without notice to her from the High Court, seeking an order restraining publication of the fact of the sexual encounter, the explicit messages, the visual material, and the identities of both parties. He alleged that the woman had

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216 Ibid [6].
217 Ibid [149].
218 *Greene v Associated Newspapers* [2004] EWCA Civ 1462.
219 There has been one unfortunate exception. On 3 October 2012 Freddie Starr obtained an *ex parte* injunction from the duty QBD Judge, Laura Cox J, preventing the media making any reference to a libellous allegation made against him by a woman following revelations about Jimmy Savile. The injunction was overturned the following day by Tugendhat J because, in the light of the rule in *Bonnard v Perryman*, it should never have been granted. Starr also had to pay £10,000 indemnity costs in respect of the media: *http://www.theguardian.com/uk/2012/oct/04/freddie-starr-itv-injunction*
220 *YXB v TNO* [2015] EWHC 826 (QB).

demanded £100,000 for her silence. The initial injunction was granted *ex parte* by Walker J on 19 February 2015.

It was reviewed, with both parties represented, on 16 March 2015 by Warby J. He was told, among other things, that the woman had been offered £100,000 rather than asking for it and that there was no substance to the blackmail allegation. He identified three facts that had not been disclosed at the initial hearing: that the "encounter" between Rojo and the woman had been witnessed by others; that a later meeting at a hotel had been to find out the woman's price for withdrawing from her contract with *The Sun* and the fact that the woman had sent a text message saying she wanted no further offers for her silence.

Warby J concluded

> "The evidential picture now before the court is materially different from that which was presented to Walker J, in a number of ways. In my judgment, the evidence on behalf of the claimant at that hearing failed fully and frankly to disclose all the information which was available to the claimant and could have been put forward had proper inquiries been made, and which it was material for the court to know. It is appropriate to discharge the orders made then and continued until this hearing."[221]

The case provides a timely reminder of the importance of full and frank disclosure and thorough evidence when obtaining interim injunctions. Material non-disclosure is taken very seriously by the court and jeopardises both past and future injunctions.[222]

3.6 PICTURES OF ADULT CELEBRITIES

3–031 Following *Campbell*, *Von Hannover 1, Theakston* and *Murray* it might have been thought that the bar had been set very high in terms of pictures of celebrities either out and about or going about their private business. Yet it is notable that the robustness of the English "intense focus" within the balancing exercise—apparent from the cases already examined above as permitted intrusion—has recently been echoed in a more Article 10-weighted set of decisions in the developing Strasbourg case law. This section also deals with the image and photographs in greater detail. It will consider the position of celebrity pictures in English law as misuse of private information, consequences of the CJEU decision in *Martinez* and finally in the developing ECtHR Convention jurisprudence.

3.6.1 Celebrity "out and about" pictures

3–032 *Weller*, discussed in a previous section, is a decision that protects the digital images of celebrity children's faces in terms of misuse of personal information. When dealing with the images of adults it is possible to mine and recast

[221] *YXB v TNO* [2015] [63].

[222] In the end the woman's story was used by the *Mail on Sunday*: *http://www.dailymail.co.uk/femail/article-3026061/I-threatened-three-years-jail-daring-expose-Manchester-United-star-tried-frame-blackmail-says-fitness-instructor.html*

the *Douglas* case as a commercial image rights case. The exclusivity of the wedding together with the ability to contract to sell that privacy[223] and then take action to protect the commercial right from being diluted and spoiled was at the root of all the manifestations of the case as it progressed through its many litigation iterations.[224] It was only by surreptitious use of a mobile phone that the pictures at the heart of the litigation were obtained in the first place. The case—stripped of all the complexities of the legal arguments it contained—is as much about image rights as it is about privacy.[225] As Lord Phillips MR stated in the *Douglas* case:

> "Recognition of the right of a celebrity to make money out of publicising private information about himself, including his photographs on a private occasion, breaks new ground. It has echoes of the *droit à l'image* reflected in the French Civil Code[226] and the German 'tort of publicity' claim.[227] We can see no reason why equity should not protect the opportunity to profit from confidential information in the nature of a trade secret."[228]

However, in the context of a misuse of private information claim, Sir Elton John found himself unable to restrain pictures taken of him walking from his Rolls Royce to the front gate of his West London home wearing a baseball cap and a tracksuit.[229] The attained celebrity argued that he had not consented to the taking of the pictures, they were surreptitiously acquired and made no contribution to any debate on a matter of public interest and he relied on *Von Hannover 1* principles. Eady J found he had no reasonable expectation of privacy and any rights he did have would not outweigh freedom of expression. The photo was not like those at issue in *Campbell* but akin to Sir Elton "popping out for some milk".[230] An important element in *Von Hannover 1* was harassment, denied in this case by the Defendants, and there was no reason to suppose their evidence was untruthful.[231] The case

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[223] Strictly there was no commercial right to contract for the images until the House of Lords recognised this in the final appeal in 2007 and—until then—it was a commercial "interest".

[224] But see particularly *Douglas v Hello (CA)* [2005] EWCA Civ 595.

[225] One practitioner disagrees: "It is about as much to do with privacy as a programme like *Celebrity Love Island* has to do with celebrity or love or, indeed, reality." Christina Michalos *Image Rights and Privacy: After Douglas v Hello!* [2005] EIPR 384.

[226] This originated from the "Mademoiselle Rachel" case. She was a famous French tragic actress of the *Comédie-Française* who had been photographed on her deathbed in 1858 and sketches were then made of her from those photographs. The court held that the images should be destroyed and that no deathbed images could be reproduced without the consent of the family, no matter how famous the person: Trib.civ.Seine, 16.6.1856 D1858, 3, 62.

[227] After Count Otto von Bismark died in 1898, two photographers broke into the room where his corpse was laid out and took pictures which were then offered for sale to the highest bidder. The Bismark family was able to get the pictures handed over to them by the oblique use of the Roman Law principle *condictio ob turpem vel iniustam causam*. Partly in response to the furore this created the German *Kunsturhebergesetz* ("KUG") was created which—in Paragraph 22—required individuals' consent to the use of their images. See also, more recently, the *Axel Springer* case.

[228] *Douglas v Hello (CA)* [2005] EWCA Civ 595 [113].

[229] *John v Associated Newspapers* [2006] EWHC 1286 (QB).

[230] *John v Associated Newspapers* [2006] [15].

[231] *John v Associated Newspapers* [2006] [17]: The photographer who had taken the photographs gave evidence that he just happened to be in the street—without knowing Sir Elton lived there—because he could get a good internet connection there from his car where he had been using his

did not involve any of the obvious categories of private information such as health or sexual life. There was nothing remotely comparable to *Peck*.[232] The lack of Sir Elton's consent was merely a factor to weigh in the balance.

> "The photograph was not taken with consent, but. . ..there is, as yet, [no] doctrine operative in English law whereby it is necessary to demonstrate that to publish a photograph one has to show that the subject of the photograph gave consent. It may be a relevant factor, but it is to my mind one of relatively little weight in these particular circumstances."[233]

In this decision Eady J allows for the most positive interpretation of the background circumstances surrounding the picture being taken. That the photographer just happened to be in the street with an appropriate camera and lens, without realising Sir Elton lived there, because he was searching for a better internet connection tests the limits of credibility in the evidential standard of the balance of probabilities.

3.6.2 Recent ECtHR Celebrity Images Decisions

3–033 The judicial approach in the ECtHR over the last two years reflects more positive and permissive Article 10 outcomes in respect of pictures and personal information. The Article 8 losers in this process have been members of the Grimaldi family, the ascribed celebrities of the royal family in Monaco, in their various persona.[234] This trend has been reinforced recently in a case involving the marriage ceremony of attributed Norwegian celebrity folk singers.

3.6.2.1 Von Hannover 2

3–034 In *Von Hannover v Germany 2*,[235] a Grand Chamber decision of the ECtHR, the court applied a five-point criteria test in respect of the pictures of Princess Caroline: the contribution to a debate of general interest; how well-known the person concerned was and what the subject of the report related to; the prior conduct of the person concerned; the content, form and consequences of the publication; and, finally, the circumstances in which the photos were taken.[236]

The "news" element in the text that surrounded the photographs involved in this case related to the ill-health of Princess Caroline's father, Prince Rainier III of Monaco. Her younger sister, Princess Stephanie, was

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laptop for around 20 minutes. He happened to notice Sir Elton and got out of his car to take the photographs.

[232] *Peck v United Kingdom* (2003) 36 EHRR 41: images of someone trying to kill himself.

[233] *John v Associated Newspapers* [2006] EWHC 1286 (QB), [21].

[234] See generally R. Callender Smith "From von Hannover (1) to von Hannover (2) and Axel Springer AG: do competing ECHR proportionality factors ever add up to certainty?" (2012) *Queen Mary Journal of Intellectual Property* Vol. 2 No. 4, 389–393.

[235] *Von Hannover v Germany 2* 40660/08 [2012] ECHR 228.

[236] Following the Grand Chamber decision on surreptitious photography in *Söderman v. Sweden* Appln 5786/08 [2013] ECHR 1128 it may be that the UK has to consider legislation—which could impact on paparazzi photography—clarifying the domestic law on this issue: *http://ukhumanrightsblog.com/2013/11/21/uk-may-need-law-against-secret-filming-and-photography-after-european-court-ruling-james-michael/#more-20439*

seen pictured as the dutiful daughter helping her frail father while Princess Caroline was pictured with her husband and daughter on holiday at the fashionable ski resort of St Moritz in Switzerland. This situation was characterised in the magazine *Frau Aktuell*[237] with the headline "That is genuine love. Princess Stéphanie. She is the only one who looks after the sick prince".

The Grand Chamber found that the illness affecting Prince Rainier, the reigning sovereign of the Principality of Monaco, was "an event of contemporary society".[238] It accepted that the photos in question "considered in the light of the accompanying articles, did contribute, at least to some degree, to the debate of general interest". It emphasised that not only did the press have the task of imparting information and ideas on all matters of public interest, but also the public had a right to receive that information.[239] It also noted that Princess Caroline had not adduced evidence of "unfavourable circumstances" in respect of how the photographs had been taken. There was nothing to indicate that the photos had been taken surreptitiously or by equivalent secret means such as to render their publication illegal.[240]

In the linked case before the Grand Chamber, *Axel Springer AG v Germany*,[241] the court used the basic five-point criteria test from *von Hannover (2)* together with one additional factor. In terms of proportionality it also had to consider the severity of the sanctions already imposed by the German courts. It emphasised that the outcome should not vary whether the appeal came under Article 10 or under Article 8. Where the balancing exercise between the two rights had been conducted in conformity with the criteria laid down in the Court's case law, "the Court would require strong reasons to substitute its view from that of the domestic courts".[242] The Grand Chamber's proportionality review gave weight to the fact that the arrest and conviction of an actor [not named in the judgment] was a public judicial event of general interest,[243] that he was sufficiently well-known to qualify as a public figure,[244] that he had revealed details about his private life in the number of interviews and had therefore sought the limelight,[245] that there were no sufficiently strong grounds for believing that his anonymity should be preserved,[246] and that the articles did not reveal details about his private life but concerned the circumstances following his arrest and conviction.[247] In relation to the severity of the sanctions imposed, the Grand Chamber considered that although these were lenient they were capable of having a chilling effect and were not justified in the light of all the other elements it had considered.[248]

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[237] 20 February 2002.
[238] Ibid [118].
[239] Ibid [118].
[240] Ibid [122].
[241] *Axel Springer AG v Germany* 39954/08 [2012] ECHR 227.
[242] *Axel Springer AG v Germany* 39954/08 [2012] [87].
[243] *Axel Springer AG v Germany* 39954/08 [2012] [96].
[244] *Axel Springer AG v Germany* 39954/08 [2012] [97–100].
[245] *Axel Springer AG v Germany* 39954/08 [2012] [101].
[246] *Axel Springer AG v Germany* 39954/08 [2012] [107].
[247] *Axel Springer AG v Germany* 39954/08 [2012] [108].
[248] *Axel Springer AG v Germany* 39954/08 [2012] [109]: *Bild* had been injuncted and fined €11,000 in respect of identifying the actor Bruno Eyron, known primarily for his role as

3.6.2.2 Von Hannover 3

3–035 Next came *Von Hannover v Germany 3*.[249] The publication at issue dated from 20 March 2002. The German magazine *7 Tage* published an article relating to the trend among celebrities of renting out their holiday homes. It went on to describe in detail the von Hannover family villa, located on an island off the Kenyan coast, setting out the furnishings, daily rental cost and activities in the area. The article featured alongside several photographs of the villa, as well as one photograph showing Princess Caroline and her husband on holiday in an unidentifiable location. The unsuccessful challenge brought by Princess Caroline related only to that photograph.

The Court unanimously held that the German Federal Court's refusal to grant an injunction prohibiting any further publication of the photograph did not constitute a breach of the applicant's privacy rights as enshrined in Article 8.[250] The Court applied the five considerations set out in *Von Hannover 2* and *Axel Springer* for balancing the right to respect for private life against the right to freedom of expression. The purpose of the article was to relay the trend among celebrities of renting their holiday homes. This could "generate reactions and a dialogue among readers", thereby "contributing to a debate of general interest".[251] The Court concluded that the German courts' qualification of the subject as an event of contemporary society "could therefore not be described as unreasonable".[252] The text of the article gave practically no details relating to the private life of the Princess Caroline and her husband, focusing instead on the characteristics of the von Hannover villa.[253] It was not a "mere pretext for publishing the photograph". The link between the two was not "purely artificial".[254] The Court could

> "accept that the photograph in question, considered in light of the accompanying article, did contribute, at least to some degree, to a debate of general interest".[255]

Princess Caroline and her husband were public figures, unable to claim the same protection for their private life as ordinary private individuals.[256] She had failed to adduce evidence before the German courts that the photograph had been taken "surreptitiously or by equivalent means".[257]

The change in the ECtHR's approach from *Von Hannover 1* to *Von Hannover 3* is marked. Where the balancing exercise has been under-

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Kriminalhauptkommissar (Superintendent) Balko in the *Balko* television series, as someone who had been arrested for possession of cocaine at the Munich *Oktoberfest* and who had subsequently pleaded guilty and been fined €18,000.

[249] *Von Hannover v Germany 3* no. 8772/10 ECHR 264 (2013). Permission to appeal to the Grand Chamber was refused in February 2014.

[250] *Von Hannover v Germany 3* no. 8772/10 [58].

[251] *Von Hannover v Germany 3* no. 8772/10 [51].

[252] *Von Hannover v Germany 3* no. 8772/10 [52].

[253] *Von Hannover v Germany 3* no. 8772/10 [51].

[254] *Von Hannover v Germany 3* no. 8772/10 [52].

[255] *Von Hannover v Germany 3* no. 8772/10 [52].

[256] *Von Hannover v Germany 3* no. 8772/10 [53].

[257] *Von Hannover v Germany 3* no. 8772/10 [56].

taken in conformity with the criteria laid down in the Court's case law, the Court will require "strong reasons" to substitute its view for that of the domestic courts.[258] It gives publishers substantially greater protection than did *Von Hannover 2*. The distinction turns on the analysis of the criterion "contribution to a debate of general interest" and the comparative importance of this value within the right to freedom of expression.[259] It could be argued that the court should have explored this linkage in greater detail rather than simply making the bare finding. In stating that the court could "not support the contention that the article was merely a pretext for publishing the photo" and that "a purely artificial link exists between the two"[260] the court conflated several principles that should have been dealt with separately. The photographs were found to contribute to a debate of general interest, not because they supported and illustrated the information being conveyed, as in *Von Hannover 2*, but because it could not be said the article was a mere pretext for publishing the photograph. There is no explanation offered as to why a photograph showing Princess Caroline and her husband at an unidentified location was sufficiently linked to the article, which, by the Court's own admission, "focused mainly on the practical details relating to the villa and its location".[261] Publishers now need only show that the article contributes to a debate of general interest, not how or why the photograph in question supports such a contribution.

Even measured against English standards of the time[262] it is difficult to see how this case would have succeeded if litigated here. The photograph itself is anodyne and, although taken without her consent, it seems unlikely that our courts would have found that she had a reasonable expectation of privacy in relation to its publication without any kind of harassing circumstances in the *Murray* sense.

3.6.2.3 Lillo-Sternberg and Sæther v Norway

3–036 This case related to the wedding of two Norwegian attributed celebrities, a rock musician and an actress, at an outdoor private ceremony on a Norwegian islet at Tjøme.[263] The bride and her bridesmaids had been rowed to the islet. The Norwegian magazine *Se og Hor* published a two-page article about the wedding accompanied by six long-lens photographs (taken surreptitiously from about 250m away) without the couple's consent. The pictures showed the bride, her father and bridesmaids arriving on the islet, the bride being brought to the groom by her father and the bride and groom returning to the mainland on foot by crossing the lake on stepping stones. The final photograph showed the bride barefoot with her wedding dress raised above her knees to avoid getting the dress wet. The article described the ceremony, the

[258] *Von Hannover v Germany 3* no. 8772/10 [47].
[259] *Von Hannover v Germany 3* no. 8772/10 [50–52].
[260] *Von Hannover v Germany 3* no. 8772/10 [51].
[261] *Von Hannover v Germany 3* no. 8772/10 [51].
[262] First publication I March 2002.
[263] *Lillo-Sternberg and Sæther v Norway* [2014] ECHR 59.

guests' emotions and the fact that the magazine had been told the couple did not want to comment on their wedding. Their Article 8 claim was dismissed by the Norwegian Supreme Court by a 3:2 majority because the text and the photographs contained nothing offensive or damaging to their reputation, the wedding was in a place which was accessible to the public and the photographs did not show the actual ceremony. The couple had arrived in a spectacular fashion in a manner which would attract public attention.

The ECtHR applied the *Axel Springer* criteria. In terms of contributing to a debate of general interest the wedding involved performing artists and it had a public aspect.[264] The couple were well-known but

> "the mere fact of having cooperated with the press on previous occasions cannot serve as an argument for depriving the party concerned of all protection against publication of the article and the photographs at issue".[265]

Although they had not consented to the pictures obtained by a photographer who was "hiding and using a strong telephoto lens",[266] it was relevant that

> "the ceremony took place in an area that was accessible to the public, easily visible, and a popular holiday location, it was likely to attract attention by third parties".[267]

The article was not unfavourable to the applicants and did not involve photographs of the actual ceremony.

The ECtHR concluded there was no violation of Article 8 and

> "both the majority and the minority of the Norwegian Supreme Court carefully balanced the right of freedom of expression with the right to respect for private life, and explicitly took into account the criteria set out in the Court's case-law which existed at the relevant time."[268]

This result has been criticised.[269] The domestic court concluded that the article made no contribution to a debate of general interest, a positive Article 8 point, and all the other points were either neutral or resulted from "surreptitious photography". None of the judges involved were of the view that the "public accessibility" of the wedding was a decisive factor. There should, arguably, have been a re-balancing of the Norwegian decision to favour the couple's Article 8 rights in Strasbourg.

The litmus test, in terms of English law, would be the weight given to this decision in any subsequent misuse of private information claim brought by celebrities here on similar facts where actually getting to or within a venue (rather than what happens later, privately) puts the couple in public view.

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[264] *Lillo-Sternberg and Sæther v Norway* [2014] [36–37].
[265] *Lillo-Sternberg and Sæther v Norway* [2014] [38].
[266] *Lillo-Sternberg and Sæther v Norway* [2014] [39].
[267] *Lillo-Sternberg and Sæther v Norway* [2014] [43].
[268] *Lillo-Sternberg and Sæther v Norway* [2014] [44].
[269] I acknowledge the assistance of discussion with Professor Bjørnar Borvik of the University of Bergen about his as-yet unpublished paper, delivered on 9 May 2014, at the University of Helsinki Freedom of Speech conference.

3.6.2.4 Courdec and Hachette Filipacchi v France

This case relates to Prince Albert II of Monaco and a *Paris-Match* interview with C, the mother of a son the Prince had fathered[270] with her.[271] The interview detailed the relationship between C and the Prince with several photographs showing him beside C or the child. The photographs had been taken by C, in her apartment, with Prince Albert's consent. The Tribunal de Grande Instance in Nanterre awarded him €50,000 by way of damages and ordered *Paris-Match* to publish a full-feature front-page extract of the judgment. **3–037**

Paris-Match appealed on Article 10 grounds. By a majority of 4:3 the ECtHR held that there had been a violation of Article 10.[272] There had been a failure to distinguish between the information which formed part of a debate of general interest and what related to Prince Albert's private life. The *Axel Springer* criteria were used to reset the proportionality balance between Articles 8 and 10 to favour *Paris-Match*.

There was a contribution to a debate of public interest because although, under the current state of the Constitution of Monaco, the Prince's child could not succeed to the throne, his very existence was such as to interest the public and notably the citizens of Monaco. In the context of a hereditary constitutional monarchy the birth of a child was of particular interest. In addition, the Prince's behaviour could be an indicator of both his personality and ability to perform his functions properly. The need to protect Prince Albert's private life had to be balanced against the debate on the future of the hereditary monarchy. There was a legitimate public interest in knowing about the child in the context of the implications he had on Monegasque political life.[273] The Prince was Head of State when the interview was published: his son had rights to affirm his existence and to make his identity known to the world, and his mother had consented to that.[274] The information and the photographs were true and authentic and had been volunteered by C.[275] The publication of the interview and photographs permitted Prince Albert's son to emerge from secrecy.[276]

It is an interventionist ECtHR decision in its recasting of the result of the proportionality balancing exercise. It affirmed the ascribed celebrity of the Prince's son, however "unconstitutionally" illegitimate. In this sense the Article 10 elements that touch on any constitutional debate about succession in relation to ascribed celebrities and their progeny are likely to prevail whether in Monaco or—for the future—in terms of the English throne. It

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[270] After publication Prince Albert publicly admitted paternity.

[271] *Courdec and Hachette Filipacchi v France* [2014] ECHR 604.

[272] There was an appeal to the Grand Chamber in respect of this decision which was heard 15 April 2015. There is a webcast of that hearing (with an English translation): *http://echr.coe.int/Pages/home.aspx?p=hearings&w=4045407_15042015&language=en.* This decision is pending at the time of publication.

[273] Ibid [59].

[274] Ibid [63].

[275] Ibid [64].

[276] Ibid [73]: "La Cour note qu'en faisant ces révélations, le but de la mère de l'enfant était manifestement d'obtenir la reconnaissance publique du statut de son fils et de la paternité du Prince, éléments primordiaux pour elle pour que son fils sorte de la clandestinité."

should also apply in English law for children who are the illegitimate offspring of achieved or attributed celebrity parents where inheritance issues, or a celebrity's default on issues of maintenance and support of a child with unchallengeable paternity or maternity, are in play.

The combined effect of *Von Hannover* 2, *Von Hannover 3* and *Axel Springer*—with the two most recent cases above—have arguably rebalanced issues relating to all classes of celebrities and the use of images of and about them. *Axel Springer* sets a trap for celebrities in that an individual's character as an actor in a television police series may receive greater Article 10 weight when balanced against the actor's Article 8 real—and less upstanding—private life.

3.7 TRENDS

3.7.1 Prevalence of Article 8 success over Article 10

3–038 The effect of the proportionality exercise in the balancing of Article 8 and Article 10 issues in misuse of private information cases raises an issue of whether there has been, cumulatively, too broad an accommodation given to the Article 8 privacy rights of celebrities of any class.

To test the first point, the author analysed reported English privacy decisions over a four and a half year period from January 2010 to June 2014. This can only give indicative rather than precise results and that weakness is acknowledged in the information presented. However some indicative information in respect of this area is better than a vacuum. The information came from the Table of Media Law Cases on the *Inforrm* website, disregarding libel and non-privacy actions.[277] The cases were given a simple score which depended only on whether the Article 8 or Article 10 argument prevailed.[278] In some cases—as with *CBT*/*Giggs*—this changed during the course of the proceedings. Each judicial decision in respect of any privacy case during this period was identified and counted separately. It is probably not surprising that Article 8 rights have prevailed at an approximate ratio of 4:1 over Article 10 rights.

Total Privacy Cases		**Art 8**	**Art 10**	**Anon**	**Photos**
JAN/JUN 2014	5 cases	5	0	3	1
JAN/DEC 2013	7 cases	4	3	5	3
JAN/DEC 2012	23 cases	16	7	13	5
JAN/DEC 2011	27 cases	24	4	23	5
JAN/DEC 2010	11 cases	10	1	9	2
Total for a four and a half year consecutive period		**62**	**15**	**55**	**16**

[277] *http://inforrm.wordpress.com/table-of-cases-2/*

[278] Whether the court preserved anonymity for one or both parties and whether photographs or videos were an issue was also noted.

There are a number of reasons that can be suggested for that. Those seeking the courts' protection are professionally advised and are claimants staking out the injunctive territory. The physical presence of the claimant in court, seeking protection for personal information—particularly intimate or sexual information—can be powerful because the value of the rights of the individual are concrete while the value of freedom of expression is more abstract. At the preliminary, injunctive stage claimants need only show that is where the balance of convenience or justice lies[279] and that the claim is more likely than not to succeed at trial.[280] If they have no chance of success they will have been told of the risks. The results, in that sense, are likely to favour the success of Article 8 arguments. However Article 10 results do emerge in cases like *AAA*, *McLaren*, *Giggs* (eventually), *Hutcheson* and *Ferdinand*. This is despite the fact that each of those cases involved private sexual information, an element given special weight in the Article 8 side of the balance. On the face of these results, however, the respect given by the English courts to Article 8 rights makes it worthwhile for celebrities at least to seek such protection because they have a significant chance of success.

The most recent example of such success was *AMC and KLJ v NGN*[280a] heard before Elisabeth Laing J. A "prominent and successful" professional sportsman won a temporary injunction preventing *The Sun on Sunday* publishing a story about a sexual relationship he had with a female celebrity X before his marriage. The Judge described him as someone who had held "positions of responsibility in his sport" and who had appeared "in advertisements for some products".[280b]

> "He is now married to A2. He seeks to restrain a national newspaper from publishing a story, to be recounted by X, about a sexual relationship between them. It is common ground that the relationship was some years ago and lasted a few months. At the time of this relationship he was not married to A2, but she had been his girlfriend for a while. X says, and this has not been specifically denied by A1, that they met at times when he should have been preparing for sports events.[280c]. . ..X now wishes to give her account in order to 'put the record straight'. It is considerably more detailed and concrete than what has been published so far. Its publication will no doubt cause embarrassment to A1 and A2.[280d]
>
> The public interest arguments circled round the suggestion that this story shows that A1, who is, and should act as, a role model is, in reality, a hypocrite. First, it is said that there is a public interest in publishing the story because A1's conduct of the relationship meant that he broke rules on a few occasions in having a woman with him when he was staying at a hotel. He denies that his conduct led to the breach of any rules. . ..Such stories may generate some interest at the time of the infraction, but I was shown no evidence to suggest that there is any current debate about past infractions by sportsmen of rules of this sort. Nor do I consider that the mere fact he broke rules in the past shows that he, is or should be publicly exposed as, a hypocrite."[280e]

The newspaper argued that, in having the relationship, the sportsman had deceived both his wife and his then manager. The wife now knew of the deceit,

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279 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL).
280 *Cream Holdings Ltd v Banerjee* [2004] UKHL 44.
280a *AMC and KLJ v NGN* [2015] EWHC 2361 (QB) in September 2015.
280b *AMC and KLJ v NGN* [6].
280c *AMC and KLJ v NGN* [7].
280d *AMC and KLJ v NGN* [9].
280e *AMC and KLJ v NGN* [24].

and that was "a private matter between them".[280f] The newspaper had also argued that the sportsman's success in his career had given him the opportunity to earn money by appearing in advertisements, which was said to be built on his image as a clean-living family man. But Laing J rejected the submission that any of the material relied on in that context showed that the sportsman had misled the public by creating and projecting a false image of himself.

> "It is argued that the public interest extends to the exposure of conduct which is socially harmful, as well as conduct which is unlawful. I doubt whether a court is equipped to act as an arbiter of what conduct, falling short of illegality, is 'socially harmful' to the extent that it should be publicly exposed. The court is perhaps even less well-equipped to do this than a newspaper editor. A1's conduct in two-timing A2 for a relatively brief period before they married must have hurt the two women concerned when they found out about it. It is not for me to moralise about such conduct. But I do express a suitably diffident doubt whether this conduct was socially harmful. It caused private pain; but no-one was corrupted or co-erced. The conduct had no ramifications beyond the three people who were affected by it. It did not affect society in any way. If it did not, I cannot see how it could be described as socially harmful. I am conscious that there is a risk that the phrase 'socially harmful' can become a pretext for judging others by reference to moral positions which those others do not, or might not, share. This is a particular risk for a court in an increasingly secular society in which some issues, especially questions of sexual conduct, do not attract the consensus which they once did. In my judgment, few people, other than adherents to strict religious codes, could rationally consider that this conduct is so fundamentally inconsistent with being a role model of the kind which A1 is that there is a public interest in exposing it."[280g]

The celebrity, X, had disclosed the information "because she was hurt by A1's 'hypocrisy about the whole situation'." The assertion appeared "to be based on reasoning after the event, rather than on any reasoning which she could plausibly have engaged in at the time" and was inconsistent with her evidence that even after she found out about A1's relationship with A2, she continued the relationship with him for a time, and that even after her relationship with A1 ended, she kept in touch with him.[280h]

Laing J added that she had concluded that the interference with the privacy rights of the sportsman and his partner proposed by X and the newspaper was article 8 rights of A1 and A2 which is proposed by R and X is not a proportionate means of achieving a legitimate aim. She said there was "a significant gap" between what was already public about the relationship and what would become public if the newspaper were to publish the story, adding: "It is proportionate, in that situation, to restrain publication of that further material."[280i]

3.7.2 Ministry of Justice Figures

3–039 There are however, post-Leveson, fewer misuse of personal information actions coming before the High Court.[281] From August 2011 to December 2013 there were 23 applications for new interim privacy injunctions; an injunction was granted in each case (save for the single one in June/December 2013) and

[280f] *AMC and KLJ v NGN* [25].
[280g] *AMC and KLJ v NGN* [27].
[280h] *AMC and KLJ v NGN* [28].
[280i] *AMC and KLJ v NGN* [31].
[281] *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/289254/privacy-injunctions-stats-jul-dec-2013.pdf*

four of the injunctions were granted by consent. Of those 23 applications, all but two involved one or more derogations from open justice in respect of the hearing and/or the proceedings. Fourteen were heard in private, 12 involved party anonymity, 15 restricted access to statements of case by non-parties and one application resulted in a super-injunction clause being included in an interim injunction (granted in the period August–December 2011). There were 18 hearings concerning the continuation or variation of interim injunctions. In 15 cases the injunction was continued and/or varied. It was discharged in three. There were nine hearings in respect of final privacy injunctions. Final injunctions were granted in all but one of the cases. Each hearing involved one or more elements of derogation from open justice; all but one involved hearings in private, six involved anonymity. A super-injunction was granted on a final basis in one case (granted in the period January to June 2013).There was no super-injunction granted on an interim basis in either 2012 or 2013.

From January–December 2013 there were seven applications for new interim injunctions. Five were applications on notice, three without. Of those that were made on notice, all were resisted, either completely or in some of the terms sought. Six of the seven injunction applications granted that year involved derogations from open justice.

The Ministry of Justice data available now covers almost 2 ½ years (29 months).[282] However the figures reveal that every application for a new interim privacy injunction since August 2011—until the single one in June/December 2013—resulted in an injunction being granted. Interim super-injunctions are almost extinct. The last one that was granted was in 2011.

Other derogations from open justice, or combinations of them, were deployed frequently by the courts. 60 per cent of applications for new interim privacy injunctions were heard in private, party anonymity was ordered in 50 per cent of the cases and access to statements of case by non-parties was restricted in 86 per cent of cases.

Two things are clear. The first is that, numerically, the two years that showed the greatest number of misuse of private information litigation were 2011 (27 cases in court) and 2012 (23 cases in court). 2013 showed a drop to seven cases being litigated and the first six months of this year have seen five. The statistics also confirm the near-extinction of the true "super injunction" and the slowdown of litigation in this area. The diminution of activity in this area may be because the self-help remedies are working effectively and because there is a greater willingness for celebrity claimants' lawyers and those acting for the media to negotiate more openly with each other before resorting to litigation. With the general practice now of the media putting celebrity targets on pre-publication warning of the generality of what may be published about them the two sides often reach accommodations which avoid injunctions and litigation but which rely on written or recorded undertakings.

[282] The Ministry of Justice cautions that the statistics are not complete for earlier periods and did not cover every application.

3.8 Summary

3–040 From the range and diversity of the topics and issues explored in this chapter it should be clear that the various ways in which private information may—and may not—be misused in a world where the technology surrounding communication and publication was changing exponentially would have required new approaches to develop with or without the HRA. The issues could no longer comfortably or realistically be contained within the traditional action for breach of confidence. However "flexible" that had been it had its obvious limits. The logic and practicality of the proportionality balancing exercise explained in *Re S* led to the development of an active new tort that tested, and still tests, both judicial articulation and the skills of practitioners acting for all categories of celebrity and the media.

Once the messages from *Campbell*, *Mosley* and *Von Hannover 1* were absorbed it was the celebrities' litigation which further fashioned its boundaries particularly with the realisation that early injunctive action could protect not only the private information but also the celebrities' identities associated with such information. The media, carrying the Article 10 freedom of speech banner, met the challenge—particularly in terms of attributed and achieved celebrity stories in the context of the tabloid press—and, by persistence, were able to reveal information that because of its public interest tipped the balance in their favour in a number of significant cases that have been examined above.

The use of parliamentary privilege to unlock celebrity identification that had been given anonymity in legal proceedings became something of a vogue for a period until Parliament—and parliamentarians—realised that a more considered and responsible attitude needed to be demonstrated. Where things are still unresolved is the unrestrained publication of private information—which may or may not be correct—on the Internet and in social media. Actions following such publications do not appear to have diminished and, anecdotally, appear to have increased.

Celebrity pictures—whether personal videos and photographs showing private sexual activity or taken by others more openly and professionally—are a continuing battle ground particularly when uploaded to the Internet and on social media sites or published in online editions of newspapers. This issue is revisited in the next chapter on Protection from Harassment.

In the background it is now a general practice for newspapers to prewarn celebrities in advance of revelations about private information, *pace* Mr Mosley, so that judgments can be made about whether litigation is likely or whether—if the story is true and tips the proportionality balance to favour an Article 10 result at trial—the matter can be run with a "balancing" comment or sympathetic editorial treatment. The clue that this has happened is a "My Drugs Hell" soft treatment of a celebrity story rather than an "X's Drug Shame" exposé.

The diminution of litigation in this area should not be surprising. In the early years of any new cause of action it is necessary for practitioners and the judiciary to test the boundaries of both the law and procedure. If a 10-year period is taken from the *Campbell* decision in the House of Lords in 2004

then the elements of the law in relation to misuse of private information have become much more certain by 2014. That is not to say that the on-going proportionality balancing test between Articles 8 and 10 is not being conducted on a daily basis between practitioners representing all categories of celebrity and the press and the media wishing to publish information. What it does mean is that only the most intractable disputes about what should be protected and where the interference is lawful are now coming to court.

CHAPTER 4

COPYRIGHT AND IMAGE RIGHTS AS PRIVACY REMEDIES

4.1 Introduction

4–001 In the previous chapter it was clear that the main issue in the *RockNRoll* case was misuse of private information. In this chapter the same case re-appears on the associated claim that *The Sun's* proposed publication was also a breach of copyright. This is an example of the bridge and linkage between the different forms of action open to all classes of celebrities to assert their privacy rights. As will be seen, if a celebrity has the copyright or can acquire it by assignment, then publication of the material may be restrained. This is an area where all classes of celebrities can seek to exert specific control over material in ways which reinforce their privacy rights. For the future this is likely to become an increasingly important area because social media pictures are now regularly "scraped" for unauthorised use in the media or more general publication elsewhere.[1] Also covered at the end of this chapter is an associated topic—image rights—the European and Roman Dutch civil law concept that individuals have rights to control the use and prevent the misuse of the integrity of their image.

The chapter on breach of confidence highlighted the importance, in the 175-year historical arc of the development of English privacy law, of the royal celebrity case of *Prince Albert v Strange*.[2] This chapter will not re-visit the copyright issues already described as latent in that case. It will however examine how copyright has been used to assert or protect privacy issues for ascribed, attained and attributed celebrities from then to the present.

Copyright, as a protected right, will be outlined first. Then the permitted interference—the areas where the protected right gives way to other interests either within the statutory regime or by development of Article 10 elements—will be identified. The primary focus in this chapter, however, is the section that then examines the development of the case law—the litigated issues—in this area. This chapter seeks to show the dynamics and development of a clear shift away from simple protection of the right to a more nuanced and proportionate approach that reflects respect for Article 10 arguments in a way that was not evident before the HRA.

UK copyright law has at its heart the Copyright, Designs and Patents

[1] *http://globalnews.ca/news/1057365/experts-warn-about-dangers-of-web-photo-scraping/*
[2] *Prince Albert v Strange* [1849] EWHC Ch J 20 (08 February 1849) and Chapter 2.2.1.

Act 1988 (CDPA) enacted 26 years ago.[3] The CDPA is supplemented and buttressed by additional contemporary statutory domestic[4] and European legislation.[5] UK law is the primary focus in this chapter. The development of public interest arguments in the context of "fair dealing" that at least test, if not instantly to permit, publication by others of material relating to all classes of celebrities, has matured in this area as a result of decisions taken by English judges post-HRA.

4.2 The Protected Right

4–002 Copyright is a bundle of between 5–6 exclusive rights which vests in original literary, dramatic, musical and artistic works as well as broadcasts, films, sound recordings and typographical arrangements. The right vests automatically on creation and does not require formalities. The right is of limited duration[6] and the essence of copyright is that it gives the right to prevent others from using the work. The exact scope of the exclusive right varies

[3] A pre-CDPA celebrity example of copyright as a privacy remedy from 1914—demonstrating pragmatism without any trace of proportionality—comes from the royal "kiss and tell" threats made by Daisy, Countess of Warwick. *Probyn v Logan* was heard before Low J in the King's Bench Division in 1914 (P. No 1594). The file cannot be located in the National Archives. The only fragment of the case that exists is the final order staying the proceedings—dated 5 July 1915—recorded in Fritz Lang's *My Darling Daisy* (Michael Joseph 1964, 184–185). The case involved the perpetually-impecunious attributed celebrity "Daisy", a former mistress of Edward VII, when she confronted the ascribed celebrity of George V. He was keen to protect what was left of his father's (in European terms "post-mortem") privacy. In March 1914 she hatched a plot with US writer Frank Harris for a "kiss-and-tell" autobiography she hoped would net around £100,000. Earlier, in1908, she had promised Edward VII that she had destroyed all his letters. Then she had "discovered" a bundle of 30 of them when the bailiffs turned up to distrain on her property. George V's advisors believed the letters would "blast" Edward VII's reputation and could damage the monarchy more generally. George V was neither prepared to be blackmailed nor to allow Daisy to humiliate his mother (Queen Alexandra) so Daisy was served with an injunction forbidding her from publishing, circulating or divulging the letters. Her response was that she would relate her story in court at the full trial of the action. She had not anticipated the Defence of the Realm Act 1914 (DORA). She had allowed Frank Harris to take some of the letters with him to the United States. Buckingham Palace claimed copyright in them. DORA, among its other provisions, prohibited the export of intellectual property which could damage the national interest. Daisy was threatened with committal to Holloway Prison for breaching the injunction. She capitulated and retrieved the material from Frank Harris in the US together with the manuscripts of her memoirs. One fragment of this legal action remains for posterity. In her final affidavit she stated: "*I am handing back with splendid generosity the letters King Edward wrote me of his great love, and which belong to me absolutely. I. . .. have never dreamed of publishing such things. My memoirs are my own affair, and every incident of those 10 years of close friendship with King Edward are in my own brain and memory*." In return she received a "loan" of £64,000 from Arthur du Cros, the chairman of the Dunlop Rubber Company, acting as an intermediary for royal interests. He was knighted two years later in 1916.

[4] Such as the Enterprise and Regulatory Reform Act 2013 and the Intellectual Property Act 2014.

[5] The latest European Commission draft of a White Paper on *Copyright Policy for Creativity and Innovation in the European Union* was leaked on 24 June 2014: *http://ipkitten.blogspot.co.uk/2014/06/super-kat-exclusive-heres-commissions.html*

[6] Copyright in a literary work, for example, ceases to exist 70 years after the death of the author.

slightly between types of work, but the rights include a right to prevent reproduction and distribution of the work to the public, rental or lending, public performance of the work, its communication to the public and its adaptation or translation.

Despite the existence of copyright in a work there are a number of activities that require a balancing against other rights that may permit more general and public use. These include making of temporary copies,[7] "fair dealing" for purposes of private study or research,[8] criticism, review and reporting,[9] and "incidental inclusion in an artistic work, sound recording, film or broadcast".[10]

The CDPA gives the author of a copyright literary, dramatic, musical or artistic work, and the director of a copyright film, the right to be identified as the author or director of the work.[11] There is also a right not to have the work subjected to derogatory treatment,[12] something that can occur when a (usually) attained celebrity's literary or artistic work is "hijacked" for other purposes.[13] There is a specific privacy provision covering the situation where someone who—for private and domestic purposes—commissions "the taking of a photograph or the making a film".[14] This creates the protected right—in respect of the commissioner—not to have copies of the work issued to the public, exhibited or shown in public or to have the work communicated to the public.

Copyright is a property right that can be sold and dealt with in the same way as other forms of property.[15] It is a right that can be assigned and a person can be licensed to do things that could otherwise be done only by the copyright owner. An infringement of copyright is actionable by the copyright owner who can seek damages, injunctions and accounts for usage as well as delivery up and destruction of infringing copies.[16] There are also criminal offences relating to counterfeiting and piracy. These may involve goods branded or endorsed by celebrities of all categories.[17]

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[7] s.28A, as inserted by the Copyright and Related Rights Regulations 2003/2498.

[8] CDPA s.29.

[9] CDPA s.30.

[10] CDPA s.31.

[11] CDPA s.77 (1).The right is not infringed unless it has been asserted in accordance with s.78.

[12] CDPA s.80–83: so called "moral rights". The Open Rights Group ORG campaigned to gain statutory exceptions for parody, caricature and pastiche: *http://www.righttoparody.org.uk* successfully (now CDPA section 30(4)). See also *Deckmyn v Vandersteen* case c-201/13 and the Information Society Directive 2001/29.

[13] As occurred in Alan Clark MP's successful litigation in respect of passing off and protecting his moral rights under s. 84 (1) CDPA: *Clark v Associated Newspapers Ltd* [1998] EWHC Patents 345. Articles in the *Evening Standard* parodied his well-known *Diaries* published in the early 1990s.

[14] CDPA s.85: in *Trimingham v Associated Newspapers* [2012] EWHC 1296 (QB) photographs had been taken by a professional photographer at Ms Trimingham's civil partnership ceremony in 2007. The photographer, a friend of hers, agreed—as a wedding present—not to charge for the work. The term "commissioned" is not defined in s.85. Tugendhat J concluded that there was no commissioning. He noted that the editors of two practitioners' works suggested that the lack of a definition was an oversight as it had existed in the 1956 Copyright Act but he found that "commissioning" carried with it an obligation to pay.

[15] CDPA s.90.

[16] CDPA s.96 and 97.

[17] *http://www.ipo.gov.uk/ipenforce/ipenforce-crime/ipenforce-role/ipenforce-report.htm*

4.3 The Permitted Interference

4–003 The key elements in the CDPA that can alter the balance of the permitted right in the context of this book are found in s.30 and relate to criticism, review and news reporting and in s.171(3) which preserves the public interest defence.[18] In essence, "fair dealing" with a work for the purpose of criticism or review—provided that the work has been made available to the public—does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement.[19] Similarly, fair dealing with a work (other than a photograph) for the purpose of reporting current events is permitted.[20] More generally, Article 10 now exists to reinforce balance within this area.[21]

4.4 Proportionality Develops

4.4.1 The Queen's Speech

4–004 A classic example of copyright infringement involving an ascribed celebrity occurred when *The Sun* published the full text of the Queen's annual Christmas broadcast to the nation two days before transmission in 1992.[22] The Queen's solicitors wrote[23] seeking damages and costs for breach of copyright. It is hard to find any fair dealing, public interest or Article 10 argument that might have justified that particular event—were it to occur now—unless, perhaps, there had been a newsworthy and substantial difference between what was written and what was ultimately broadcast.[24]

4.4.2 Newspaper Spoilers

4–005 Celebrity copyright issues can arise when celebrities sell their stories exclusively to one newspaper or media outlet. Strictly these are not examples of copyright being used as a privacy remedy save that, while the celebrities have often chosen to benefit commercially from such exclusive agreements, they are also exercising their private life rights to control how and what is—and

[18] In respect of s.171 (3) see Alexandra Sims *Strangling their creation: the courts' treatment of fair dealing in copyright law since 1911* (IPQ 2010) 2 192–224.
[19] CDPA 1988 s.30 (1).
[20] CDPA 1988 s.30 (2).
[21] In *Unilever plc v Nick Griffin* [2010] EWHC 899 (Ch) Arnold J granted the manufacturer of Marmite an injunction preventing it being used in a "Love Britain Vote BNP" advertisement about to be broadcast by the BNP's attributed or achieved celebrity leader Nick Griffin. But he observed at [18] about the s.171 (3) defence if used by the BNP: ". . ..as it presently exists in English law it is somewhat limited. . .[but] there may be room for further development, particularly in a political context such as this."
[22] *The Sun*—having originally claimed that it came by the transcript legitimately—subsequently printed an apology on 16 February 1993, paid all costs and made a £200,000 donation to a charity nominated by the Queen.
[23] 13 February 1993.
[24] Punishment was the withdrawal of *The Sun's* press accreditation to photograph the Royal family attending church at Sandringham on Christmas Day.

is not—put into the public domain or their moral rights not to have such matters misrepresented or distorted. Even before *Douglas v Hello* there was a line of cases which dealt with the protection of the exclusive copyright owner's rights against rival media "spoilers" claiming s.30 CDPA "fair dealing" to defend—with variable success—what was or was not "fair", something that was always going to turn on the individual facts of each case.

In *Associated Newspapers Group plc v News Group Newspapers Ltd*[25] shortly after the death of the Duchess of Windsor, *The Daily Mail* acquired the copyright in letters between the late Duke and Duchess and was publishing them. *The Sun* acquired copies and published a "spoiler". The "reporting current events"[26] provision was prayed in aid—unsuccessfully—by *The Sun* on the basis that the current events were the death of the Duchess, her motives and intentions in seeking publication of her 15 letters, and the fact that the undisclosed letters themselves had been published, casting light on matters of historical interest. This was given short shrift by Walton J:

> "[Counsel for *The Sun*] has tried to make a great deal of play on the lines that to grant the injunction would be to interfere with the press's freedom of speech or publication. It seems to me that that is total nonsense. A person is not in any way prohibited from saying exactly what he likes, or publishing exactly what he likes, if he cannot publish it in the precise words which somebody else has used, which is the essence of copyright. Freedom of speech is interfered with when somebody is not allowed to say what is the truth: and the truth here is that the Duchess wrote a large number of letters to the Duke and the Duke wrote a large number of letters to the Duchess and anybody is free to say that and also to say, on the one hand, that they are the most tender love letters they have ever read or, on the other hand, that they consider them about the most banal letters they have ever read. There is no interference of any description in the present application with freedom of speech."

4.4.3 The Public Interest pre-HRA

4–006 Celebrities (of all three categories), a royal link and *The Sun* were at the heart of *Hyde Park Properties v Yelland*.[27] This case also introduced the public interest issues—in terms of freedom of speech—that developed the exploration of the proportionality balancing exercise in cases which followed. A few hours before Diana Princess of Wales and Dodi Fayed were killed in the car crash in the Pont de l'Alma Tunnel in Paris on 31 August 1997 they had visited the Villa Windsor in Paris, a property leased by Mohammed Al Fayed, Dodi's father. They were recorded on video tape. Photographic prints (the "driveway stills") were subsequently made from the tape. Security at the Villa Windsor was the responsibility of a company controlled by Mr Al Fayed. *The Sun* subsequently received copies of the prints and published them—without consent—on 2 September 1998 as part of an article entitled "*Video That Shames Fayed*". It was argued (successfully before Jacobs J at first instance) that "fair dealing" within the s.30 CDPA defence carried an implicit public interest defence on the basis that the images disproved certain claims made about the whereabouts of Dodi Fayed and Diana Princess of Wales at a

[25] *Associated Newspapers Group plc v News Group Newspapers Ltd* [1986] RPC 515.
[26] CDPA s. 30(2).
[27] *Hyde Park Properties v Yelland* RPC (1999) 116(18) 655–672 and Case No 1999/0459/3 Court of Appeal.

particular time.[28] The argument failed in the Court of Appeal because the Court held the information could have been relayed to the public without infringing copyright.[29] In relation to whether a public interest defence should apply, Aldous LJ determined:[30]

> ". . ..the basis of the defence of public interest in a breach of confidence action cannot be the same as the basis of such defence to an action for infringement of copyright. In an action for breach of confidence the foundation of the action can fall away if that is required in the public interest, but that can never happen in a copyright action. The jurisdiction to refuse to enforce copyright. . ..comes from the court's inherent jurisdiction. It is limited to cases where enforcement of the copyright would offend against the policy of the law."

He went on to say that such circumstances were not capable of definition but situations where the work was immoral, scandalous or contrary to family life; injurious to public life, public health and safety or the administration of justice or incited or encouraged others to act in such a way. He concluded:[31]

> ". . ..the submission that the driveway stills needed to be published in the public interest to expose the falsity of the statements made by Mr Al Fayed has no basis in law or in logic. Perhaps the driveways stills were of interest to the public, but there was no need in the public interest in having them published when the information could have been made available by *The Sun* without infringement of copyright and was in any case in the public domain after the statement by Mr Cole on behalf of Mr Al Fayed."

This is best considered as a decision of its time. It failed to anticipate the more tightly-focused emphasis and analysis on proportionality that emerged from the developing jurisprudence resulting from the Human Rights Act 1998. This recognised the importance of reflecting ECHR Article 10 freedom of speech issues, particularly in the light of Walker LJ's remarks in *Ashdown v Sunday Telegraph* (see below).

4.4.4 Towards the Identification of Article 10

4–007 The *Ashdown v Sunday Telegraph* litigation in 2001 was a test that related more to an attained political celebrity seeking to retain the commercial benefit of what he had written about in relation to his time as a former leader of the Liberal Democratic Party than about litigation to preserve his privacy rights. But the Court of Appeal's findings on the tension between copyright and ECHR Article 10 freedom of expression established an important principle: Article 10 *could* override the CDPA. The *Sunday Telegraph* published extensive extracts from a confidential record which Paddy Ashdown had made of an important meeting at 10 Downing Street in 1997. Ashdown sued for

[28] *Hyde Park Properties v Yelland* RPC (1999) 116(18), 659: "The gist of the falsehoods [were] concocted for the purpose of divorcing Mr Al Fayed in the public eye from any responsibility for the deaths of Diana and Dodi (it was one of his employees at the Paris Ritz who was the driver and is said to have been drunk), and possibly also to give credence to the view that but for the crash, Mr Al Fayed would have become the step-grandfather to a future King."

[29] A precursor of *Campbell* without the pictures.

[30] At [64].

[31] At [67].

copyright infringement and breach of confidence. The High Court awarded Ashdown summary judgment, dismissing the *Telegraph's* defences including defences based on freedom of expression and fair dealing. The *Telegraph's* appeal failed. The circumstances in which freedom of expression will prevail over copyright are rare.[32] Copyright protects the expression of ideas, not the ideas themselves. The public interest which newspapers serve in disclosing information such as the matters referred to in Ashdown's confidential record can normally be protected without the newspaper copying the *exact* words. To establish credibility, however, the press and media often publish the verbatim detail of documents. In such instances the form of the document is of equal importance to the content and a newspaper may still have a fair dealing defence under the CDPA. In the absence of a s.30 "fair dealing" defence, could it still be right for a newspaper to publish substantial verbatim extracts from a document? The Court of Appeal decided that the newspaper need only have published one or two short extracts to establish authenticity. It had gone much further and "deliberately filleted" material in order to extract colourful passages that were most likely to add flavour to its article. This was furthering the newspaper's commercial interests in a manner which was "essentially journalistic". The Court, however, distanced itself from Aldous LJ's decision in *Hyde Park Residence Ltd v Yelland* that the CDPA 1988 represented a comprehensive code which adequately performed the balancing process between competing rights of property interests and freedom of expression leaving no room for a free-standing defence of public interest.[33] The court also considered the meaning of "reporting current events" and confirmed that a liberal interpretation should be put on the word "current".[34]

[32] In a non-copyright situation, the "over-stretch" was recently articulated in *Kennedy v The Charity Commission* [2014] UKSC 20 where the present state of ECtHR decisions on Article 10 were described by Lord Mance at [98] as "unsatisfactory".

[33] Walker LJ at [58]: ". . ..we do not consider that Aldous L.J. was justified in circumscribing the public interest defence to breach of copyright as tightly as he did. We prefer the conclusion. . ..that the circumstances in which public interest may override copyright are not capable of precise categorisation or definition. Now that the Human Rights Act is in force, there is the clearest public interest in giving effect to the right of freedom of expression in those rare cases where this right trumps the rights conferred by the Copyright Act. In such circumstances, we consider that s.171 (3) of the Act permits the defence of public interest to be raised. We do not consider that this conclusion will lead to a flood of cases where freedom of expression is invoked as a defence to a claim for breach of copyright. It will be very rare for the public interest to justify the copying of the form of a work to which copyright attaches. We would add that the implications of the Human Rights Act must always be considered where the discretionary relief of an injunction is sought, and this is true in the field of copyright quite apart from the ambit of the public interest defence under s.171(3).

[34] Ibid [64]: "The meeting between the claimant, the Prime Minister and others in October 1997 was undoubtedly an event, and while it might be said that by November 1999 it was not current solely in the sense of recent in time, it was arguably a matter of current interest to the public. In a democratic society, information about a meeting between the Prime Minister and an opposition party leader during the then current Parliament to discuss possible close co-operation between those parties is very likely to be of legitimate and continuing public interest. It might impinge upon the way in which the public would vote at the next general election. The 'issues' identified by the Sunday Telegraph may not themselves be 'events', but the existence of those issues may help to demonstrate the continuing public interest in a meeting two years earlier."

In *Pro Sieben Media AG v Carlton Television*[35] the attributed celebrity was a mother 17-weeks pregnant with eight live embryos as the result of fertility treatment. Ms Mandy Allwood gave an exclusive interview to the German broadcaster Pro Sieben's 30-minute daily *TAFF* program. Carlton TV used a 30-second "lift" of Ms Allwood and her partner from *TAFF* as part of a critical piece on cheque-book journalism. In relation to s.30 (2) CDPA Walker LJ, held:

> "I consider that Ms Allwood's multiple pregnancy, its progress and its eventual outcome were on any view current events of real interest to the public. The volume and intensity of media interest was sufficient to bring the media coverage itself within the ambit of current events. The fact that Mr Clifford had sold an interview. . ..to German television for £30,000. . ..was an event of limited and ephemeral interest, but it was in my view a current event."

4–008 He was, in effect, enunciating the public interest test in terms to read—pre-HRA—a proportionality element into the statutory defence. Post-HRA this is then reflected in *Frazer-Woodward plc v BBC*.[36] The Claimant—whose principal director was successful former paparazzo turned picture agent—brought copyright infringement proceedings against the BBC for the use of 14 photographs of Victoria Beckham and her family in a television programme. The BBC relied on the s.30 CDPA "fair dealing" defence for the purposes of criticism and review. The Court applied *Pro Sieben* and dismissed the claim.[37]

The use of copyright for privacy protection—echoing what could not be found overtly in *Albert v Strange*—returned unequivocally in 2006 within the litigation surrounding the *Mail on Sunday's* attempts to publish the Prince of Wales' private journals including the one relating to his visit to Hong Kong.[38] In *HRH The Prince of Wales v Associated Newspapers* (No.3) (CA),[39] shortly after a state visit by the Chinese President to London, the newspaper published extracts from a journal written by the Prince about his official visit to Hong Kong in 1997. It had obtained this from a former employee in the Prince's private office, together with seven other journals. Blackburne J, at first instance, granted the Prince summary judgment in relation to the Hong Kong journal only. In relation to the copyright portion of the claim in the appeal the newspaper argued, unsuccessfully, that its publication was fair dealing or in the public interest. It was common ground that the Prince owned the copyright in the journal.[40] Publication of substantial parts of it had occurred. None of the statutory defences relied on succeeded. The s.30 (2) CDPA "fair dealing" for the purpose of reporting current events failed

[35] *Pro Sieben Media AG v Carlton Television* [1998] EWCA Civ 2001.

[36] *Frazer-Woodward plc v BBC* [2005] EWHC 472 (Ch).

[37] The decision also gives guidance as to the meaning of "sufficient acknowledgement": Mann J [76]: "What matters for these purposes is how the material appears in the programme, and there is a sufficient link to make the identification. This is sufficiently clearly a repetition of the previous photograph for the identification to carry over for the purposes of the acknowledgment provision."

[38] The breach of confidence elements of this case have already been discussed in Chapter 2.

[39] *HRH The Prince of Wales v Associated Newspapers* (No.3) (CA) [2006] EWCA Civ 1776.

[40] *HRH The Prince of Wales v Associated Newspapers* (No.3) [75].

because,[41] while it was just arguable that part of the published articles related to current events,[42] the majority of the article had no bearing on such matters at all.

> "The quotations from the Journal that infringed copyright had been chosen for the purpose of reporting on the revelation of the contents of the Journal as itself an event of interest and not for the purpose of reporting on current events. In these circumstances. . ..including the fact that the Journal had been obtained in breach of confidence, it could not be argued that the publication of the articles constituted fair dealing for the purpose of reporting current events."[43]

As to whether the newspaper had a defence under s.30(1) of the CDPA, in terms of sufficient acknowledgement and its availability to the public, that failed because its limited private circulation did not amount to "availability".[44] In terms of the s.171(3) CDPA "public interest" defence the newspaper had argued that, because Prince Charles had no intention of publishing the journal, no commercial interest was at stake. In such circumstances Prince Charles' only purpose in invoking the CDPA was to protect his privacy and it could not be right that he should be able to rely upon his copyright in order to protect his privacy. That argument—which had failed at first instance—gained no further traction on appeal.[45]

An example of the practical advantages to celebrities of using the property elements of copyright to protect their privacy rights to prevent intrusion formed a discrete part of Briggs J's judgment in *Edward RockNRoll v NGN* that touches on Article 10 issues.[46] He had asked about the approach he should adopt in the balancing exercise where the copyright injunction impinged on Article 10 rights of freedom of expression. He observed that ownership of copyright was a private intellectual property right that—unlike Article 8—was not expressly qualified. He cited *Appleby v UK*[47] as an instance where the ECtHR considered how to balance the private property right of a landowner to exclude political demonstrators from his land against the demonstrators' right to express political views under Article 10.

> "Although it was held that there had been no positive obligation on the state to restrict the landowner's property rights on the facts, it was recognised that enforcement might need to be restrained if it would completely have prevented any effective exercise by the demonstrators of freedom of expression."[48]

His view was that if a threatened breach of copyright impinged on Article 10 rights then the court might decline the discretionary remedy of an injunction, leaving the claimant to a claim in damages.[49] Reflexively applying issues

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[41] *HRH The Prince of Wales v Associated Newspapers* (No.3) [78].

[42] Prince Charles' failure to attend the banquet at Buckingham Palace for the Chinese state visit that had occurred just before the publication of the articles and his role as Heir to the Throne.

[43] Lord Phillips of Worth Matravers CJ, at [78].

[44] A similar situation to the etchings that Queen Victoria and Prince Albert circulated in a limited fashion to a few close friends.

[45] Ibid [84].

[46] *Edward RockNRoll* [2013] EWHC 24 (Ch) [43–46].

[47] *Appleby v UK* (2003) 37 EHRR 38 [41–48].

[48] *Edward RockNRoll* [42].

[49] The status of copyright as a property right also brings into play the rights provided for under

within *Theakston*[50] he reasoned that—because the copyright claim would only prevent the actual copying of the photograph—there would be no disproportionate Article 10 fetter on text describing the photograph.[51] He concluded, in terms of the case before him:

> "The statutory requirement in an Article 10 context for an applicant for interim relief to demonstrate a probability of success at trial is nonetheless as applicable to a claim in copyright as it is to a claim to restrain misuse of private information. Applying that test. . ..the claimant has a much better than even chance of obtaining an injunction to restrain the breach of copyright inherent in the threatened publication of the Photographs as such."[52]

4–009 He then pointed out that Facebook's standard terms and conditions provided for a non-exclusive transferrable licence in Facebook's favour. That did not prevent Mr RockNRoll, as copyright owner by assignment of the rights of the original photographer,[53] restraining the potential copyright breach by *The Sun*. There had been no suggestion that *The Sun* had been assigned any rights by Facebook "and it seems very unlikely that the proprietors of Facebook would think it in their interests to do so in the future, at almost any price".[54] It is also clear from paragraph 37 of the judgment that he had decided that a textual description—to avoid copyright problems—of the lower half of Mr RockNRoll in the photograph would have been too graphic in private information terms.

The dichotomy between the expectation of privacy in relation to the *information* in any photograph or picture as opposed to the copyright in the photograph or picture itself is an important one, with echoes of *Albert v Strange* and the description of the pictures in the proposed brochure. Outside the judgment—but as a matter of fact—*The Sun* had made it clear in the proceedings that it was the textual description of the pixelated lower half of the picture that made the proposed story because of the bizarre nature of the private information it disclosed. Editorially it was never considered that the whole picture could ever have been used.[55]

Article 1 of the First Protocol ECHR which provides: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." See *Sporrong and Lonnroth v Sweden* Application 7151/75, (1982) 5 EHRR 35, [61]. The ECHR case law emphasises that, under Article 10, the vital means of the press as a "public watchdog" is underlined. The press duty is to impart ideas and information of public interest: *The Observer and the Guardian v UK* application 13585/88, (1991) 14 EHRR 153, [59]. Also *Ashby Donald and others v France* (appeal number 36769/08) with its emphasis on the respect to be given to Article 10 rights.

[50] *Theakston* [2002] EWHC 137 (QB).

[51] Having asked the question of all counsel in the case, their silence meant he had to provide the answer himself.

[52] *Edward RockNRoll* [44].

[53] The friend who had originally posted it on his *Facebook* page.

[54] [2013] EWHC 24 (Ch) [46].

[55] See also the "Tulisa Sex Tape" litigation: *Contostavlos v Mendahun* [2012] All ER (D) 152 (Apr).

4.4.5 ECtHR notes Article 10. . . .in the margin of appreciation

4–010 Outside the English law context of the CDPA—but staying in the realm of celebrities, their pictures and the proportionality balancing exercise—the ECtHR decision in *Ashby Donald and others v France*[56] saw the court holding that a conviction based on copyright law for illegally reproducing or communicating copyright-protected material *could* be regarded as an Article 10 interference. Any conviction fell to be tested against the "necessary" element of functionality in a democratic society and not just the fact that it was prescribed by law and apparently pursued a legitimate aim.[57] It was insufficient to justify a sanction or judicial order restricting artistic or journalistic freedom of expression simply because a copyright law has been infringed.[58] The three applicants were fashion photographers who published fashion pictures—taken at fashion shows in Paris during 2003—on their internet site *Viewfinder*. The pictures were published without the permission of the fashion houses. The Court of Appeal in Paris fined them between €3,000 and €8,000 together with an award of €255,000 of damages and payment for publication in three publications of the judgment against them. They claimed the Court of Appeal had failed properly to consider the exception[59] within French law for reproduction, representation or public communication of works exclusively for news reporting and information purposes. The ECtHR found that the application was admissible and not manifestly ill-founded[60] but that the convictions did not breach Article 10 on the facts and merits of the case. Publication of pictures of models on the catwalk at fashion shows—and the fashion clothing they were modelling—was not an issue of general interest to society and related more to a kind of "commercial speech".[61] The court's articulation of the difference between matters that contribute to a debate of general interest to the public and the money-driven "commercial speech" elements it found in this case—and the subsequent margin of appreciation approval of significant financial penalties—came close to sanctioning a "chilling effect".[62] If the context of the use of the pictures had been to demonstrate a point about women's rights in the world of fashion or the exploitation of young, thin female models then the Article 10 exercise might have been more likely to have decided in the applicants' favour.[63]

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[56] *Ashby Donald and others v France* Appl. 36769/08 (5th Section) 10 January 2013.

[57] Reinforced, on February 19 2013, by *Neij and Sunde Kolmisoppi v Sweden* Appl. 40397/124.

[58] Because of the wide margin of appreciation available to France in this particular case, the impact of Article 10 here was relatively modest.

[59] In Article 122-9 of the Code de la Propriété Intellectuelle.

[60] *Ashby Donald* [25].

[61] *Ashby Donald* [39].

[62] In the sense that it is the inhibition or discouragement of the legitimate exercise of natural and legal rights by the threat of legal sanction.

[63] As in *MGN v UK* (2011) 53 EHRR 5 and *Von Hannover (2)* (2012) 55 EHRR 15.

4.5 IMAGE RIGHTS IN ENGLISH LAW AND THE CJEU DECISION IN *MARTINEZ*

4.5.1 Introduction

4–011 While copyright *per se* is not the most commonly deployed litigation route used to maintain celebrity privacy, the issues relating to the protection of celebrities' personal or family image is still at its most embryonic stage of development in English law. In the same way that English judges refused to recognise a nominate privacy action until forced to by the effect of the HRA, recognition of the existence of image rights causes English judges to express similar denials. Instead, alternative remedies of passing off and misrepresentation have been pressed into service and stretched to the limits of their jurisprudential logic while the binding effect of a Luxembourg CJEU judgment on digital image rights has been ignored.

At the margins of the English jurisdiction, however, the Bailiwick of Guernsey has seen a gap in the judicial market and an on-going commercial opportunity in this area.[64] It is the first jurisdiction in the world to offer registered image rights as a new form of intellectual property.[65] The claimed benefits are legal certainty, publication to the world by the online Register of Personalities and Images, clarity for the marketing of image rights, tax advantages and wider scope of protection than that given by registered trademarks.

The protection of celebrities' image rights—with associated privacy benefits—have the capacity to grow and develop rapidly in utility and importance in a world that allows for almost immediate and far reaching publication of images on the internet and the social media.[66]

4.5.2 Image Rights in English Law

4–012 Because image rights—as understood in European and Roman Dutch civil law systems—are not recognised as being available to celebrities of any category in English law, other remedies have been pressed into service. This can be seen in the line of cases from *Irvine v TalkSport*[67] to Birrs J's (and the subsequent Court of Appeal's) *Rhianna* decision.[68] These cases use "passing off" or "false endorsement" to allow celebrities to protect their commercial rights in this area. Birrs J left no room for misunderstanding about this:

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[64] See Jason Romer and Kate Storey *Image is everything! Guernsey registered image rights* Ent. L.R. 2013, 24(2), 51–56.

[65] Guernsey is a dependency of the British Crown but is not part of the United Kingdom. It has its own Government, legislature and court system. It is not part of the European Union. UK Privy Council decisions are binding and English case law is persuasive.

[66] Effective 3 December 2012.

[67] *Irvine v TalkSport* [2003] EWCA Civ 423. £25,000 damages awarded to F1 driver Eddie Irvine in respect of a doctored photo that made him appear to be endorsing "Talk Radio".

[68] *Fenty v Arcadia Group Brands* [2013] EWHC 2310 (Ch) and [2015] EWCA Civ 3. The fashion retailer *Topshop* sold T-shirts with the pop celebrity Rihanna's image on them produced from a photograph taken by an independent photographer. *Topshop* had a licence from the photographer to use the image but no licence from Rihanna. She successfully contended that sales of the T-shirts without her permission infringed her rights.

> "It is important to state at the outset that this case is not concerned with so called 'image rights'. Whatever may be the position elsewhere in the world, and however much various celebrities may wish there were, there is today in England no such thing as a free standing general right by a famous person (or anyone else) to control the reproduction of their image (*Douglas v Hello* [2007] UKHL 21). There is a developing law of privacy but no question of that arises in this case. The taking of the photograph is not suggested to have breached Rihanna's privacy. A celebrity may control the distribution of particular images in which they own the copyright but that right is specific to the particular photographs in question. Whether an image right can or should be developed is not what this case is concerned with."[69]

His mention of *Douglas* reflects the fact that celebrities are able to impose (and enforce) obligations of confidence by contract in relation to private events such as private weddings and receptions.[70]

The Court of Appeal judgment—upholding Birss J's decision—was delivered, with substantial agreement from Richards and Underhill LLJ, by Kitchen LJ. He repeated the familiar mantra: "There is in English law no "image right" or "character right" which allows a celebrity to control the use of his or her name or image."[71] He agreed that a celebrity seeking to control the use of his or her image had to rely on some other cause of action such as breach of contract, breach of confidence, infringement of copyright or—as here—passing off.[72]

In finding that Rihanna had suffered from a sustainable case of passing off, he noted:

> "It is not necessary for the purposes of these proceedings to attempt to define all of the circumstances in which the law of passing off law may be invoked to prevent the unauthorised use of a name or likeness of a famous real or fictitious person, for here Rihanna contended that she had a reputation and goodwill in connection with her business activities and further, that the use of her image on the t-shirt amounted to a misrepresentation and was likely to deceive members of the public into believing it was approved of and authorised by her and so, in short, that she was happy to be associated with it and had endorsed it. Put another way, it was her case that the misrepresentation that she was associated with the t-shirt made it more attractive and so played a material part in the decision of the public to buy it."[73]

At least one commentary on the Court of Appeal decision[74] has noted that effective image protection requires law-makers to reconcile "the commodification of real human beings with their dignitary rights, including their autonomy and privacy" as broadly defined by the ECtHR in *Von Hannover*.[75] After all, image may be everything but, without protection, it is nothing.

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[69] *Fenty v Arcadia Group Brands* [2013] [2].

[70] Celebrity weddings are a specialist market and a revenue stream for celebrities: examples involving *OK!* include David and Victoria Beckham (£1m, 1999); Michael Douglas and Catherine Zeta-Jones (£1m, 2000); Jordan and Peter Andre (£2m, 2005); Ashley Cole and Cheryl Tweedy (£1m, 2006); and Wayne Rooney and Coleen McLoughlin (£2.5m, 2008).

[71] *Fenty v Arcadia Group Brands* [2015] EWCA Civ 3 [29].

[72] *Fenty v Arcadia Group Brands* [2015] [33].

[73] *Fenty v Arcadia Group Brands* [2015] [37].

[74] Susan Fletcher and Justine Mitchell *Court of Appeal found no love for Topshop tank: the image right that dare not speak its name* E.I.P.R. 2015, 37(6), 394–405.

[75] *Von Hannover* (2004) 40 E.H.H.R.1 ECtHR at [50].

4.5.3 *Martinez*

The *Martinez* decision was not cited to Birrs J or in the Court of Appeal.[76] This CJEU decision, it is maintained, allows for a wide interpretation permitting various options for those seeking to protect themselves against infringement of their image rights.[77] Its significance is that, as a decision from Luxembourg, it is binding on the 28 EU member states. **4–013**

Olivier Martinez, a French actor, claimed interference with his private life and infringement of his image rights as a result of a posting in the UK on the *Sunday Mirror's* website which was accessible in France. It stated "Kylie Minogue is back with Olivier Martinez" together with details of their meeting. *MGN* argued that the Tribunal de Grande Instance de Paris lacked jurisdiction because there was insufficient connection between the act of placing the text and images online in the UK and the causation of any damage in France.

The CJEU considered first the interpretation of Article 5(3) of Regulation (EC) No 44/2001[78] and how the expression "the place where the harmful event occurred or may occur" should be interpreted when the alleged infringement of personality rights occurred in content placed online on an internet website. It concluded that the phrase covered both the place where the damage occurred (France) *and* the place of the event giving rise to it (England). This was because:

> "those two places could constitute a significant connecting factor from the point of view of jurisdiction, since each of them could, depending on the circumstances, be particularly helpful in relation to the evidence and the conduct of the proceedings".[79]

The Grand Chamber noted that *Shevill*[80] had established that defamatory statements in newspapers—which were distributed in a number of different member States—allowed the victim to seek damages both in the place of the original publication and from any of the courts in other countries where distribution, publication and damage had taken place. Did this principle go beyond print media and newspaper publication and apply to internet publications? Did it need to be distinguished on the basis that publication on an internet website meant that it could be accessed instantly by an indefinite number of internet users worldwide? The Court answered "yes" to the first question. It properly limited the effect of the answer to the second question by deciding that the claimant had[81]

> "the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action

[76] Linked cases C-509/09 and C161/10 *eDate Advertising GmbH v X and Martinez v MGN Ltd.*
[77] See R. Callender Smith "Mirror, Mirror on the Wall. . ..Are Those Image Rights I See Before Me?" (2012) *Queen Mary Journal of Intellectual Property*, Vol. 2 No. 2, 195–197.
[78] This relates to jurisdiction and enforcement of judgements in civil and commercial matters and jurisdiction in 'matters relating to tort, delict or quasi-delict'.
[79] Ibid [41].
[80] C – 68/93 *Shevill and Others* [1995] ECR I – 415, paras [20–21..].
[81] Ibid [52].

> before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised."

The judgment introduces a new concept of a celebrity claimant's "centre of interests". It suggests[82]—perhaps optimistically—that both the claimant and the defendant will be able "easily to identify" where the claimant may sue, as the defendant will be "in a position to know" where the centre of interests would be. In some cases this will be straightforward. It will be where he lives, his "habitual residence", or where he does most of his business (where he pursues a "professional activity").[83] However, the lives and business of many EU celebrities—particularly the attributed and achieved celebrity categories of musicians, actors and sports personalities—are unlikely to fit neatly or clearly into such a binary definition. They may be living in one state and perhaps regularly touring or playing in other EU states. Also of significance will be the nature of the information, the countries it will be reasonably foreseeable that the information will be of interest in, and the actual language of publication.

4–014 On the basis of *Martinez*, although the Duke and Duchess of Cambridge have taken action in France (and Italy, Sweden and elsewhere in the EU) in respect of the intrusive "balcony" photographs taken of them in September 2012 that were published on newspaper and magazine internet sites, they could have issued proceedings in the High Court in London for damages for misuse of private information as well as asserting damage to their image rights.

Just as UK online publishers can be pursued in the courts of other EU member states, those principles must apply here to EU-based online publishers. There is no reason why UK claimants cannot use this decision as authority to protect their image rights in terms of privacy issues rather than simply seeking economic protection of their image rights more generally throughout the EU member states.

Additionally it is clear that Scots law, with legal roots traditionally aligned to European influences, already offers ways in which image and personality rights and remedies could be developed within that jurisdiction.[84] The legal principles could then be "walked across" the border by any Supreme Court decision in much the same way the Scottish case of *Donoghue v Stevenson* created new law on negligence and the scope of the duty of care that was then applied throughout the UK.[85]

As Black observes:[86]

> Personality rights are "a separate category of rights, distinguishable from real, personal and immaterial property rights". Long familiar in Civil law jurisdictions the term is now beginning to gain currency in Scotland. Where publicity rights are treated as a subset of personality rights

[82] Ibid [49–51].
[83] Ibid [49].
[84] See Elspeth Christie Reid *Personality, Confidentiality and Privacy in Scots Law* (W. Green 2010).
[85] [1932] UKHL 100 (26 May 1932).
[86] Gillian Black *Publicity and Image Rights in Scots Law* 373.

there is likely to be an emphasis on the dignitarian aspects, for concepts such as privacy and human dignity are central to any legal protection of personality. This means that the commercial significance of infringement in publicity situations may be marginalised.

It is suggested that the bridge into the practical application of image rights as a protected privacy—rather than purely a commercial—issue within English law, and the potential unlocked by this area of continental and Scots law, exists already and has the potential for development as a result of *Martinez*.[87–90]

4.6 Summary

4–015 Copyright can provide a flexible and additional privacy remedy for anticipated or actual breaches. As was argued earlier in this book, *Albert v Strange* is a copyright case in all but name and spans one edge of that proposition, particularly in terms of injunctive relief. At the other edge is the remedy of damages—with all the other sub-remedies associated with a full trial of an alleged breach—because even then the privacy interest can be protected as it was in the *Ashdown* and *Douglas* cases.

Fair dealing in the s.30 CDPA sense seemed to retain much of its "equitable" origins, even early in the life of the HRA. Walton J's "total nonsense" conclusion in *Associated v NGN* decision in 1986 is representative of conservative and conventional judicial thinking. Only recently—along with s.171 (3)—has the rigour of the proportionality balancing test brought proportionality into the judicial consideration of fairness.

The digital age has brought with it recorded surveillance in volumes unimagined even a decade ago. Celebrities of all classes are captured on public and private CCTV systems.[91] Ownership of such images not only has a market potential for sales to the press and media but can also be used to restrain misuse which is not authorised or licensed. The potential imprecision of what is required in the commissioning of celebrity photographs needs careful thought to enhance privacy protection. Uncommissioned or "free" pictures taken by friends of aspiring attributed celebrities—before they hit the headlines for the first time—may need acquisition by payment, for an assignment of copyright, to protect the celebrity-to-be's future rights in this area.

European jurisprudence indicates that the Article 8/10 considerations within *Ashby Donald v France* provide scope for development at each end of the celebrity privacy spectrum but perhaps more particularly in the area of permitted intrusions and Arnold J's observations in the *Marmite/BNP* case about the under-developed potential of the s.171 (3) public interest defence in a political context may be tested in future litigation.

[87–90] C-509/09 and C-161/10 *eDate Advertising GmbH v X and Olivier Martinez and Robert Martinez v MGN Limited*: Judgement of the Grand Chamber.

[91] As, for example, Dominique Strauss-Kahn found out to his cost after an incident in a New York hotel in May 2011.

CHAPTER 5

PROTECTION FROM HARASSMENT ACT 1997 AS A PRIVACY REMEDY

5.1 Introduction

5–001 In the previous two chapters the *RockNRoll* case provided a thematic link between misuse of private information and copyright as privacy regimes available to celebrities. In this chapter it is the *Trimingham* case—which included celebrity copyright litigation—as part of a protection from harassment (and misuse of private information) claim which provides the thread of continuity.[1a] This chapter examines the ways in which anti-stalking legislation—created by the Protection from Harassment Act 1997 (PHA) which had its legislative roots as an anti-Domestic Violence measure—has become a potent weapon in the privacy armoury of celebrities of all categories.[1]

The PHA's remedies have matured potently over the last 15 years in ways beyond what could have been envisaged by the original legislators, the press or celebrities themselves. Importantly, it is pre-HRA in origin. It has had to develop to accommodate the proportionality balancing exercise within and between Articles 8 and 10, particularly in terms of complaints by celebrities about the targeting of individuals by newspapers. The Act contains no explicit public interest defence. As will be seen, for all practical purposes, it has been the *Re S* proportionality formulation that has carved that out within the case law—by analogy—both in the Act's criminal and civil manifestations.

The stalking of celebrities is as old as history. Greek mythology reflects gods and goddesses demonstrating unsettling obsessions for prominent human beings.[2] In the real world, the determined and the obsessed will always seek to breach the best efforts of security placed around the individual safety and seclusion of celebrities. It is clear, for instance, from historical[3] and Royal Protection Squad data[4] published in the US by researchers using Home

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[1a] See Chapter 4.2.

[1] For a prescient assessment on the potential of this area for celebrities to assert their privacy rights see Andrew Scott *Flash Flood or Slow Burn? : Celebrities, Photographers and Protection from Harassment* (2009) Media & Arts Law Review 14 (4), 397–424.

[2] Zeus was—perhaps—the greatest mythical serial celebrity stalker/seducer starting, at a mortal level, with Europa (daughter of King Agenor of Sidon) followed by another seven: Lo, Semele, Ganymede, Callisto, Maia, Metis, Dione and Danae.

[3] James, Mullen, Pathé, Meloy, Farnham, Preston and Darnley "Attacks on the British Royal Family: The Role of Psychotic Illness" *J Am Acad Psychiatry Law*, 2008, 36: 59–67.

[4] James, Meloy, Mullen, Pathé, Farnham, Preston and Darnley "Abnormal Attentions Towards

Office data that the ascribed celebrities of the monarch and other members of the royal family are regular and specific targets (outside the terrorist spectrum) in respect of incidents which are likely to bring them into civil or criminal proceedings as potential victims, witnesses or complainants. In *Attacks on the British Royal Family* it was noted that—between 1778 and 1994—there were 23 attacks[5] on the life or safety of the monarch or members of their immediate families.[6] As will be examined later in this chapter, there are unresolved issues that arise out of the constitutional position of the monarch should she wish to use the PHA to enforce her privacy rights.[7]

5–002 The list of UK celebrities who have been stalked, in the non-paparazzi sense, includes Gwyneth Paltrow,[8] ITN newsreader Julia Somerville,[9] Catherine Zeta-Jones[10] and David Walliams.[11] In 2007 the BBC presenter Emily Maitlis—who had been stalked over a lengthy period by a former University colleague[12]—appeared as a prosecution witness at his trial for s.2 PHA offences at West London Magistrates' Court where she faced (before the court resolved the problem) the stalked person's nightmare: cross-examination by the accused after her stalker sacked his defence advocate.

A now annual royal anti-harassment notice to the press, media and photographers is but one example. In 2009 the monarch warned[13] and annually now reminds the media and photographers about privacy issues[14] in relation to the royal estates at Sandringham and Balmoral. The first warning specifically mentioned taking action not only in relation to breaches of privacy, on the basis that members of the royal family spent private time at Sandringham and Balmoral often with invited friends and guests, but also under the provisions

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the British Royal Family: Factors Associated with Approach and Escalation" *J Am Acad Psychiatry Law*, 2010, 38: 329–340.

[5] "Attacks" were defined by the researchers as "any hostile act involving either a weapon or the making of physical contact by an individual". Alarming intrusions that had no hostile intent—such as Michael Fagan's appearance in the Queen's bedroom in 1982—were not classified. Neither were group events, such as the stoning of George III's coach in London in 1795 and the attempted storming of the Prince of Wales' convoy by anti-nuclear protesters in Barrow-in-Furnace in 1992. Events such as the unwelcome but non-hostile physical contact by model Jane Priest in her encounter with Prince Charles in the Australian surf in 1979 were also excluded.

[6] Of these, 83% were on the monarch. George III was attacked six times, Queen Victoria eight times, Edward VIII once and Elizabeth II on three occasions. Of the remainder, four involved the monarch's children and one the spouse of the heir to the throne. Only two attacks resulted in serious physical injury. In 1864, Queen Victoria's son, Prince Alfred, was shot and seriously injured at a Grand Charity Picnic in Sydney. The attempted kidnapping of Princess Anne in the Mall in 1974 left the Princess unharmed but led to four people being shot and seriously injured. Minor injuries were sustained by King William IV when he was hit by a stone and Queen Victoria received a black eye and a bruise to the head when she was attacked while riding in her carriage. The remaining 19 attacks did not lead to any form of physical injury.

[7] See 5.3 in this Chapter: Can the monarch take action under the Act?

[8] 2000: *http://news.bbc.co.uk/1/hi/entertainment/1071724.stm*

[9] 2001: *http://news.bbc.co.uk/1/hi/uk/1506465.stm*

[10] 2005: *http://news.bbc.co.uk/1/hi/wales/4666313.stm*

[11] 2008: *http://news.bbc.co.uk/1/hi/entertainment/7529652.stm*

[12] Edward Vines*: http://www.dailymail.co.uk/news/article-1101664/Schizophrenic-stalked-BBC-presenter-Emily-Maitlis-20-years-sent-secure-hospital.html*

[13] In October 2009.

[14] In letters sent on her behalf by her solicitors headed: "Re: HM The Queen".

of the PHA. The 2009 warning complained that there had been a number of previous intrusions into the privacy of the royal family resulting from professional photographers using long distance lenses, not only to observe the royal family, but also to photograph them going about their activities on the Estates.[15] The media was requested—before publication—to review material "photographic or otherwise" which was submitted and related to either estate in the light of the monarch's "clear request for the harassment and breaches of privacy to cease".[16] This royal adoption and endorsement of the protective elements of the PHA in terms of ascribed celebrities put the media on notice that, inevitably, attributed and achieved celebrities would follow the royal lead in adding this to the repertoire of remedies within the Act to protect their private life rights.

The Act is an unusual, possibly unique, piece of legislation in its range and flexibility. It incorporates criminal sanctions, as well as the potential for parallel civil protection, in respect of conduct that is essentially similar in nature. The standard of proof required varies depending on the court before which the prosecution or complaint is pursued. The Act has been developed both by statutory amendment and by adapting case law to cover a broad range of conduct, broader than originally envisaged, and now includes "stalking" offences which, arguably, only replicate conduct which was already subject to the Act. More subtle forms of harassment or potential harassment —beyond the original obvious purposes of the Act—will be identified as will be the remedies that arise from issues relating to publication, actual or anticipated. Although an undeveloped area at the moment, through the Act—and more general principles of aiding and abetting and vicarious liability—the media at a corporate level and photographic agencies who commission defendants who are photographers and others involved in intrusive surveillance could find themselves as co-defendants or caught by the effect of post-acquittal Restraining Orders (ROs). Also, ROs—created by the PHA—can be imposed in respect of criminal conduct that is not charged under the Act itself,[17] such as offences under the Data Protection Act 1998[18] or the CDPA.

[15] There had earlier been Sandringham-generated photographs including the Queen wringing the neck of a pheasant at a shoot on the estate (19 November 2000) and Prince Edward apparently beating a gun dog at Sandringham (28 December 2008: investigated by the RSPCA but with no prosecution) as well as an unsubstantiated report that Prince Harry had shot and killed a protected Hen Harrier at Sandringham on 24 October 2007. The Duke and Duchess of Cambridge with Prince George and Princess Charlotte now use Anmer Hall, on the 20,000-acre Sandringham estate, as their private home.

[16] When Kate Middleton was photographed playing tennis during the Christmas holiday period 2009 (after the October 2009 warning) the Rex photographic agency agreed to pay £10,000 to charity in lieu of damages, plus an apology and costs for invading her privacy. The pictures were taken by a freelance photographer on Christmas Eve and Christmas Day 2009 in Cornwall. The pictures were not published in the United Kingdom but were syndicated overseas where some were published.

[17] In *R v Buxton (Ivan David) & Others* [2010] EWCA Crim 2923.

[18] In particular ss. 55, 56(5) and—in respect of corporate liability—66 of the DPA.

5.2 THE PROTECTED RIGHT

5–003 The Act[19] prohibits harassment in two generically different situations. The first type of clearly prohibited conduct[20] covers issues around stalking,[21] disputes between neighbours or between colleagues in the workplace. "Stalking" includes following a person; contacting, or attempting to contact, a person by any means; publishing any statement or other material relating or purporting to relate to a person, or purporting to originate from a person; monitoring the use by a person of the internet, e-mail or any other form of electronic communication; loitering in any place (whether public or private); interfering with any property in the possession of a person; watching or spying on a person. The second type of prohibited conduct covers campaigns by individuals or groups attempting to put unlawful pressure on others and is beyond the scope of this book.[22]

An objective "reasonable person" test operates to determine whether a course of conduct amounts to harassment.[23] A "course of conduct" excludes matters which can be shown to being pursued for the purposes of preventing or detecting crime, under any enactment or rule of law or that—in the particular circumstances[24]—it was reasonable.[25]

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[19] As subsequently amended by the Serious Organised Crime and Police Act 2005, s.125(1).

[20] Section 1(1) "A person must not pursue a course of conduct (a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other."

[21] Via s.111 and s.112 of the Protection of Freedoms Act 2012).That Act inserts s.2A and s.4A into the PHA, creating three new offences: s.2A(1) stalking; s.4A(1)(b)(i) stalking involving fear of violence and s.4A(b)(ii) stalking involving serious alarm or distress. A person is guilty of the offence of stalking if, and only if, he or she is first guilty of harassment as set out in the PHA. The offence of stalking occurs where the course of conduct amounts to harassment and the acts or omissions involved are ones associated with stalking and the person knows or ought to know that the course of conduct amounts to harassment of the other person. The prosecution only have to prove that the defendant knew or ought to have known the course of conduct amounted to harassment, not that he or she knew or ought to have known that it amounted to stalking.

[22] Section 1(1A) "A person must not pursue a course of conduct (a) which involves harassment of two or more persons, and (b) which he knows or ought to know involves harassment of those persons, and (c) by which he intends to persuade any person (whether or not one of those mentioned above) (i) not to do something he is entitled or required to do or (ii) to do something that he is not under any obligation to do."

[23] Section 1(2) "For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other."

[24] Examined recently in a non-celebrity context by the Supreme Court in *Hayes v Willoughby* [2013] UKSC 17.

[25] Section 1(3): Subsection (1) does not apply to a course of conduct if the person who pursued it shows—(a) that it was pursued for the purpose of preventing or detecting crime, (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or (c) that in the particular circumstances the pursuit of the course of conduct was reasonable. *R v Colohan* [2001] EWCA Crim 1251 ". . .1(3)(c). . .poses even more clearly an objective test, namely whether the conduct is in the judgment of the jury reasonable. There is no warrant for attaching to the word "reasonable" or via the words "particular circumstances" the standards or characteristics of the defendant himself," per Hughes J.

5.2.1 Criminal Offences

5–004 The Section 1 offences in the Act are summary criminal matters carrying up to six months imprisonment and/or a fine of up to £5,000. Section 4 provides for more serious criminal instances when the target for the harassment is put in fear of violence—on at least two occasions—with the potential penalty, in addition to fines, of imprisonment for up to five years if the matter is committed for trial on indictment to the Crown Court or up to six months imprisonment as a summary offence in the Magistrates' Court. In terms of "stalking"[26] the following now exist: the summary offence of s.2A(1) stalking and the either way offence of s. 4A stalking involving serious alarm or distress.[27] There is no explicit public interest defence within the PHA.

Section 5 of the Act provides for Restraining Orders (ROs) on conviction. Section 5A[28] of the Act provides for ROs on acquittal. In criminal cases ROs can be imposed by reference to the civil standard of proof and can involve the use of hearsay evidence.[29–30] In either case the ROs may, "for the purpose of protecting the victim of the offence, or any other person mentioned in the order", prohibit the defendant from further conduct which amounts to harassment or which would cause a fear of violence for a specified period or until further order. If the defendant does anything which is prohibited then a summary conviction carries up to six months imprisonment and/or a fine or—on indictment—up to 5 years imprisonment and/or a fine. A "course of conduct" is defined by Section 7 of the Act and must involve conduct on two or more occasions in relation to a single individual or at least on one occasion to each individual if the conduct is in relation to two or more individuals.

5.2.1.1 Criminal Offences and Social Media

5–005 The HRA, tensions between Articles 8 and 10 and prosecutions under the Act in respect of modern methods of communication are exemplified in *R v Debnath*.[31] The defendant appealed from an RO prohibiting her, among

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[26] The *Oxford English Dictionary* definition is "the action, practice or crime of harassing or persecuting a person with unwanted, obsessive, and usually threatening attention over an extended period of time." Examples: "Stalking is generally defined as an ongoing course of conduct in which a person behaviourally intrudes upon another's life in a manner perceived to be threatening" (A. Nicastro, A. Cousins and B. Spitzberg "The Tactical Face of Stalking" (2000) 28(1) *Journal of Criminal Justice* 69); "A constellation of behaviours in which one individual inflicts on another repeated unwanted intrusions or communications" (M. Pathe and P. Mullen "The Impact of Stalkers on their Victims" (1997) 170 *British Journal of Psychiatry* 12).

[27] A person is guilty of the s.4(A) offence where he engages in a course of conduct that amounts to stalking, and either causes another to fear, on at least two occasions, that violence will be used against him, or causes him serious alarm or distress which has a substantial adverse effect on his usual day-to-day activities. It must be shown that the defendant knows or ought to know that his course of conduct will cause another so to fear on each of those occasions or (as the case may be) will cause such alarm or distress.

[28] Domestic Violence, Crime and Victims Act 2004, s.12(5).

[29–30] This mixing of criminal and civil standards of proof—in criminal matters where there has been an acquittal—creates the potential for a significantly disproportionate outcome.

[31] *R v Debnath* [2005] EWCA Crim 3472.

other things, from publishing any information about the man who was the focus of her attention and his fiancée, whether true or not. She had conducted a campaign against the man—a former work colleague—after a one-night stand with him. She believed he had given her a sexually transmitted disease although she had never actually had that disease. Her campaign ranged from criminal damage to his car, registering him on gay contact websites, falsely complaining to his employers that he was harassing her and tampering with his e-mails and those of his fiancée. She argued that the wide terms of the RO infringed her Article 10 ECHR rights to publish the truth.

The Crown successfully argued that the terms of the RO were proportionate because they were no wider than was necessary to protect the victim, who has suffered a long-term campaign of harassment from her. The RO was only breached if its terms were contravened without reasonable excuse. The restriction on her Article 10 rights needed to be balanced against the rights of the victim, who was also a member of society. The purpose of the order was to afford protection to the victim and his fiancée. They had protection under the domestic law and also had Article 8 rights to private and family life. The correct test was whether the RO pursued a legitimate aim and whether the restriction imposed was proportionate and necessary to achieve that aim. She had two convictions relating to harassment of him, and was now facing a third indictment relating to his fiancée. The restriction on publishing the truth about two named individuals who were private citizens, not public figures, with whom she had no enduring connection was clearly proportionate to protect them from further interference and harassment. She had no need to publish any information about them. No offence would arise if, in the future, she could establish that there was a reasonable excuse. Balancing the relevant rights, the restriction that she was subject to was minor whereas the level of protection afforded to her targets was great.[32] The Court of Appeal upheld the order, commenting that the defendant seemed incapable of distinguishing truth from fiction and had continued her campaign even when on remand. There was, in effect, no public interest/Article 10 defence open to her for inaccurate information and her conduct consequent on it.

The issues in two summary prosecutions of web-site harassment, *R v Puddick*[33] and *R v Fredrics,*[34] demonstrate how fact-sensitive matters can become in terms of whether prosecutions—as opposed to court-imposed ROs—under the Act provide an effective privacy remedy. In *Puddick* the defendant had set up a number of different websites to highlight how a wealthy businessman—who, along with the defendant, became an attributed celebrity as a result of this case—had conducted an adulterous affair with the defendant's (now-reconciled) wife. District Judge Elizabeth Roscoe concluded that simply setting up websites was not a "course of conduct" which

[32] *R v Debnath* [2005] [18].

[33] Westminster MC 15–17 June 2011 and *http://www.2bedfordrow.co.uk/the_plumber,_the_lover_and_the_internet_-_michael_wolkind_qc_blogs/8 Westminster MC 15 – 17 June 2011 and http://www.2bedfordrow.co.uk/the_plumber,_the_lover_and_the_internet_-_michael_wolkind_qc_blogs/8*

[34] Kingston MC July 2010. See also *http://www.sirpeterscott.com* and *Surrey Comet* 30 July 2010 *http://www.sirpeterscott.com/images/30.7.10comet.jpg*

caused "alarm and distress" to the alleged victim.[35] This case was one of the first to highlight the issue of whether someone, exercising Article 10 rights freely to express themselves widely online about something that had a genuine factual base, could be guilty of harassment in this criminal context. Because the standard of proof for the prosecution to satisfy the burden on it is "beyond reasonable doubt" in the light of a "not guilty" plea, the focus of the proportionality balance took place in the context of a more demanding Article 10 dynamic than in *Debnath*.[36] The issue in this and the next example related to individuals highlighting in a repetitious way what was true and what they believed they had a right to express and others had a right to consider. The proportionality balancing act, in terms of their "targets" Article 8 rights, are the reverse of *Debnath*. The public interest/Article 10 rights prevailed and resulted in acquittals.

5–006 In *Fredrics*, another District Judge[37] decided that the defendant—a composer and former Senior Lecturer of Music—had no case to answer in relation to s.2 prosecution under the Act. He had set up a satirical whistle-blower website alleging wrongdoings by officials at Kingston University. The website used the Vice-Chancellor's name as the domain name and Sir Peter Scott (the Vice-Chancellor and an achieved celebrity) objected to this misrepresentation. The brief press report in relation to this case suggests that the District Judge found that the website contained material of public concern about alleged bullying, the role of external examiners and the retirement age policy. These cases suggest that, in the absence of any defined or overt public interest defence within the Act itself, fact-sensitive issues provide a judicial route to the delivery of pragmatic, fact-based conclusions, particularly in summary trials.[38]

Harassment in the form of cyber-stalking can take place on the Internet and through the misuse of email. It can include the use of social networking sites, chat rooms and other forums opened up by the new technology. Such campaigns can result in harassment prosecutions under the Act in a variety of ways such as:

- the way in which personal information is accessed (or communicated) about the victim
- as a means of surveillance of the victim
- identity theft by subscribing a victim to services and by purchasing goods and services in their name

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[35] *http://www.ianpuddick.com*

[36] Where she had pleaded guilty at Leicester Crown Court on 29 June 2004 to one s.2 PHA offence and two further counts of unauthorised modification of computer material contrary to s.3(1) of the Computer Misuse Act 1990.

[37] Deputy District Judge Shlomo Kreiman, quoted as saying: "Harassment laws were not intended to protect individual reputations."

[38] However—although currently untested – s.1(3) (c) could be a quasi-public interest defence applicable to some news gathering activities by the media in any sustained activity or campaign to explore and publicise corruption or criminal wrong-doing. Whether it could be extended to cover reprehensible conduct short of outright criminality remains to be tested: there is a strong Article 10 argument that it should. See also *Fulton v Sunday Newspapers* at 5.4.2 in this chapter.

- damaging the name of the victim
- electronic sabotage (spamming or sending viruses)
- tricking other internet users into harassing or threatening the victim.

The DPP's current guidance to Crown Prosecutors emphasises issues of proportionality.[39] It even reminds that there is, in this area, a "high threshold" at the evidential stage.[40] Prior to this Nicola Brookes—a private individual[41] who was subjected to a barrage of "trolling" abuse in 2012[42] when she posted a supportive comment about ascribed X-Factor celebrity Frankie Cocozza on Facebook—had been faced with the reluctance of CPS Kent to prosecute the matter "because it was too difficult".[43] Ms Brookes was left to take action privately in the High Court to secure the trollers' identities by way of a *Norwich Pharmacal Order* (NPO).

Then, in 2014, the pendulum swung in a "chilling" fashion in respect of Article 10. In what might be seen as disproportionate police over-reaction to previous inactivity there were a series of examples of journalists and "tweeters" being issued with "prevention of harassment" letters or receiving police "warning" visits.[44] The Act provides no statutory recognition for such letters and—as the journalist recipients discovered—there was no process for getting them withdrawn.[45] The IPCC upheld the decision of the

[39] The advice includes prosecutions under the PHA and other provisions such as offences under the Contempt of Court Act 1981, s.5 of the Sexual Offences (Amendment) Act 1992, breaches of an RO or breaches of bail: *http://www.cps.gov.uk/news/latest_news/dpp_publishes_final_guidelines_for_prosecutions_involving_social_media_communications/* and *http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/* This loads the first, evidential, stage of the prosecution assessment under the Code for Crown Prosecutors with the adjectival "high threshold" element that might otherwise have been expected to appear at the second stage of the assessment, the public interest examination in relation to any prosecution.

[40] Ibid [34–34]: Because of the daily volume of "many millions of communications" sent via social media—and in the context of s.1 of the Malicious Communications Act 1988 and s.127 of the Communications Act 2003—such comments create "the potential that a very large number of cases could be prosecuted before the courts. Taking together, for example, Facebook, Twitter, LinkedIn and YouTube, there are likely to be hundreds of millions of communications every month. In these circumstances there is the potential for a chilling effect on free speech and prosecutors should exercise considerable caution before bringing charges under those two sections. There is a high threshold that must be met before the evidential stage in the Code for Crown Prosecutors will be met. Furthermore, even if the high evidential threshold is met, in many cases a prosecution is unlikely to be required in the public interest. . ..". The trigger for this guidance was a s.127 Communications Act 2003 prosecution relating to a tweet about Robin Hood airport at Doncaster: *DPP v Chambers* [2012] EWHC 2157 (Admin).

[41] Who became an attributed celebrity by trying to support an existing attributed celebrity.

[42] One "troll" set up a Facebook profile in Ms Brookes' name, with a picture of her and her email address, describing her as a drug dealer, prostitute and child abuser.

[43] *http://www.guardian.co.uk/technology/2012/jun/08/facebook-revealing-identities-cyberbullies*

[44] *http://www.pressgazette.co.uk/journalist-investigating-%C2%A3100m-investment-fraud-given-absurd-harassment-warning-met-police*

[45] The first one, relating to *Croydon Advertiser* journalist Gareth Davies, came from him making two telephone calls and a doorstep visit—a course of conduct—on a man convicted of fraud. The second related to Florida-based UK journalist David Marchant receiving a harassment warning as a result of his investigation into an alleged £100m investment fraud. Then Michael Abberton, who had tweeted something UKIP did not like, received a visit from Cambridge police whose

Metropolitan Police to issue one of those letters to Croydon Advertiser journalist Gareth Davies.[46]

There is an inevitable range and variation about what will be considered—as a matter of fact—to be a "course of conduct" under the Act. For instance—and admittedly in a domestic context rather than a situation involving a celebrity—in *R v Curtis*,[47] the Court of Appeal held that a series of six incidents, over the course of nine months during a volatile relationship where there had been aggression on both sides, did not constitute a course of conduct that amounted to harassment for the purposes of s.1 and did not form the basis of an offence under s.4(1).

5.2.1.2 Corporate Crime: Implications of Harassing Surveillance

5–007 The misuse of "surveillance" in the context of the Act[48] raises the question of whether Max Mosley could have complained to the police about the conduct of *The News of the World* in paying one of the participants in their sadomasochistic sessions to film these activities surreptitiously, for subsequent repeated use by the newspaper. The filming itself took place on more than one occasion and, on that basis, amounts to a course of conduct. The effect of the filming ultimately caused Mr Mosley harassment, alarm or distress.[49]

While the newspaper publications—and web postings of the videos—were the trigger for Mr Mosley's civil action in terms of the breach of his private life rights, the deep reach of criminal conduct spelled out in s.7(3) and (3A) would have allowed for prosecution of those who aided, abetted, counselled or procured conduct falling within the terms of the Act.[50] It may be fortunate for all those involved on the editorial side of that story that he did not make a complaint in those terms, given that he succeeded in his litigation[51] in the French courts[52] where he recovered the equivalent of £32,000 in fines, damages and costs.

The spectre of corporate criminal liability for News International and its Directors— the indictments for which might have at their heart conspiracy

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Chief Constable subsequently agreed the visit had not been necessary : *http://inforrm.wordpress.com/2014/05/15/tweeting-about-ukip-political-expression-and-the-cambridge-police-tamsin-allen/*

[46] *http://www.pressgazette.co.uk/ipcc-says-met-was-right-issue-reporter-who-asked-questions-fraudster-harassment-warning.* This is the subject of a Judicial Review application.

[47] *R v Curtis* [2010] EWCA Crim 123.

[48] *R v Curtis* [2010] [23].

[49] "Once such recording has taken place, however, a separate issue may need to be considered as to the appropriateness of onward publication. . ..obviously the nature and scale of the distress caused is in large measure due to the clandestine filming and the pictures acquired as a result," per Eady J *Mosley v NGN* [2008] EWHC 1777 [17].

[50] s.7 (3A): "A person's conduct on any occasion shall be taken, if aided, abetted, counselled or procured by another – (a) to be conduct on that occasion of the other (as well as conduct of the person whose conduct it is); and (b) to be conduct in relation to which the other's knowledge and purpose, and what he ought to have known, are the same as they were in relation to what was contemplated or reasonably foreseeable at the time of the aiding, abetting, counselling or procuring."

[51] *http://inforrm.wordpress.com/2011/09/25/news-max-mosley-and-a-french-criminal-complaint-against-news-of-the-world-and-neville-thurlbeck/*

[52] *http://www.theguardian.com/media/2011/nov/08/news-group-fine-mosley-france*

to commit PHA, Computer Misuse Act 1990, Regulation of Investigatory Powers Act 2000 (RIPA) or Communications Act 2003 offences—awaits a prosecution decision.[53]

5.2.2 Civil Actions

5–008 Section 3 PHA provides a civil remedy in the form of a statutory tort with damages and the possibility of an injunction, for harassment as defined in s.1 of the Act. There is an important distinction available in civil proceedings permitting greater speed and flexibility. Action may be taken on the basis of only a *single* act provided that the court is satisfied that further breaches are anticipated.[54] Victims who experience harassment can seek an RO, the breach of which can lead directly to criminal proceedings under the Act.[55] However, no power of arrest can be attached to this civil order and, in order to enforce it though the civil courts, the victim needs to return to court to apply for a warrant of arrest.

The CPS has issued detailed guidance to prosecutors in an attempt to achieve a unified, holistic approach where there are parallel criminal prosecutions and civil actions under the Act.[56] It recognises that the "needs of individual victims vary" and "to ensure their safety, the criminal and civil law may need to be used in conjunction." Prosecutors are reminded of the options open to victims or other agencies under civil procedures so that an "all-encompassing approach can be taken in safeguarding and supporting victims". Prosecutors are enjoined "routinely to make enquiries to see if there are any concurrent civil proceedings" and that, just because "civil proceedings are ongoing does not mean that criminal proceedings cannot be commenced or continued."[57]

5.2.2.1 The Extent of the Act in Civil Proceedings

5–009 An early case on the practical application of the Act in civil proceedings—*Turner v Microsoft*[58]—suggested that the PHA was directed at "stalking, anti-social behaviour by neighbours and racial harassment" and *not* for a

[53] Since June 2014 – and the verdicts in the first phone-hacking trial at the Central Criminal Court – Rupert Murdoch is one such individual: *http://www.theguardian.com/uk-news/2014/jun/24/scotland-yard-want-interview-rupert-murdoch-phone-hacking*. On 25 June 2015 both News Corp and Scotland Yard declined to comment on whether or not Rupert Murdoch had been questioned by police. *http://www.pressgazette.co.uk/year-hacking-trial-verdict-has-rupert-murdoch-avoided-predicted-police-questioning*

[54] S.3 (1): An actual or apprehended breach of section 1 may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question. S.3 (2) allows for damages caused by (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.

[55] S.3 (6) (a): Where the High Court or a county court grants an injunction.. . .and without reasonable excuse the defendant does anything which he is prohibited from doing by the injunction, he is guilty of an offence. Conviction on indictment carries up to 5 years' imprisonment. Summary conviction carries up to 6 months.

[56] *http://www.cps.gov.uk/legal/s_to_u/stalking_and_harassment/#a10*

[57] *http://www.cps.gov.uk/legal/s_to_u/stalking_and_harassment/#a10*: "The availability of civil proceedings does not diminish a defendant's criminal behaviour and is not therefore a reason, in itself, to discontinue."

[58] *Turner v Microsoft* (2000) *The Times* 15 November.

course of conduct such as oppressive litigation.[59] Two later cases took an opposite approach and expanded the reach of the Act in its developing case law.[60] The *British Gas* case confirmed that the only difference between harassment as a tort and as a crime was the standard of proof but (per Jacob and Sedley LJJ) it was "strongly arguable" the British Gas's conduct was sufficiently grave to merit the intervention of the courts. Examples of web campaigns that led to attributed celebrity notoriety and which led to harassment being restrained in civil proceeding are *Cray v Hancock*[61] and *Law Society v Kordowski*[62] where it occurred by continued posting of defamatory remarks about solicitors on websites. In *CBL v Person Unknown*,[63] the claimant had a Twitter account and had received unpleasant, unwanted tweets which threatened to reveal information of an intimate sexual nature about his sexual interests and the impact that could have on his family and children. Nicola Sharp J noted that:

> "[Relief was sought] first of all, because the nature, content and indeed the number of tweets amount at least arguably to harassment within [the Act]; second, on the ground that the information. . .. is, information in which [CBL] has a reasonable expectation of privacy. It is said that there is no reason, certainly at this stage, to suppose that there will be any relevant 'defence' which would justify the publication of that information."[64]

Tweeting in terms that harass as above is clearly caught within the Act. Equally—although pursued as a defamation claim by Lord McAlpine against (in particular) Sally Bercow[65]—celebrity (and other) Twitter users who repeatedly put defamatory or harassing material into the public domain against specific targets could find that the civil proceedings taken against them include civil proceeding under the Act.

Two cases involving Abu Qatada's family emphasise the Act's flexibility in terms of protecting celebrities' privacy and anti-harassment needs. They resulted from the media-enhanced attributed celebrity notoriety[66] of Abu Qatada[67]—of his wife and children[68] (to restrict demonstrations close to

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[59] See the Home Secretary's remarks (Michael Howard MP) on Second Reading of the Bill.

[60] *David Lloyd v Halifax Bank* (2007) The Times 25 September: an injunction was granted against Halifax Bank after a customer—who had become ill with lung cancer and got behind with repayments—received over 750 telephone calls from bank staff about the matter over a 10-month period. In *Ferguson v British Gas Trading Ltd* [2009] EWCA Civ 46 the Court of Appeal confirmed that the conduct of the defendant in sending the claimant "bill after bill, and threatening letter after threatening letter" in error when she had ceased to be their customer and when they knew (or should have known) that she did not owe them any money was sufficiently grave for the conduct to be considered "oppressive and unacceptable".

[61] *Cray v Hancock* [2005] All ER (D) 66 (Nov): a campaign against a solicitor claimant, including e-mails, internet forum postings and spoof websites, amounted to harassment—with more extensive damages awarded for harassment (£10,000)—than for the defamatory elements (a further £9,000).

[62] *Law Society v Kordowski* [2011] EWHC 3182 (QB).

[63] *CBL v Person Unknown* [2011] EWHC 904 (QB).

[64] *CBL v Person Unknown* [2011] [5]. See also *JPH v XYZ* EWHC 2871 (QB).

[65] *McAlpine v Bercow* [2013] EWHC 981 (QB).

[66] His real name is Omar Othman.

[67] Embodied in *The Sun*'s campaign headline of 15 February 2012: *Let's try harder to kick out Qatada http://www.thesun.co.uk/sol/homepage/news/4116837/Boot-out-Abu-Qatada-Join-our-bid-to-kick-extremist-out-of-Britain.html*

[68] *The wife and children of Omar Othman v ENR*: injunction issued by Silber J on 25 February

their home) and the family's landlord's home (to prevent further media harassment and publication of details that might promote demonstrations close to or outside it).[69]

Protecting private life rights from workplace bullying was not one of the obvious purposes to which the Act could be turned. However the significance of *Majrowski v Guy's and St Thomas's NHS Trust*[70]—in the context of this chapter—is that it confirms that an employer (whatever its legal personality) can be vicariously liable for acts of harassment carried out by an employee within the scope of employment and can be, therefore, a proper defendant. The case is also important for an observation by Baroness Hale in the House of Lords that "conduct might be harassment even if no alarm or distress were in fact caused". In *Green v DB Group Services (UK) Ltd*[71] Ms Green suffered from a nervous breakdown because of workplace bullying and succeeded in claims based on negligence and the Act. Owen J considered vicarious liability[72] and the nature and extent of the connection.[73] She was awarded £35,000 general and £25,000 specific damages.[74]

In respect of the monarch's (or any category of celebrities') threats to seek protection of private life rights by using the Act, such vicarious liability can be read across to the activities of photographers working for photographic agencies or journalists making intrusive and overly-persistent and disproportionate enquiries. Freelance photographers on retained contracts with photographic agencies and freelance or retained photographers on newspaper titles generate similar vicarious liability for their employers. Whether it could be extended further to "bullying" activities of reporters and television crews might also be relevant.[75] However in such situations it is likely that the potential employer/media outlet would point not only to its Article 10 rights but also to the "journalistic, literary or artistic" defence in s.32 of the Data Protection Act 1998.[76]

Before looking at the key celebrity cases where the Act has been employed there is a discrete issue that requires consideration: how might the monarch

2013, the terms of which were reported in an MoJ press release of the same date.

[69] *AM v News Group* Newspapers [2012] EWHC 308 (QB).

[70] *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34.

[71] *Green v DB Group Services (UK) Ltd* [2006] EWHC 1898 (QB).

[72] *Bernard v Att. Gen. of Jamaica* [2005] IRLR 398 [18]. Lord Steyn: ". . ..concentrate on the relative closeness of the connection between the nature of the employment and the particular tort, and . . .. ask whether in looking at the matter in the round, it is just and reasonable to hold the employer vicariously liable."

[73] *Lister v Helsey Hall* [2001] UKHL 22.

[74] Other heads of damage remained to be quantified outside the judgment.

[75] *R v Broadcasting Standards Commission ex parte BBC* (1999) 0779/C QBCOF involved the secret filming of transactions in one of Dixons' stores as part of a BBC *Watchdog* programme wishing to show second-hand goods being sold as new (again). The Court of Appeal held the company had a stand-alone privacy right, enforceable to prevent such intrusions. Interestingly this decision pre-dates the commencement of the Human Rights Act 1998 in the UK.

[76] *http://inforrm.wordpress.com/2010/10/15/opinion-privacy-claims-reasonable-belief-in-public-interest-public-domain-and-procedure-antony-white-qc/* and explored separately in Chapter 6.5.1. In terms of media activity, the provisions (and observance) of the relevant industry codes of practice created by the PCC and OfCom is a relevant factor here because it is specifically written in to s.32 (3). And see: *Editors' Code of Practice* on Privacy (3) and, specifically, Harassment (4) (i): IPSO.

actually take action to use the Act either for criminal or civil proceedings. In all the other privacy regimes considered in this book—breach of confidence, misuse of private information, copyright and data protection breaches—it would be possible for the Attorney General to take action on behalf of the monarch by seeking appropriate interim relief or summary judgment. A prosecution or a civil claim under the PHA, however, would require more direct and personal engagement by the monarch because of the evidence that would need to be adduced and tested.

5.3 The Key Protective Cases

5.3.1 *Thomas v NGN*

5–010 The first time the Act, arguments about Articles 8 and 10 and the proportionality balancing exercise were applied and analysed in terms of newspaper publication was in *Thomas v NGN*,[77] a Court of Appeal decision. *The Sun* had generated attributed celebrity notoriety for Ms Esther Thomas, a black civilian clerk working at a City of London police station, when it reported that two police sergeants had been demoted to constables after Ms Thomas reported them for making racist jokes about a Somali asylum seeker.[78] The paper then ran letters from readers attacking Ms Thomas' actions and then an article that further identified her. She claimed she received a number of racist hate letters because of the articles and had become terrified and scared to go to work.

Lord Phillips MR agreed with the County Court judge[79] that the meaning of "harassment" was sufficiently clear that it was not necessary to look at what had been said in Parliament under the principle in *Pepper v Hart*[80] and that the definition clearly went beyond the narrow categories of stalking and neighbour disputes. *The Sun* had argued that its Article 10 freedom of expression rights should be protected.[81] Lord Phillips noted the requirement in Section 12 of the Human Rights Act 1998 that "courts had to take care not to interfere with journalistic freedom unless satisfied that this is necessary". *The Sun* had also argued that the Act could not be applied to press publications

[77] *Thomas v NGN* [2001] EWCA Civ 1233.

[78] *Thomas v NGN* [2001] [5]: "She found her way 8,000 miles here from Somalia – surely she can find her way f***ing back" to which Ms Thomas replied: "If she was a blonde 6ft Australian you would have treated her differently". One of the police officers responded: "I'd have taken her out to dinner". Ms Thomas: "You'd like to shoot us all". Police officer: "I'd have you shot if you don't get on with your work".

[79] HHJ R Cox at Lambeth Country Court had refused to strike out her claim. *The Guardian* contributed £5,000 to help fund her action which could have resulted in £40,000 in costs had she failed.

[80] *Pepper v Hart* [1993] AC 593.

[81] Citing in particular *Nilsen and Johnsen v Norway* (2000) 30 EHRR 878 [43]: "The test of 'necessity in a democratic society' requires the Court to determine whether the 'interference' corresponded to a 'pressing social need', whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient", and *Observer and Guardian v UK* (1992)14 EHRR 153 [19].

because harassment (as defined by s.7) would make any series of publications calculated to cause an individual distress a crime *and* a tort unless proved reasonable.[82]

Lord Phillips concluded that, when *The Sun's* three publications were considered together, he was satisfied that Ms Thomas had an arguable case that *The Sun* had harassed her by publishing racist criticism which was "foreseeably likely to stimulate a racist reaction" on the part of their readers and cause her distress.[83] To the argument that, if the test of whether a series of publications constituted harassment was to turn on whether the conduct of the publisher was reasonable, then that test lacked the certainty that the Strasbourg court required if it was to find that a restriction on freedom of expression was prescribed by law, he stated:

> "On my analysis, the test requires the publisher to consider whether a proposed series of articles, which is likely to cause distress to an individual, will constitute an abuse of the freedom of the press which the pressing social needs of a democratic society require should be curbed. This is a familiar test and not one which offends against Strasbourg's requirement of certainty."[84]

Article 10 (1) sets out the right of freedom of expression, stating that it includes the freedom to hold "opinions and to receive and impart information and ideas without interference by public authority. . ..". Article 10 (2) qualifies the right "since it carries with it duties and responsibilities". The qualifications include the protection of "public safety" and prevention of "disorder or crime". Harassment falls clearly into both of those categories. On that basis the Court of Appeal judgment was a proportionate decision taken in line with those Article 10 qualifications, allowing Ms Thomas the opportunity to take the matter to trial.

5.3.2 *Howlett v Holding*

5–011 Harassment by publication can sometimes take place in situations that are outside the use of traditional media. *Howlett v Holding* is one such example.[85] Eady J granted an injunction under the Act to the claimant preventing the defendant from causing aircraft to fly past with banners describing her in derogatory terms, dropping abusive leaflets or putting her under surveillance by a private detective agency in an attempt to show she was a benefits cheat. She was, in fact, an attributed celebrity as local councillor who had spoken out against a planning application presented by a company with which the defendant was involved. The campaign of harassment had been going on intermittently for between four and five years.[86] He argued that any

[82] In earlier cases the ECtHR had decided that complaints about media intrusion into the private lives of individuals were inadmissible because the remedies provided by English law were adequate: *Winer v United Kingdom* [1986] 25 EHRR CD 154 and *Earl Spencer and Countess Spencer v United Kingdom* [1998] 25 EHRR CD 105.

[83] *Thomas v NGN* [2001] EWCA Civ 1233 [49].

[84] *Thomas v NGN* [2001] [50].

[85] *Howlett v Holding* [2006] EWHC 41 (QB).

[86] Mrs Howlett had successfully brought to libel actions against Mr Holding in respect of allegations of dishonesty made by him about her. In the second libel action Mr Howlett had given

injunction restraining him from flying banners with messages would constitute an infringement of his Article 10 rights to free speech. The claimant's Article 8 rights were engaged in relation to her privacy and in respect of the protection of her physical and psychological integrity. Eady J, keeping his focus on the key issue, observed:

> "As always, one must pay the closest regard to proportionality. Mrs Howlett is not seeking to restrain Mr Holding from exercising his right of free speech, even to make derogatory allegations about her, for all purposes. If he has genuine concerns, even now, that Mrs Howlett may yet be breaking the law, he can go to the appropriate authorities and report those concerns. Indeed, he has already done so. . ..[but] the anguish that Mrs Howlett has had to suffer at Mr Holding's hands over the last four years is out of all proportion to the value to be attached to the exercise of his right of free speech by the methods he has chosen." [87]

Applying the necessary "intense focus" and addressing "the important issue of proportionality", Eady J concluded that there was

> ". . ..only one answer. Mrs Howlett is entitled to call upon the protection of the law and to have Mr Holding's acts of aerial harassment restrained by injunction."[88]

He criticised Mr Holding for trying to "goad" Mrs Howlett into launching a third set of libel proceedings, describing what he had done as "using the surveillance as a weapon of attack,"[89] dismissing the claim of the s.1(3) (c) defence as with "no rational basis".

> "It is necessary, however, to remember that Parliament's objective was to prevent stalking and other forms of harassment and, accordingly, that arguments of 'reasonableness' for the purpose of s.1 (3) (c) need to be scrutinised carefully with that in mind. The terminology needs to be interpreted alongside the concepts of necessity and proportionality, as contemplated by Article 8(2). . . . .Here I see no reason at all why Mr Holding's behaviour should be classified as reasonable."[90]

Eady J pointed out that the Article 10 right, in terms of the proportionality balancing exercise, did not extend to protecting remarks directly inconsistent with the ECHR's underlying values.[91] He noted that the defendant was a rich man who used his wealth to manipulate or subvert court orders in a cruel and cynical way. In terms of surveillance and having Mrs Howlett followed in the street, causing her anxiety because she never knew when he might strike, and praying in aid *Peck v United Kingdom*,[92] he concluded:

> "It may now safely be said that it is not possible for those who wish to intrude upon the lives of individuals through surveillance, and associated photography, to rely upon a rigid distinction being drawn in their favour between what takes place in private and activities capable of being witnessed in a public place by other people."[93]

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evidence that he wanted to make her life "living hell" by way of retribution for her daring to speak out publicly in her capacity as a local councillor, where she had qualified privilege.

87 *Howlett v Holding* [2006] [12–13].

88 *Howlett v Holding* [2006] [14].

89 *Howlett v Holding* [2006] [18].

90 *Howlett v Holding* [2006] [35].

91 *Jersild v Denmark* (1994) 19 EHRR [35] and *Lehideux & Isorni v France* (1998) 30 EHRR [53].

92 *Peck v United Kingdom* (2003) 26 EHRR 41.

93 *Howlett v Holding* [2006] [26].

In giving short shrift to the attempt to use exceptions or defences in s.1 (3) of the Act under the guise of "preventing or detecting crime" Eady J retained a narrow focus. In terms of s.1(3) (c) of the Act, and the Article 8 requirement that any encroachment on a citizen's privacy rights would have to be "in accordance with the law", he observed that it was necessary to consider whether there were any legal constraints restricting surveillance outside the specific context of the Act. He concluded that was not the case.[94] In effect he construed "reasonableness" in terms of proportionality and the public interest.

5.3.3 Paparazzi

5–012 A significant proportion of PHA cases have come from litigation instigated or threatened by celebrities of all categories and are aimed at the activities of paparazzi photographers. Early-adopters[95] were Sienna Miller, Lily Allen and Amy Winehouse. In November 2008 Sienna Miller settled an action with the Big Pictures agency[96] after a "campaign of harassment" including confrontations outside her home, dangerous car chases and pursuit while out walking her dogs. More recent examples, to prevent over-bearing paparazzi activity, include Hugh Grant's girlfriend (and the mother of his child),[97] Cheryl Cole,[98]Lara Stone and her husband David Walliams,[99] The "boy band" One Direction's Harry Styles was awarded the injunction, in particular, on safety rather than outright harassment grounds, to prevent close pursuit by an unnamed paparazzo on a motor scooter.[100]

Requests to the media by the royal family not to publish photographs of the monarchy outside their official duties are becoming commonplace with reminders about the PHA. Typical was a warning from Clarence House in October 2013 on behalf of the Duchess of Cambridge that proceedings under

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[94] Part II of the Regulation of Investigatory Powers Act 2000 required that any surveillance, even by the law enforcement agencies, would have to be authorised in writing. Mr Holding did not have that authorisation.

[95] As noted by Andrew Scott *Flash Flood or Slow Burn? Celebrities, photographers and the Protection from Harassment Act* (2009) Media & Arts Law Review 14(4) 397–424.

[96] £37,000 plus costs together with a further £35,000 damages and costs from *The Sun*/*News of the World* and £15,000 from *The Star*. She then recovered an agreed further £100,000 damages and costs for harassment from News International as a lead defendant in the phone-hacking litigation before Vos J in 2012.

[97] *Ting Lan Hong v XYZ* [2011] EWHC 2995 (QB): When Hugh Grant attended Ms Hong's home he asked the photographers if there was anything he could do or say to make them leave a new and frightened young mother in peace. "They said 'show us the baby'. He refused. He asked if they thought it was acceptable for grown men to be harassing and frightening a mother and baby for commercial profit. They shrugged and took more pictures." Tugendhat J [19]. She had earlier received anonymous telephone calls telling her to tell Hugh Grant to "shut the fuck up" when he appeared on *Question Time* to talk about the phone-hacking scandal. Ms Hong took misuse of private information action against Associated Newspapers for subsequent events.

[98] *Cheryl Cole v XYZ* (unreported) 15 June 2011: injunction granted by Eady J.

[99] *Stone and Walliams v XYZ* [2012] EWHC 3184 (QB).

[100] *Harry Styles v Paparazzi AAA http://inforrm.wordpress.com/2014/03/11/news-harry-styles-harassment-case-photographers-consent-to-permanent-injunctions/* The injunction prevented "Paparazzi AAA and others" from pursuing the singer by car or motorbike. It also stopped them placing him under surveillance, loitering or waiting within 50 metres of his home, and photographing him in such circumstances.

the Act would be taken if pictures of the Duchess of Cambridge walking to shop in Oxford Street were published.[101] That was then followed by an email from Clarence House in November 2013 asking for the removal of photographs of Prince Harry on a trip to the fast food outlet Nandos.[102–103] These warnings reflect a *Von Hannover 1* approach to such activity, ignoring, perhaps, Strasbourg's increasingly liberal change of emphasis on this issue in *Von Hannover 2* and *Von Hannover 3* and described in Chapter 3.

The artist known as "Banksy"—an achieved celebrity—presents an interesting practical problem in relation to a series of covertly-taken photographs that purport to identify him—and which apparently show him at work creating his signature street art—and the Act.[104] Those who have the pictures accept that they were taken surreptitiously and as part of a course of conduct to expose Banksy's identity. Banksy, himself, has a commercial interest in ensuring that his identity remains his own private "property". In any litigation that arises out of this situation he will wish to maintain his anonymity. He may then be faced with the s.1(3) defence relying on the photographic surveillance being pursued "for the purpose of preventing or detecting crime," namely criminal damage.[105]

5.3.4 Anonymity and the Act

5–013 In *ZAM v CFW*[106] the case combined injunctive relief and anonymity together to restrain publication (subsequently breached) of defamatory allegations in parallel with the PHA, to prevent harassment by publication of such material.[107] Key factors in Tugendhat J's initial decision included threats of blackmail by one of the defendants as well as failure to submit a credible defence, despite the serious nature of the allegations. *ZAM*'s wife was a beneficiary under substantial family trusts: *CFW* was her sister (also a beneficiary of the trusts) and her sister's husband (*TFW*). The allegations related to financial impropriety suggesting *ZAM* had misappropriated money from the trusts and demanded the liquidation of assets. Tugendhat J was satisfied

[101] Friday 25 October 2013: *The Sun* received a warning that if it used a picture of the Duchess of Cambridge "out and about" then PHA action would be taken on the basis that she must have been followed by a professional photographer for the picture to be taken. The picture was not used.

[102–103] *http://www.pressgazette.co.uk/royal-family-urges-press-stop-pursuit-and-harassment-royals-outside-official-duties*. The images, taken inside the restaurant were picked up by the *Mail Online* and the *Daily Mirror*. Both publications subsequently removed the photographs. The Note to Editors said an increasing number of photographs were being taken and result in "pursuit and harassment". The Editor's Code of Practice states: "It is unacceptable to photograph individuals in private places without their consent. . .Private places are public or private property where there is a reasonable expectation of privacy."

[104] It appears that two different national newspapers paid £80,000 and £30,000 for pictures that reveal Banksy's identity.

[105] This could also provide the platform for a thorough exploration of Banksy's—and others' personal image rights—in English law.

[106] *ZAM v CFW* [2011] EWHC 476 (QB).

[107] This is a rare example of an interim injunction in libel proceedings being granted together with anonymity in a libel action.

that, in addition to the allegations being seriously defamatory, the conduct of the defendants (particularly *TFW*) amounted to a clear case of harassment under the Act. Without an injunction there would continue to be a course of conduct amounting to harassment. He accepted *ZAM's* case that *TFW* both understood and intended that publication of the allegations would cause alarm and distress, key elements of harassment.[108]

This case brought together an unusual combination of facts: the serious nature of the allegations, the harassment element, the lack of justification or any other defence and the clear and aggressive pursuit of publication in breach of the interim injunction.[109] *TFW* failed to appear at trial or produce any evidence to support his allegations, some of which appeared on the Internet. As one commentator noted[110] Tugendhat J stated that he was granting anonymity in the case under the court's jurisdiction "in accordance with s.6 of the Human Rights Act 1998 and CPR 39.2 (4)". He did not state exactly which Convention right the court was protecting. He referred to anonymity orders frequently being made where blackmail was alleged and cited a number of privacy cases to that effect. Anonymity in the case appeared to have been granted to protect *ZAM's* reputation under Article 8, apparently actively applying the Supreme Court decision in *Re Guardian News and Media Ltd*[111] that the right to protection of reputation was a right which—as an element of private life—fell within the scope of Article 8. It was the first time that an anonymity order had been granted on that basis. The development of anonymity orders in harassment (and private information) cases is a significant reinforcement which benefits all categories of celebrity and ordinary members of the public equally.[112] Tugendhat J did not, however, explain why he did not institute contempt proceedings against *TFW*.[113]

5.3.5 *Brand and Goldsmith v Berki*

5–014 It may come as something of a surprise that a special birthday surprise could lead to harassment litigation about defamatory material but that is what

[108] *ZAM v CFW* and *TFW* [2013] EWHC 662 (QB) [118]: Although there were eight publications, there was a single award of damages for defamation (totalling £120,000). Since the harassment came from the defamatory publications, it was not appropriate to award damages under the PHA claim.

[109] *ZAM v CFW* and *TFW* [2013] [117]: "The allegations of dishonesty in financial matters go to the heart of his professional career in finance. . ..The sexual allegations go to the heart of his family life, and to the benevolent voluntary activities which also formed an important part of his life. . ..an allegation of being a paedophile is. . .so foul that even the most categorical vindication does not prevent a person so accused of having his name permanently linked with the allegation."

[110] Jennifer Agate *A collector's item: interim injunctions and anonymity in libel action* Ent. L.R. 2011 22 (6), 181–183.

[111] *Re Guardian News and Media Ltd* [2010] UKSC 1.

[112] Although Imogen Thomas—a model who was identified when Ryan Giggs was able to conduct most of his privacy litigation as CTB—would probably disagree.

[113] Ibid: [106] "[TFW] has a history of defiance of the Interim Injunctions, misinforming the public as to what the action is about, and manipulation of the national press. . ..the fact that the Interim Injunctions were inaccurately reported in major national newspapers may be relevant to my findings as to the number of readers the Second Defendant has been able to attract to his website publications, and thus to damages, as explained below."

happened in this case. One celebrity[114] wanted to give her celebrity partner at the time[115] a personalised massage. For this she commissioned the defendant, a qualified masseuse, to come to their home.

Carr J described what happened next:

> "There was a meeting between the Claimants and the Defendant at the Second Claimant's house in Oxfordshire on 7th June 2014. There is a dispute as to what occurred at that meeting. The Claimants say that the First Claimant was uneasy with the Defendant and did not wish to proceed with the massage. The position was uncomfortable but not unfriendly. The Defendant on the other hand alleges that she was the victim of wrongful and criminal conduct. The Claimants deny any such conduct. The Defendant's services as a masseuse were not in the event taken up. She was driven home and paid her agreed fee by the Claimants. Their case is that since then she has unlawfully harassed them and will continue to do so absent the imposition of injunctive relief."[116]

Ms Berki represented herself. Carr J observed:

> "I also record the fact that the Defendant states that she is currently in psychotherapy and considers herself disabled due to her "learning, mental health, audio processing and endocrinological disorder". Additionally, it is right to record that her first languages are Hungarian and German, not English. A medical report from 2003 suggests that she has some problems of dyslexia. It states that her reading comprehension was "slightly imperfect". But she had "excellent intellectual capacities", her performance falling into "the extremely high intelligence range". A psychological report from 2013 (prepared in the context of other litigation) stated that her mental state was intact and that she was not depressed. She refers in her witness statement to having post-traumatic stress disorder, but there is no medical evidence to this effect, although there is evidence (in the 2013 psychological report) that she suffered trauma and shock following an alleged assault by her former partner in 2012."[117]

Based on her emails, online communications, her witness statement and "eloquent oral submissions and her demeanour in court" the Judge was satisfied that Ms Berki "was well able to understand and participate effectively in the proceedings". She did not need an interpreter and was "able independently to communicate clearly, articulately and intelligently in English". She was university educated with political experience and was working as an intern survey analyst at the LSE.[118]

Because of Ms Berki's barrage of defamatory publications attacking the claimants' treatment of her—on the internet, to newspapers and to other individuals by email— the injunctive litigation was about avoiding the defamation trap of the Rule in *Bonnard v Perryman*. That, as explained elsewhere in this book, would allow continuous and repetitious publication of the defamatory material to a defendant seeking to rely on the defence of truth at trial.

Carr J was satisfied that Ms Berki's actions went "well beyond annoyance. They can fairly be described as oppressive and unacceptable" and that there was a course of harassing conduct the effect of which she was aware. "What

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[114] Jemima Goldsmith, described in the judgment as "a journalist and a UNICEF UK Ambassador".

[115] Russell Brand, described as "a well-known comedian and actor".

[116] *Brand & Goldsmith v Berki* [2014] EWHC 2979 (QB) [3].

[117] *Brand & Goldsmith v Berki* [2014] [29].

[118] *Brand & Goldsmith v Berki* [2014] [30].

the Defendant describes as her tendency to sarcasm cannot explain away the distressing nature of her comments."[119]

She held that the test for the grant of an injunction where publication was to be restrained was met. She also referred to the *American Cyanamid* test, holding that the balance of convenience lay in favour of the injunction. That lower threshold was relevant where an harassment claim encompassed conduct other than mere publication.[119a]

5.3.6 *CG v Facebook Ireland*

5–015 In *CG v Facebook Ireland & Joseph McCloskey*[120] CG had been convicted of and sentenced for a number of sex offences.[121] He was released on licence on 27 February 2012. The second defendant operated a Facebook page/profile called *Keeping our Kids Safe from Predators 2*.[122] CG sued Facebook and the second defendant in relation to a series of inflammatory posts, alleging that they constituted—among other things—harassment. Stephens J found

> "All of content of the profile/page 'Keeping our Kids Safe from Predators 2' in relation to CG was oppressive and unreasonable and that there was a course of conduct over a period of time which amounted to harassment of CG and which both of the defendants knew or ought to have known amounted to harassment of him. CG's evidence about the abusive language that was used is a factor to be taken into account but it is not determinative. I consider that language was oppressive and unreasonable amounting as it did to a campaign of vilification. I find that the second defendant is liable to the plaintiff for unlawful harassment."[123]

On that basis he awarded CG £20,000 damages.[124] He had no difficulty finding Facebook to be a publisher once it had knowledge of the offending posts. He rejected the argument that a claimant had to provide the URL of each individual post or comment before Facebook could investigate. This approach is both practical and proportionate. It would help others who find themselves continuously seeking the take-down of material that simply re-appears on a new page or site as soon as it is removed. Finding that the previous litigation put Facebook on sufficient notice of itself is a notable step.

[119a] Full trial of this matter is listed for November 2015.

[119] *Brand & Goldsmith v Berki* [2014] [42].

[120] *CG v Facebook Ireland & Joseph McCloskey* [2015] NIQB 11.

[121] The effective overall sentence was one of ten years imprisonment with five years being on licence.

[122] He had already been the subject of litigation involving someone with a similar background to CG in *XY v Facebook Ireland* [2012] NIQB 96.

[123] *CG v Facebook Ireland & Joseph McCloskey* [2015] NIQB 11 [100].

[124] *CG v Facebook Ireland & Joseph McCloskey* [2015] [106]. "I attribute £15,000 to the first series of postings and £5,000 to the second and third series of postings. Accordingly I enter judgment against both the first defendant and second defendant in favour of the plaintiff in the amount of £15,000 and I further order the first defendant to pay the plaintiff the additional amount of £5,000. The defendants have not sought any order as between each other." This award is being appealed to the Court of Appeal.

5.4 PERMITTED INTERFERENCE: S.1 (3) OF THE ACT

5.4.1 *Trimingham v Associated Newspapers*

5–016 The permitted statutory intrusions by virtue of s.1(3) of the Act are unsuccessful when presented in the context of a campaign that one party claims is reasonable but which the court concludes is malign or malicious in the *Howlett v Holding* sense.[125] Given that the focus of the PHA is to prevent unwarranted intrusions then civil proceedings, with the lower burden of proof embodied in the balance of probabilities, might be thought to signal a more effective, straightforward and a less stressful method of protecting celebrity privacy rights. *Trimingham v Associated Newspapers*[126] is, against that observation, an example of the unpredictability of the litigation process even when there is a demonstrable focus on proportionality and the "ultimate balancing test". Carina Trimingham—the bi-sexual partner of former MP and Cabinet Minister Chris Huhne—abandoned her appeal against Tugenhat J's eventual decision[127] shortly after Mr Huhne and his former wife were convicted of conspiracy to pervert the course of justice. For reasons discussed below the intrusion permitted by Tugendhat J's decision merited further appellate scrutiny.

When the trial opened before him,[128] it was adjourned after a heavy hint from the Judge to her counsel that the pleadings should be amended to include a claim under the PHA.[129] In the action itself she complained about the publication of details of her private civil partnership ceremony, of her private conversations with friends, and of details of her sexual life. The headlines to two early stories (of a total of 65) set the tone of others: *Chris Huhne's bisexual lover: Life and very different loves of the PR girl in Doc Martens*[130] and *First picture of Chris Huhne's lover and the lesbian civil partner she has left broken hearted.*[131] The stories included claims that she faced the "formidable task of transforming herself into a cabinet minister's consort", and that with her "boyish cropped, spiky haircut and love of Dr Marten boots and jeans, could be forgiven for feeling rather out of place" and that she "does not fit the traditional feminine mould of 'political wife'". There was also a comment piece describing her as a "comedy lesbian from central casting" and "Millie Tant, straight from the pages of *Viz* magazine".[132]

In his judgment Tugendhat J noted that *Thomas v NGN*[133] went to the

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[125] Or as in *Hayes v Willoughby* [2013] UKSC 17.

[126] *Trimingham v Associated Newspapers* [2012] EWHC 1296 (QB).

[127] On 18 February 2013.

[128] On 4 October 2011: "In the course of the hearing Mr Justice Tugendhat said that he thought it would be extremely unsatisfactory for him to try the case without considering whether the pleaded facts also amounted to harassment. On the second day the Claimant applied to amend to include a harassment claim. The Judge allowed the amendment. . .and adjourned the trial." *http://inforrm.wordpress.com/2011/10/05/news-trimingham-privacy-trial-adjourned/*

[129] Rather than using the same details to aggravate the misuse of private information claim for damages.

[130] 21 June 2010.

[131] 22 June 2010.

[132] Richard Littlejohn *Daily Mail* 24 June 2010.

[133] *Thomas v NGN* [2001] EWCA Civ 1233

Court of Appeal only in respect of the refusal of the County Court judge to strike out Ms Thomas' claim, not on the concluded result of the action itself.[134] No-one, subsequently, had claimed successfully under the Act against an English newspaper.[135] Reflecting on what Lord Phillips had said in *Thomas*, Tugendhat J explored the dynamics of s.1 (3) (c) of the Act thus:

> ". . ..for the court to comply with HRA s.3, it must hold that a course of conduct in the form of journalistic speech is reasonable under PHA s.1 (3) (c) unless, in the particular circumstances of the case, the course of conduct is so unreasonable that it is necessary (in the sense of a pressing social need) and proportionate to prohibit or sanction the speech in pursuit of one of the aims listed in Art 10 (2), including, in particular, for the protection of the rights of others under Art 8. The word 'targeted' is not in the statute. I take Lord Phillips to be using it to give guidance as to what is meant in s.7 (3) by the words 'conduct in relation to . . . a person': those words are to be interpreted restrictively to comply with HRA s.3."[136]

In short, Lord Phillips' test required the publisher to consider whether a series of articles, which were likely to cause distress to an individual, would "constitute an abuse of the freedom of press which the pressing social needs of a democratic society require should be curbed". Applying Lord Steyn's *Re S* stage (iv) terms—the proportionality test or "ultimate balancing test"—the PHA s.1 (3) (c) required the court to apply that test to "the pursuit of the course of conduct".[137]

5–017 Tugendhat J then summarised the issues he had to decide in the case. The parties accepted that publishing 65 articles amounted to a course of conduct. If the conduct was not reasonable then the distress suffered by Ms Trimingham amounted to harassment.

> "So the principal issues in the present case are: (1) was the distress that Ms Trimingham suffered the result of the course of conduct, in the form of speech, that she complains of? (2) if so, ought the Defendant to have known that that course of conduct amounted to harassment? (3) if so, has the Defendant shown that the pursuit of that course of conduct was reasonable (in the sense defined in *Thomas*)? To both questions (1) and (2) there are subsidiary questions: was Ms Trimingham a purely private figure or not? and, either way, was she in other respects a person with a personality known to the Defendant such that it ought not [sic] to have known that the course of conduct amounted to harassment?"[138]

He considered whether excessive repetition—65 taunting articles referring to her bisexuality and appearance—might create a course of conduct amounting to harassment. Did these cross the line from what was reasonable to what was unreasonable within the meaning of the PHA s.1 (3) (c)?[139]

> "But repetitious publications of the words complained of in this case do not fit easily into that analysis. In one sense the Defendant may be said to have targeted Ms Trimingham, because it names her. But the Defendant has not targeted her in a way that any other defendant has

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[134] *Trimingham v Associated Newspapers* [2012] EWHC 1296 (QB) [50]. The result of *Thomas* was never publicised as the matter settled between the parties.

[135] And, in Northern Ireland, an action against a newspaper had failed: *King v Sunday Newspapers Ltd* [2010] NIQB 107; [2011] NICA 8. See also *Fulton v Sunday Newspapers Ltd* [2014] NIQB 35 (at 5.4.2 below).

[136] *Trimingham v Associated Newspapers* [2012] EWHC 1296 (QB) [53].

[137] *Trimingham v Associated Newspapers* [2012] [55].

[138] *Trimingham v Associated Newspapers* [2012] [111].

[139] *Trimingham v Associated Newspapers* [2012] [268].

> been alleged to harass a claimant, so far as I am aware (e.g. sending numerous messages, making numerous demands, and following, and threatening her). This is because each time the Defendant has named Ms Trimingham it has done so in a story in which the main character is Mr Huhne. And each publication has been prompted by a particular event in Mr Huhne's public career or life, or some other newsworthy event, such as a party conference."[140]

He decided that the main target of the articles was Mr Huhne. Ms Trimingham was named only because of the "very important secondary role" she played in the events relating to him and, factually, was named in less than half of those articles.[141] He made it clear that he was not deciding that a "secondary character" could never succeed but only that she could not, on the basis of repetition or taunting arising from repetition about her "being considered in isolation from the repetition and fresh reporting of stories about Mr Huhne".[142]

> "I find that the words complained of are 'in relation to her'. . ..I also find that because each occasion on which the words complained of have been repeated is an occasion related to a newsworthy event relating to Mr Huhne, the fact of the repetition, even 65 times, does not have the effect that speech which is otherwise 'reasonable' (within the meaning of the PHA s.1(3)(c)) crosses the line, so as to amount to harassment."[143]

So, when he balanced the factors required by *Re S* it was not "necessary or proportionate" to make any injunction in the terms sought or to make a finding of harassment under the Act.[144] In deciding that all of her claims failed, he accepted her assertion that repeated mocking of a person by a national newspaper by reference to their sexual orientation would almost inevitably be so oppressive as to amount to harassment. However, he found that the words "bisexual" and "lesbian" were factually accurate words[145] which were "not normally understood to be pejorative by a reasonable person". He did not accept that the references to "spiky hair" and "DM boots" were anything more than factual references to her "appearance".[146] That distress—as a result of the publication of references to her sexuality and her looks was no different to the distress caused by the general reporting of her affair with Mr Huhne MP.

In using the word "reasonable" Tugendhat J gave it the special meaning he believed he was required to give it in order to interpret s.1(3) (c) of the Act compatibly with Article 10 and not whether "what the Defendant has done is reasonable in any other meaning of the word reasonable". All any court could do was to find whether or not it was "necessary and proportionate to sanction or prohibit a particular publication on one of the grounds specified in Art 10(2)".[147]

The Court of Appeal[148]—before the appeal was withdrawn—was told that the case would:

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[140] *Trimingham v Associated Newspapers* [2012] [269].
[141] *Trimingham v Associated Newspapers* [2012] [270].
[142] *Trimingham v Associated Newspapers* [2012] [271].
[143] *Trimingham v Associated Newspapers* [2012] [272].
[144] *Trimingham v Associated Newspapers* [2012] [273].
[145] *Trimingham v Associated Newspapers* [2012] [257].
[146] *Trimingham v Associated Newspapers* [2012] [296–297].
[147] *Trimingham v Associated Newspapers* [2012] [340].
[148] In granting permission to appeal on 24 September 2012 Lord Justice Laws emphasised that there were "significant issues" as to the Judge's treatment of the harassment claim.

> "have significant ramifications as more and more people nowadays find themselves in the 'public eye'. In his report Lord Justice Leveson urges the new press regulator to 'equip itself to deal with complaints alleging discrimination'. He criticises the media's representation of women and minorities and refers to prejudicial and pejorative references including of sexual orientation.[149] This appeal will analyse this point in depth and be important both in terms of the implications for publishers and could well provide guidance on how a new Code could be drafted."

On any reading of Tugendhat J's judgment there is scope for arguing that he misapplied the test for determining whether references were pejorative. He focussed almost entirely on whether the words "bisexual" and "lesbian" were—of themselves —pejorative, without sufficiently considering the context in which they were used. That separation of comments about Ms Trimingham's sexuality and comments about her appearance seems to miss the fact that those negative references to her appearance—by continually casting her as masculine and unattractive, and having the look of a laughable lesbian cartoon character—created a pejorative stereotyping about her sexuality.

Also he may have erred in assessing whether the newspapers' references to her sexuality were irrelevant by applying the wrong test and allowing inappropriate deference to editorial style. References to a person's sexuality—as well as their race, ethnicity, and other personal characteristics—merit special protection and required careful scrutiny, beyond the broad, general approach that he adopted which largely deferred to editorial discretion.[150] On causation, he concluded that references to her sexuality caused her no distress or damage: that is a strange finding. He held she was not a private individual because of her PR work for leading politicians and because of her sexual relationship with Mr Huhne.

He seems to have glossed over the point that, in terms of the PHA claim, *any* public figure might be equally upset by comments about their sexuality—or indeed their race, or ethnicity—as a private figure might be. Any public figure facing a repetitive press campaign focussing on the fact that they had a big nose and had Jewish ethnicity would be likely to feel harassed over and above issues of discrimination. With the appeal withdrawn, however, none of these issues can be tested. The decision as it stands does, however, provide a detailed exploration of the intrusion permitted by s.1 (3) (c) of the Act in the context of celebrities' Article 8 rights as against newspapers' Article 10 rights.

5.4.2 *Fulton v Sunday Newspapers*

5–018 Section 1 (3) in the context of the troubles in Northern Ireland was examined in *Fulton v Sunday Newspapers Ltd.*[151] It is a harassment case that goes to the heart of both s.1 (3) (a) *and* (c). It highlights—in the special circumstances

[149] At 3.151–3.157 of the *Leveson Report.*

[150] Pejorative and irrelevant references to sexuality are expressly precluded by Clause 12 of the Editors Code. It was a ground of the appeal that the Judge erred by failing to take the Code into account rather than finding—as he did—that at most the Code provided some evidence of what a reasonable journalist ought to know.

[151] *Fulton v Sunday Newspapers Ltd* [2014] NIQB 35.

that still obtain in relation to that Province—both the "investigative" and "reasonableness" elements of journalism and the public interest. It arose from the attributed celebrity notoriety of Mr Colin Fulton and the newspaper's "relentless publication", since September 2012, of allegations that he was associated with the UVF either as a member or leader. The Police Service for Northern Ireland (PSNI) had warned Mr Fulton that he had been the target of five death threats from dissident Republicans.

He wanted an injunction restraining the newspaper from harassing him under the provisions of the Protection from Harassment (Northern Ireland) Order 1997[152] and from continuing with publications given the material risk to his life caused by them.[153] Gillen J, in refusing the injunction, made only one mention of proportionality (as will be seen). He focussed on Article 10 and the public interest in the exposure of serious crime and reporting on paramilitaries in the Province.[154] He concluded:

> "it is in the public interest that investigative journalism should not be impeded where it is publishing legitimate information concerning serious criminal activity. Quite apart from the UVF association. . ..the newspaper has published allegations of deeply troubling criminal activity on the part of this plaintiff associated with the UVF. The court has a duty to protect the doctrine of freedom of expression. This is an objective value to which the courts must remain committed."[155]

Gillen J believed that the value of freedom of speech lay in the "public interest that investigative journalism be free to reveal the full nature of criminal activity" that might be "unfolding in a community bedevilled by paramilitary activities". Serious allegations have been made about Mr Fulton including thefts from occupied houses, "punishment attacks on teenagers of a particularly pernicious nature", an attack on three girls, and "participation in illegal drinking clubs in which drugs are sold in addition to serious involvement in the UVF".[156]

> "Apart from the issue of freedom of expression and the right to investigate paramilitary and other criminal activities in the community, it seems to me it would be logistically extremely difficult to separate his alleged involvement in these crimes. . ..from his alleged participation in the UVF and his association with leading members. It would be neither proportionate nor practical for such a division to be made in the event." [157]

Gillen J, balancing everything, noted that Mr Fulton had not issued a libel writ because of "financial constraints".

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[152] Article 3 of the NI Order mirrors the *actus reus* and *mens rea* requirements in the English PHA and, identically, does not apply to a "course of conduct" if the person who pursued it shows: "(a) that it was pursued for the purpose of preventing or detecting crime or. . ..(c) that in the particular circumstances the pursuit of the course of conduct was reasonable."

[153] In respect of ECHR Article 2.

[154] It is possible to imagine similar scenarios arising on the UK mainland-—in the future—about the activities of high profile, attributed celebrity religious leaders and issues in relation to religious fundamentalism and jihad.

[155] *Fulton v Sunday Newspapers Ltd* [19].

[156] *Fulton v Sunday Newspapers Ltd* [19].

[157] *Fulton v Sunday Newspapers Ltd* [19].

5.5 ACCESS TO THE CIVIL PROTECTION OF THE ACT

5–019 The *Howlett, Brookes* and *Trimingham* cases point up a fundamental "gateway" issue in relation to the protection of private life rights: the problem of gaining access to the civil processes and procedure to assert rights generally and to seek civil PHA protection. Ms Trimingham's decision to withdraw her appeal is unlikely to have occurred because of a lack of funding. Mr Huhne is a wealthy man. It may owe more to the attributed celebrity couple wishing to present a lower media profile and to move on with Mr Huhne's post-imprisonment rehabilitation. Had the Court of Appeal found in her favour it is likely that the matter would have been taken to the Supreme Court and—thereafter—to Strasbourg, keeping the matter (and the descriptions used of Ms Trimingham) alive for the media and in the public eye for months if not years.

Mrs Brookes found solicitors prepared to act for her on a *pro bono* basis and Mrs Howlett was fortunate to find lawyers to act for her on the basis of a Conditional Fee Agreement (CFA). The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)[158] introduced radical changes to CFAs recommended by Lord Justice Jackson[159] in 2010. Following consultation, however, the Government announced in March 2013 that CFAs for privacy and defamation proceedings have been retained for the moment.[160]

As was seen in Chapter 3 *Campbell v MGN*[161] carried a CFA "sting" to it for the *Daily Mirror* (the losing party). The "sting" was corrected in MGN's favour on an Article 10 appeal to Strasbourg.[162] However, that case emphasised that it is not just the modestly-resourced who seek protection for their legal costs. Moreover, the high evidential, public interest and burden of proof hurdles that need to be cleared to get the CPS to prosecute—particularly in the light of the DPP's 20 July 2013 guidelines in respect of social media prosecutions—explain why the civil remedies within the PHA will remain attractive to harassed celebrities of all categories as well as those individuals on the periphery—like personal assistants, colleagues and partners—whose phones have been hacked.

5.6 SUMMARY

5–020 The Act provides a broad and flexible method for action and enforcement—particularly because "harassment" is not defined and therefore its reach is greater—in both the criminal and the civil courts. It can prohibit surreptitious,

158 LASPO s.44–s.46.

159 Review of Civil Litigation Costs 2010.

160 Via the Conditional Fee Agreements Order 2013 in force from 1 April 2013.

161 *Campbell v MGN* [2004] UKHL 22.

162 *MGN v United Kingdom* (Case No.39401/04) [2011] ECHR 66: the judgment found that the imposition of success fees of 100% in media cases was a breach of Article 10. The decision does not suggest that all success fees are inconsistent with Convention rights. A balance had to be struck between access to justice and other relevant rights: where that was struck was always "fact sensitive".

unwanted photography,[163] surveillance, telephoning and obtaining access to another person's home or property.[164] There are other pieces of common law and statutory legislation which can be used separately but none which are quite as broad in the spectrum of activities which can be captured by this Act. Other criminal legislation is made more effective by the existence of the possibility of Restraining Orders which owe their existence and breadth to this Act.

The PHA provides a route for younger members of the royal family to complain to the CPS and to seek a criminal prosecution with a view to obtaining a Restraining Order whether or not it achieves a conviction. That Restraining Order, depending on the span of defendants in the charge, could apply to anyone who "aided, abetted, counselled or procured" the harassment that was the subject of the complaint. Such action would properly become a cause célèbre.

If there is a problem then it is in terms of getting the police and prosecutors to address the criminal conduct or, on the civil side, gaining access to the remedies.[165] That issue is likely to grow in the future. The availability of all the new methods of communication and forums has increased the range of ways in which individuals can be harassed and the volume of requests being made to prosecutors, lawyers generally and the courts for appropriate remedies. Harassment and repeated unlawful surveillance raise issues in terms of misuse of personal data which are explored in detail in the next substantive chapter.

[163] *Crawford v CPS* [2008] EWHC 148 (Admin): harassing includes surveillance and surreptitious photography when carried out by man on his former wife and her new partner.

[164] Even in situations which do *not* have elements of trespass.

[165] See also: Simon Sellers *Online privacy: do we have it and do we want it? A review of the risks and UK case law* E.I.P.R. 2011, 33 (1), 9–17.

CHAPTER 6

DATA PROTECTION ACT 1998 AS A PRIVACY REMEDY[1]

6.1 Introduction

6–001 The Data Protection Act 1998 (DPA) is the only piece of English legislation which is specifically directed at protecting personal information and an individual's privacy in respect of it.[2] Celebrities were "early adopters", testing its effectiveness with cases like *Campbell*, *Douglas* and *Murray*. In each of those early cases, while the data protection claim was pleaded in the action, it was relegated to being little more than a footnote in the final result. In both *Campbell* and *Douglas* the DPA damages were assessed at £50. Supermodels are not the only celebrity litigants to need the prospect of more than that to get out of bed to litigate. The 10 years since *Campbell* has—as a result—seen a struggle to kindle the fire of the DPA's potency and effectiveness.

The background history leading to the passing of the DPA was uninspiring.[3] Further, breach of confidence and misuse of private information were the litigation issues which received the lion's share of the judicial and academic attention in *Campbell* and *Douglas*, leaving the data protection breaches in them relegated to a "technical" area of the process which did nothing to bring

[1] Elements of this chapter were presented both at Charles University in Prague on 18 June 2015 at an event organised specially by the University's Law Department and Všehrd (the Association of Czech Lawyers) and at Newcastle University Law School's *The Campbell Legacy: A Decade of "Misuse of Private Information"* on 17 April 2015. I am also grateful to Professor George Brock, Professor of Journalism at City University, London, for convening an expert group under the aegis of the Reuters Institute for the study of Journalism to consider the media issues in relation to *Google Spain* on 24 April 2015 and to Dr Judith Townend, Director of the Centre for Law & Information Policy at the Institute of Advanced Legal Studies (IALS) at the University of London, for convening a similar event on 25 June 2015.

[2] The Act came into force on 1 March 2000—replacing the moribund Data Protection Act 1984, the Access to Personal Files Act 1987 and the Access to Health Records Act 1990—thus pre-dating by six months the statutory recognition in the HRA 1998 of Article 8 privacy and Article 10 freedom of speech rights which became effective on 2 October 2000. Comments from politicians and the media about "judge-made" privacy law being created out of the HRA ignored what Parliament itself had created in the DPA. Its genesis was in the European Data Protection Directive 95/46/EC. The 1984 DPA contained some elements of the now-familiar Data Protection principles but it did not recognise an individual's right to privacy.

[3] Ian J. Lloyd, *Information Technology Law* 6th edn (OUP 2011) 29–33, contains a revealing summary of the history of data protection in the UK, its inbuilt administrative deficiencies which have hobbled its regulatory potential and the political lack of will surrounding the area generally since Kenneth Baker MP's 1969 Data Surveillance Bill and Brian Walden MP's 1969 Privacy Bill both failed to gain traction.

to data protection the celebrity status it has recently achieved as a result of the *Vidal-Hall*,[4] *Hegglin*,[5] *Mosley*[6] and *Google Spain* decisions.[7] That begs the question about how and why the Act had remained so moribund for so long as an active privacy remedy. The answer may be, partly, because the DPA created a Regulator—the Commissioner—who has both Regulatory and Enforcement powers through a variety of civil and criminal procedures at his disposal. But it also created a statutory tort available for individuals who suffer from breaches of the principles in the Act.[8]

The DPA is not an elegant or easily accessible piece of Parliamentary drafting.[9] One Lord Chancellor called it "incomprehensible".[10] It has been considered almost as an ugly relation in the law of privacy and its occasional appearances in law reports "tell of maverick claims and paltry damages".[11] One lawyer with experience of the Act having worked at the Commissioner's Office characterised it thus:

> "An individual who wishes to use the Act to take action against the press will need deep pockets, a robust constitution and preferably a favourable life expectancy."[12]

Whatever the practical limitations or failures that exist within the drafting, enforcement and operation of the Act, developments both now and in the future are likely to encourage the operation of a regime of personally-enforceable data protection rights rather than what has appeared—through much of the life of the Act so far—to be a well-intentioned but inert set of data protection principles. An inherent problem within the current enforcement and regulatory regime is that it has only been able to be as active as the Commissioner in post at any particular time has been able or has chosen to be. Private individuals can act on their own, as will be seen, but the Act creates a statutory right for data subjects to seek help and assistance from the Commissioner in enforcement and litigation.[13] It is, perhaps, a silent reproach to the public information from the Commissioner about the Act and its provisions that only one person has ever attempted to use this right since it came into force.

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[4] *Google Inc v Vidal-Hall & Ors* [2015] EWCA Civ 311.

[5] *Hegglin v Persons Unknown and Google* [2014] EWHC 2808 (QB).

[6] *Mosley v Google Inc & Anor* [2015] EWHC 59 (QB).

[7] Case C-131/12 *Google Spain and Google Inc v AEPD and González*.

[8] It has a statutory relative, the Freedom of Information Act 2000 (FOIA), whose title disguises the fact that s.40 FOIA protects personal data via the absolute exemption "gateway" which opens directly into the provisions of the DPA.

[9] Historically there has been criticism about whether the UK's implementation of the Act properly reflected the European Data Protection Directive 95/46/EC with threats of infraction proceedings: *http://amberhawk.typepad.com/amberhawk/2013/02/question-answered-why-does-the-european-commission-think-the-uks-data-protection-act-is-a-deficient-implementation-of.html* and also *Ministry of Justice v Information Commissioner & Dr Chris Pounder* [EA/2012/0110]. See most recently *Vidal-Hall v Google Inc* [2014] EWHC 13 (QB) [92–95].

[10] Lord Falconer, as Lord Chancellor and Minister of Justice, 18 October 2004 in an interview to Patrick Wintour of the *Guardian*: *http://www.guardian.co.uk/uk/2004/oct/18/freedomofinformation.schools*

[11] Philip Coppel QC: address to Statute Law Society 19 March 2012: *http://www.statutelawsociety.org/__data/assets/pdf_file/0019/103870/19.03.12_P.Coppel_paper.pdf*

[12] Rosemary Jay *Data Protection Law and Practice* 4th edn Sweet & Maxwell 2012, 556.

[13] Section 53 of the Act.

6–002 Actually gauging the extent and operation of the Act and Directive 95/46/EC is not straightforward as a number of UK decisions[14] and one CJEU case,[15] have demonstrated. However the jurisdictional effect of *Vidal-Hall*[16] and similar recent cases coupled with the CJEU decision in *Google Spain* have brought new vigour to it.

In terms of proportionality and the practical operation of the regulatory aspects of the Act by the Commissioner, the Leveson Report fired a ranging shot over the media's bows with the comment that:

> ". . ..the exercise of. . ..these powers has to be kept under review, considered within the overall framework and purposes of the data protection regime as a whole, and both reasonable and proportionate in all the circumstances . . ..[R]elevant considerations in that context would include. . .. the extent of objective evidence of poor practice along with the nature and seriousness of that poor practice and levels of public concern. Evidence of widespread ignorance of the requirements of law and good practice (whether on the part of industry or individual) would be particularly relevant, especially if that ignorance were related to the genuine complexity of those requirements. As an expert regulator, the ICO would then be in a unique position to address the problem with explanation, education and support."[17]

The broader context of what Leveson highlighted—as will be seen later—is that the Commissioner may need greater resources. Also, that the current position of s.32 of the Act disproportionately favours the press in the way it finally became legislation. How and when any recalibration takes place remains to be seen.

The next sections examine how the Act has functioned to protect privacy rights and how the permitted interferences have or have not outgrown the Act in the case law that has been created.

6.2 THE PROTECTED RIGHTS IN THE ACT

6.2.1 The Core Rights

6–003 The core rights in relation to personal data protected within the Act are set out in the Schedule containing the Data Protection Principles.[18] "Personal data"[19] means data (including *sensitive* personal data) relating to a living individual[20]

[14] *Durant v FSA* [2003] EWCA Civ 1746, *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47, *Edem v IC and FCA* [2014] EWCA Civ 92 and, most recently, *Google Inc v Vidal-Hall & Ors* [2015] EWCA Civ 311 affirming *Vidal-Hall v Google Inc* [2014] EWHC 13 (QB).

[15] *Bodil Lindqvist* C-101/01 (6 November 2003): referring to individuals on an internet page and identifying them either by name or by other means constitutes processing of personal data by automatic means within the meaning of EU law.

[16] *Google Inc v Vidal-Hall & Ors* [2015] EWCA Civ 311 [17–49] and [51].

[17] Leveson Vol. III Part H [2.66], 1087.

[18] The key Data Protection Principle in Schedule 1 is the 1st Principle: "Personal Data shall be processed fairly and lawfully and, in particular, shall not be processed unless: (a) at least one of the conditions in Schedule 2 is met, and (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

[19] Data Protection Act 1998 s.1 (1).

[20] Issues about a "living" individual in s.1. (1) of the Act – the "data subject" – are far from straightforward. The Act contains a further addition extending it "to any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect

who can be identified from those data on its own or from those data when combined with other information in the possession of—or likely to come into the possession of—the data controller. "Data" itself covers information which may be held in five different ways[21] and "data controller"[22] means someone who either alone, jointly or in common with other persons, determines the purpose for which and the manner in which any personal data are—or are to be—processed. While data is defined in this way as "information" it follows that "personal data" includes expressions of opinion recorded about an individual and any indication about the intentions of the data controller or any other person in respect of that individual. This gives an individual what has been described elsewhere as "informational self-determinism".[23] The regime established by the Act creates rights[24] belonging to individuals in respect of information being held about them. This gives the individual data subjects rights of access to control over and compensation for misuse of information held and used by others about them. These key rights are access to what is held on them (s.7),[25] a requirement—on notice—not to process personal data where it could cause damage to the data subject (s.10), the right to compensation for damage or distress[26] (s.13)[27] and for rectification, blocking, erasure and destruction (s.14).

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of the individual". Ian J. Lloyd, *Information Technology Law* 40, notes: "This represents. . ..an unfortunate legacy from the original Act of 1984 which included a widely criticised distinction between statements of opinion – which were classed as personal data and statements of the data controller's intentions toward the data subject – which were not. The argument put forward by the government . . .. was that statements of intention are personal to the data controller rather than to the subject. This is certainly arguable, but the point applies with equal if not greater validity with regard to statements of opinion. Even the then Data Protection Registrar was moved to comment to the effect that he found the distinction unclear and the provision in the Data Protection Act 1998 should perhaps be seen as a measure to remove what had generally been considered an unsatisfactory distinction, rather than a deliberate effort to depart from the requirements of the Directive."

[21] Ibid s.1 (1) (a) – (e): (1) information which is being processed by means of "equipment operating automatically in response to instructions given for that purpose"; (2) information which is recorded with the intention that it should be processed by such equipment; (3) information which is recorded as part of the relevant filing system or with the intention that it should form part of such a system; (4) information which forms part of an accessible record (such as an individual's health or educational public record) and (5) information which is recorded information held by a public authority and which does not fall within any of the four preceding categories.

[22] Ibid s.1 (1).

[23] German Federal Constitutional Court's (*Bundesverfassungsgericht*) 1984 decision declaring the proposed statistical census an unjust invasion of privacy: *Bundesverfassungsgericht* Decisions Vol. 65, 1.

[24] Which, in the context of recent decisions such as *Re Mobile Phone Voicemail Interception Litigation* [2012] EWHC 397 (Ch), resemble the rights within the intellectual property regime.

[25] *Austen v University of Wolverhampton* [2005] EWHC 1635 (QB).

[26] In *Sean Robert Grinyer v Plymouth Hospital NHS Trust* (unreported 28 October 2011) HHJ Cotter QC, sitting at Plymouth County Court, assessed £12,500 damages (and £4,800 for loss of earnings) for personal injury under s.13 of the Data Protection Act 1998 on a conventional common law basis upholding a claim for aggravated damages but not exemplary damages. The Claimant's then partner had unlawfully accessed his medical records in the course of her employment as a nurse and thereby committed a breach of the Act. This exacerbated a pre-existing paranoid personality disorder and prevented him also from accepting an offer of employment: *http://www.unitystreetchambers.com/barrister/johnisherwood.php*

[27] Section 13 (1) and see *Halliday v Creation Consumer Finance* [2013] EWCA Civ 333 for how complex establishing this can become.

An individual who suffers *distress* because of any contravention by the data controller of any of the requirements of the Act is entitled to compensation from the data controller for that distress if (a) individual also suffers damage because of the contravention or (b) the contravention relates to the processing of personal data for the "special purposes".[28] The data controller has a defence if he can show that he took such care as, in all the circumstances, was reasonably required to comply with the requirement concerned.[29] Section 14 applies where the data subject satisfies the court that personal data of which he is the subject are inaccurate. The data controller can be ordered to rectify, block, erase, or destroy those data and any other personal data in respect of which he is the data controller and which contain an expression of opinion which appears to the court to be based on inaccurate data.[30]

So, in an English *Google Spain* scenario, repetitive linking by a UK-based search engine of a data subject who was not a celebrity of any category or any kind of public figure to a report of a long-satisfied County Court judgment or to criminal proceedings that actually led to an acquittal could be breaches under the Act. This is not a right to be forgotten, as the *Google Spain* judgment has been characterised. It is a right to have information that was correct at the time—but which has been satisfied or superseded through the passage of the years—treated correctly and proportionately according to the law.[31]

6.2.2 A Worked Example: *Steinmetz v Global Witness*

6–004 A worked example of some of the elements described above was a High Court claim by Mr Benny Steinmetz, an international entrepreneur and billionaire. It also reflected the extent of the tensions between the protected rights and the permitted intrusions in respect of them. *Steinmetz and others v Global Witness Limited*[32] involved a claim under the Act brought by Mr Steinmetz[33] the Chairman of a mining conglomerate.[34] The claim was against the Nobel-prize winning NGO, Global Witness (GW).[35] Subject access requests were made under s.7 of the Act in respect of personal data held by GW about four claimants. Complaints were then made to the Commissioner about GW's non-compliance with the requests.[36] The claim used the Act to mirror

[28] In the Act, by virtue of s.3 and discussed later, "special purposes" means any one or more of the following: the purposes of journalism, artistic purposes and literary purposes.
[29] Section 13 (3).
[30] Section 14 (1).
[31] Case C-131/12 *Google Spain and Google Inc v AEPD and González* [81].
[32] The details of the High Court claim are available on *http://www.bsgresources.com/bsgr-guinea/bsgr-guinea-analysis-reports/claim-filed-against-global-witness/*
[33] Worth £1.7 billion in 2010: *http://israel21c.org/culture/israels-10-richest-men-and-women/*
[34] BSGR's interests include 50% of the Simandou iron ore reserve in Guinea.
[35] Global Witness—with offices in the UK and US—investigates and reports internationally on natural-resource related conflict and corruption. Since November 2012, it had alleged that BSGR's share in the Simandou reserve, one of the largest and most valuable in the world, was obtained by corruption. Those allegations are being investigated by the Government of Guinea and by a US Federal Grand Jury.
[36] In the proceedings the claimants sought disclosure order under s.7(9) in relation to personal data, an order under s.10 that GW ceased to process any of the Claimants' personal data on the

a libel claim[37] by inviting the High Court to make findings on the truth of the corruption allegations reported by GW.[38]

For its part, GW maintained that the claim has been brought for collateral and illegitimate purposes[39]—that it was an abuse of process—and was an unwarranted attack on its Article 10 freedom of expression right.[40] It relied on the s.32 media exemption in relation to processing for the purposes of journalism, emphasising that the High Court had a s.3 HRA 1998 duty to interpret s. 32 DPA in a manner which is compatible with Article 10.[41]

This claim—and the defence to it—confronted the issue of where the balance should be struck[42] under the Act between the privacy rights of a billionaire entrepreneur, with the resources to litigate the matter fully, and the Article 10 rights of GW as an NGO to inform and bring matters to the attention of the public.[43] If GW was held to be a news organisation—as some of the recent ECtHR decisions suggest it might so be characterised—then by analogy the s.32 exemption would apply to protect it.[44] On 4 September 2014 the Commissioner issued the promised post-Leveson *Data Protection and Journalism: a guide for the media*.[45] The outcome of the *Steinmetz* litigation, if it continues, is likely to have a significant influence on this important area and, when the s.32 issue was referred to the Commissioner, he decided that GW was entitled to rely on this "journalism" exemption of the Act.[46] He

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basis that it was obtained without authorisation as well as seeking identification of GW's sources, a s.14 Order against GW requiring it to rectify, block, erase or destroy inaccurate data and s.13 damages for distress.

[37] See, in particular, *The Economist*'s characterisation of the case in the sub-heading *Libel laws have become laxer. Try invoking data protection instead http://www.economist.com/news/britain/21599791-libel-laws-have-become-laxer-try-invoking-data-protection-instead-data-lock*

[38] For a detailed exposition of the Act's potential as a reputational shield see Dr. David Erdos *Filling Defamation's "Gaps": Data Protection and the Right to Reputation* Oxford Legal Studies Research Paper 69/2013.

[39] GW seeks to stay the proceedings by using s.32 (4) of the Act, requiring the Commissioner to decide on the application of s.32 to the disputed data.

[40] *http://www.globalwitness.org/library/global-witness-fights-misuse-data-laws-threatens-journalistic-freedom*

[41] A live issue that remains undamaged by the Supreme Court FOIA decision in *Kennedy v Charity Commission* [2014] UKSC 20.

[42] The "proportionality" issues in relation to Article 10 Freedom of Speech and ECtHR jurisprudence were recently robustly examined (and rejected) by Laws LJ in *Miranda v SSHD* [2014] EWHC 255 (Admin). "In a press freedom case, the fourth requirement in the catalogue of proportionality involves as I have said the striking of a balance between two aspects of the public interest: press freedom itself on one hand, and on the other whatever is sought to justify the interference: here national security. On the facts of this case, the balance is plainly in favour of the latter." [73]. Also, generally [39–47], [72–75].

[43] ECtHR 27 May 2004, Case No. 57829/00, *Vides Aizsardzības Klubs v. Latvia* and ECtHR 12 June 2012, Case. Nos. 26005/08 and 26160/08, *Tatár and Fáber v. Hungary*.

[44] ECtHR 14 April 2009, Case No. 37374/05, *Társaság A Szabadságjogokért v. Hungary* and ECtHR 25 June 2013, Case No. 48135/06, *Youth Initiative for Human Rights v. Serbia*.

[45] The guide states that it "simply clarifies our view of the existing law as set out in the DPA," to help the media fully to understand their obligations and to promote good practice. The guide was not mandatory: *https://ico.org.uk/media/for-organisations/documents/1552/data-protection-and-journalism-media-guidance.pdf*

[46] *http://www.globalwitness.org/sites/default/files/141215%20letter%20from%20ICO%20to%20GW%20%282%29%20%281%29.pdf*

declined to make a determination under s.45 DPA and the four key factors he considered in coming to that conclusion were:

(1) whether the personal data was being processed only for journalism, art or literature (s.32(1))
(2) whether that processing was taking place with a view to publication of some material (s.32(1)(a))
(3) whether the data controller had a reasonable belief that publication was in the public interest (s.32(1)(b)) and
(4) whether the data controller had a reasonable belief that compliance was incompatible with journalism. (s.32(1)(c)).

This—subject to any appeal—is a decision that has major implications for journalists inside and outside the mainstream media. Online campaigning journalists and bloggers in certain circumstances now have a greater chance of being able to argue that the s.32 exemption applies to them.

Henderson J's Chancery Division judgment in March 2014 on the preliminary issue of whether the two applications should be heard together by the same Judge or whether GW's claim for a stay on s.32 grounds should be heard first is instructive.[47] The Judge decided on the latter course because Parliament had "pretty clearly taken the line" that s.32 issues should first be determined by the Commissioner.[48] He also conceded that data protection law was "slightly arcane and complicated".[49]

6.2.3 Section 13 Damages: uncertainty gives way to clarity?

6–005 On the issue of damages and operation of s.13—and the results of claims under the Act—the situation had, until recently, been clouded with doubt. This uncertainty hobbled the utility of the Act in early celebrity litigation. Gray J in *Lord Ashcroft v AG and Department for International Development*[50] interpreted the Act as containing a free-standing duty on data controllers to comply with the principles, breaches of which would engage s.13. But, on the facts of the case before him[51]—which related to events spanning the two Data Protection Acts—he found that the 1984 Act conferred a private law right to damages only by its s.23 in respect of the alleged disclosure of documents. Any other breaches of the 1984 Act—or its principles—were a matter for the Commissioner rather than a claim for damages through the courts.

In *Douglas*[52] Lindsay J held that, although the Claimants had established

[47] *Steinmetz & others v Global Witness* [2014] EWHC 1186 (Ch).
[48] *Steinmetz & others v Global Witness* [2014] [21].
[49] *Steinmetz & others v Global Witness* [2014] [29].
[50] *Lord Ashcroft v AG and Department for International Development* [2002] EWHC 1122 (QB).
[51] In 1999 and 2000 articles had been published revealing confidential and sensitive personal information about the Claimant in documents leaked from the Foreign Office and the second Defendant. This case related to an application to re-amend his particulars of claim in his action for damages for breach of confidence and privacy in order to add breaches of the 1984 and 1998 Data Protection Acts.
[52] *Douglas* [2003] EWHC 786 Ch.

claims to compensation under s.13 of the Act, that did not give a separate route to recovery for the damage or distress beyond a nominal award of £50. That was on the basis that he could not see how the damage and distress were caused "by reason of any contravention. . ..of [the] Act".[53] The same conclusion was reached by Patton J at first instance in *Murray v Express Newspapers and Big Pictures*.[54] He decided that damage meant ordinary pecuniary loss and rejected the contention that damages could be awarded under the Act by reference to the market value of the data that had been misused. By the time the case went to the Court of Appeal, where its result was overturned and a new trial ordered,[55] *Express Newspapers* had settled the action by the payment of £500.[56] The picture agency subsequently settled rather than appealing the matter to the House of Lords and—again—an opportunity to explore issues of quantum that might assist with setting an informed tariff for damages was lost.

6.2.4 Floodgates closed? *Quinton v Pierce*

6–006 Eady J may have anticipated—and tried to close—the floodgates the *Steinmetz* litigation seeks to open. In *Quinton v Peirce & another*[57] he held that it was neither necessary nor proportionate to interpret the scope of the Act so as to provide a parallel set of remedies for the publication of information which was neither defamatory nor malicious.[58] He held that the remedy could only be granted where the facts said to be inaccurate only had one possible interpretation.

Although in principle s.13 damages under the Act would appear to be straightforward—without some of the quirks of the rules in slander, libel and malicious falsehood in respect of aspects of general and special damages—the lack of any change in the case law on this point to demonstrate the effectiveness and simplicity in this area seemed to be intractable.[59] Although compensation for actual losses was recoverable and compensation for distress was

[53] In both *Douglas* and *Campbell* the nominal award was £50.

[54] *Murray v Express Newspapers and Big Pictures* [2007] EWHC 1908 (Ch).

[55] *Murray v Big Pictures* [2008] EWCA 446.

[56] On the data protection point, C sought compensation for an amount equivalent to the cost of him consenting to the taking of his picture, an image/personality rights analogy that now has force in the light of the October 2011 CJEU decision in *Martinez v MGN* (C-509/09 and C-161/10). The Court of Appeal said, in relation to the claim under the Act: "If the trial judge were to hold that article 8 is engaged and that the article 8/10 balance should be struck in David's favour, it would follow that Big Pictures' admitted processing of David's personal data was unlawful. It would also follow that the processing was unfair and that none of the conditions of Schedule 2 to the DPA was met." And also: "The DPA claim raised a number of issues of some importance, including the meaning of damage in section 13(1) of the DPA. It seems to us to be at least arguable that the judge has construed "damage" too narrowly, having regard to the fact that the purpose of the Act was to enact the provisions of the relevant Directive".

[57] *Quinton v Peirce & another* [2009] EWHC 912: this was a dispute between two former MPs from rival parties—also district councillors in Oxfordshire—and material in an election leaflet said to contain untrue factual statements.

[58] *Quinton v Peirce & another* [2009] [87].

[59] See *Halliday v Creative Consumer Focus* [2013] EWCA 333 where £1 nominal damages and £750 for distress was awarded *only* because the Defendant had conceded the "damage" point.

specifically recoverable in relation to complaints about the special purposes it was not possible to point to any cases which dealt with the spectrum of sums available. The Act had been overshadowed by the damage that could be recovered for a breach of confidence or breach of private life rights. Importantly, until very recently, it was difficult to see how damages recoverable by virtue of it might correspond to the levels of damage available in other privacy actions.

6.2.5 Floodgates opened? *Desmond v Foreman*

6–007 However in *Desmond v Foreman*[60]—a case that also had within it a defamation claim—Tugendhat J dismissed the application for summary judgment by the Defendants, finding that the Claimant's case under Article 8 and the DPA had a real prospect of success in relation to some of the communications complained of. It had been open to the Claimant to complain to the Commissioner. Tugenhat J, however, thought that:

> "proceedings under the DPA may provide the most appropriate form of investigation. . .. It is for consideration whether claims under the HRA or in defamation would add any benefit to the Claimant over and above a claim under the DPA. And as noted above, a claim under the DPA appears to raise no issues of limitation."[61]

He directed the DPA claim to proceed first and separately from the other two claims.[62] Following that decision the case disappeared below the litigation horizon: this sometimes indicates that the matter has settled. If not, then this case may provide a valuable insight into issues of the relevant quantum when in particular—it is set ahead of consideration of Article 8 and defamation issues within it.

6.2.6 Floodgates removed? *Vidal-Hall v Google Inc*

6–008 Tugendhat J returned to this theme—unlocking the potential of the protected rights within the Act—recently and most notably in *Vidal-Hall v Google Inc*.[63] The Claimants had used *Apple* devices to access the internet and various Google services. They added DPA breach and damages claims late in the proceedings, against Google Inc, which also involved issues of service out of the jurisdiction, breach of confidence and misuse of private information. In relation to the DPA claims, Tugendhat J noted there were two objections:

> "first that it is too late, and second that the damage recoverable under the DPA does not include damages for distress unless there is also financial damage."[64]

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[60] *Desmond v Foreman* [2012] EWHC 1900 (QB): The Claimant had been a cover teacher who was suspended and ultimately dismissed following allegations that he had conducted himself in an inappropriate sexual manner towards a sixth-form student. The communications implied that he was actually guilty of and had actually committed various serious offences (including rape, of which he had been accused in 2001 but exonerated through court proceedings). He claimed breaches of DPA Principles 1, 2, 3, 4 and 6.

[61] *Desmond v Foreman* [2012] [81].

[62] *Desmond v Foreman* [2012] [82].

[63] *Vidal-Hall v Google Inc* [2014] EWHC 13 (QB).

[64] *Vidal-Hall v Google Inc* [2014] [79].

He disposed of the first pragmatically, relying on 2011 Supreme Court authority affirming that the Civil Procedure Rules had created the "overriding objective" enabling courts to deal with cases justly, to save expense and ensure that cases were dealt with expeditiously.[65] On the second he considered[66] the effect of *Johnson v MDU* and *Murray* v *Big Pictures*[67] together with the Opinion of the Article 29 Working Party 1/2008.[68] He declined to follow *Johnson* on the basis that no Article 8 right had been engaged in that case and that it was not an authority for the proposition that s.13 DPA claims were bound to fail "absent any claim for pecuniary damage".[69] He concluded:

> "Since the meaning of damage under DPA s.13 is a question of law, the general rule might suggest that I should decide it, since damage. . .is a jurisdictional requirement. . .. However, unlike some jurisdictional issues of law. . .. the meaning of damage under s.13 is a question which might arise for decision at trial, if the permission to serve out is not set aside.[70]
>
> This is a controversial question of law in a developing area, and it is desirable that the facts should be found. . .. I shall therefore not decide it. However, in case it is of any assistance in the future, my preliminary view of the question is that [the Claimants'] submissions are to be preferred, and so that damage in s.13 does include non-pecuniary damage."[71]

Tugendhat J adopted the Claimants' leading counsel's submission that "moral damage" was a recognised EU concept indicating the right to compensation for breach of individual rights "where the rights are non-pecuniary or non-property based".[72] This was because, on 24 June 2010, a European Commission press release announced that it had issued a Reasoned Opinion to the UK (the second stage under EU infringement proceedings) requesting it to strengthen data protection powers.[73]

6.2.7 Floodgates destroyed? *Google Inc v Vidal-Hall*

6–009 The Court of Appeal, in effect, followed and strengthened Tugendhat J's decision. Its view on the issue of "moral damage"—now a significant continental addition to English jurisprudence—was straightforward:

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[65] *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31 [74–75].
[66] *Vidal-Hall v Google Inc* [90–104].
[67] *Johnson v MDU* [2007] EWCA Civ 262 and *Murray v Big Pictures* [2007] EWHC 1980 (Ch) and [2008] EWCA Civ 446.
[68] WP148, 7: "The extensive collection and storage of search histories of individuals in a directly or indirectly identifiable form invokes the protection under Article 8 of the European Charter of Fundamental Rights. An individual's search history contains a footprint of that person's interests, relations, and intentions. These data can be subsequently used both for commercial purposes and as a result of requests and fishing operations and/or data mining by law enforcement authorities or national security services."
[69] *Vidal-Hall v Google Inc* [91].
[70] *Vidal-Hall v Google Inc* [100].
[71] *Vidal-Hall v Google Inc* [101–103].
[72] *Vidal-Hall v Google Inc* [95].
[73] *Vidal-Hall v Google Inc* [94]: "The right to compensation for moral damage when personal information is used inappropriately is also restricted. These powers and rights are protected under the EU Data Protection Directive and must also apply in the UK. As expressed in today's reasoned opinion, the Commission wants the UK to remedy these and other shortcomings."

"[77]. Since what the Directive [95/46/EC] purports to protect is privacy rather than economic rights, it would be strange if the Directive could not compensate those individuals whose data privacy had been invaded by a data controller so as to cause them emotional distress (but not pecuniary damage). It is the distressing invasion of privacy which must be taken to be the primary form of damage (commonly referred to in the European context as "moral damage") and the data subject should have an effective remedy in respect of that damage. Furthermore, it is irrational to treat EU data protection law as permitting a more restrictive approach to the recovery of damages than is available under article 8 of the Convention. It is irrational because, as we have seen at paras 56 and 57 above, the object of the Directive is to ensure that data-processing systems protect and respect the fundamental rights and freedoms of individuals "notably the right to privacy, which is recognized both in article 8 of the [Convention] and in the general principles of Community law". The enforcement of privacy rights under article 8 of the Convention has always permitted recovery of non-pecuniary loss.

[78]. Additionally, article 8 of the Charter of Fundamental Rights of the European Union ("the Charter") makes specific provision for the protection of the fundamental right to the protection of personal data: "everyone has the right to the protection of personal data concerning him or her". It would be strange if that fundamental right could be breached with relative impunity by a data controller, save in those rare cases where the data subject had suffered pecuniary loss as a result of the breach. It is most unlikely that the Member States intended such a result.

[79]. In short, article 23 of the Directive does not distinguish between pecuniary and non-pecuniary damage. There is no linguistic reason to interpret the word "damage" in article 23 as being restricted to pecuniary damage. More importantly, for the reasons we have given such a restrictive interpretation would substantially undermine the objective of the Directive which is to protect the right to privacy of individuals with respect to the processing of their personal data.

The judgment is at least as important because of the consistency of the courts' decisions about the jurisdiction of English courts to hear the case. All the claimants resided in England. This was also one of the jurisdictions where Google provided search engine facilities. Committing a tort in England which caused damage here allowed service of the claim on Google outside the jurisdiction.[74]

"Damage is alleged to have arisen from what the Claimants, and potentially third parties, have, or might have, seen on the screens of each Claimant. That is. . ..publication. . ..So publication to the Claimants plainly was effected in this jurisdiction."[75]

Importantly, the Court of Appeal took the most unusual—but not unprecedented—course of using its editing pencil to disapply s.13(2) in trenchant language.[76] **6–010**

"[93]. In view of the importance to the DPA scheme as a whole of the provisions for compensation in the event of any contravention by a data controller, the limits set by Parliament to the right to compensation are a fundamental feature of the legislation. If we knew why Parliament had decided to restrict the right to compensation for distress in the way that it did, it would be impossible for the court, under the guise of interpretation, to subvert Parliament's clear intention. The court would, in effect, be legislating against the clearly expressed intention of Parliament on an issue that was central to the scheme as whole. We do not consider that it can make any difference that we do not know why Parliament decided to restrict the right to compensation in this way. It is sufficient that, for whatever reason, Parliament decided not to permit compensation for distress in all cases. Instead, it produced a carefully calibrated scheme which permits compensation for distress but only in certain tightly defined circumstances.

[94]. We cannot, therefore, interpret section 13(2) compatibly with article 23.

. . ..

[74] *Vidal-Hall v Google Inc* [72–75].

[75] Publication to the Claimants plainly was effected in this jurisdiction [77].

[76] *Google Inc v Vidal-Hall & Ors* [2015] EWCA Civ 311

> [105]. . . ..What is required in order to make section 13(2) compatible with EU law is the disapplication of section 13(2), no more and no less. The consequence of this would be that compensation would be recoverable under section 13(1) for *any* damage suffered as a result of a contravention by a data controller of any of the requirements of the DPA. No legislative choices have to be made by the court."

The power to disapply statutory provisions which conflict with EU provisions comes from the European Communities Act 1972 (ECA).[77] By disapplying this provision of the DPA the Court of Appeal re-wrote (by editing out) a portion of an Act passed by the expressed will of Parliament.[78]

The Supreme Court will hear this appeal in May or June 2016 in respect of two questions. Firstly, whether s.13(2) DPA is incompatible with Article 23 of the Directive. Secondly, whether s.13(2) DPA conflicts with the rights guaranteed by Articles 7 and 8 of the EU Charter of Fundamental Rights.

6.3 THE PROTECTED RIGHT IN THE EU CHARTER OF FUNDAMENTAL RIGHTS

6.3.1 Introduction

6–011 Article 8 of the EU's Charter of Fundamental Freedoms (the Charter) is embodied in the Treaty of Lisbon and has been effective in the EU (and the UK) for the last four years.[79] It contains a clear, independent and free-standing right in relation to the protection of personal data in its Article 8.[80] Rights and freedoms in the Charter can be limited but only subject to the principle of proportionality.[81]

Directive 95/46/EC—by Article 1—requires Member States to protect the fundamental rights and freedoms of natural persons and, in particular, their right to privacy with respect to the processing of personal data. Article 13 (1) (g) of the Directive permits exemptions to restrict the scope of

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[77] Section 2(4) and 3(1) ECA give effect to the doctrine of the supremacy of EU law, as interpreted by the Court of Justice, over national law; and where EU law is in doubt, requires UK courts to refer the question to the Court of Justice. As a consequence of the rule of construction in section 2(4) all primary legislation enacted by Parliament after the entry into force of the ECA on 1 January 1973 is to be construed by the courts and take effect subject to the requirements of EU law. This obliges the courts to disapply legislation which is inconsistent with EU law. It first happened in *Factortame (No 1)* [1990] 2 A.C. 85; *Factortame (No 2)* [1991] 1 A.C. 603 when Part II of the Merchant Shipping Act 1988 was held by the House of Lords to be inconsistent with EU law and therefore disapplied. The same principle was followed by the House of Lords in disapplying discriminatory provisions in the Employment Protection (Consolidated) Act 1978. In neither Act was there any provision expressly providing for the later enactment to apply notwithstanding the ECA.

[78] It is only by virtue of the ECA that the courts have this power. Under the Human Rights Act 1998, for example, the courts have the power to make a declaration of incompatibility, but not to disapply the offending statutory provision.

[79] In force from 1 December 2009.

[80] (1) Everyone has the right to the protection of personal data concerning him or her. (2) Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. (3) Compliance with these rules shall be subject to control by an independent authority.

[81] Article 52 (1).

the data protection provisions when they constituted a necessary measure to safeguard the protection of the rights and freedoms of others.[82]

During the time that the case law in respect of Charter Article 8 remained relatively undeveloped there appeared to be a danger that the strength of this stand-alone provision would be diluted by being seen only as an amplification of Charter Article 7/Convention Article 8 privacy rights rather than having an independent force of law on its own.[83] In particular:

> "It took a significantly long time for the ECJ to articulate any reference to Charter Article 8 and the fact that it established any specific right to the protection of personal data. . ..It did so only with issues around the Data Protection Directive's objective that Member States should protect the fundamental rights and freedoms of natural persons and in particular their right to privacy with respect to the processing of personal data. It also considered reconciling those rights with the fundamental right to freedom of expression. It did not specify exactly which fundamental rights had to be reconciled."[84]

In the light of *Google Spain* it is now clear that such concerns were inaccurately focussed and only half-correct: the failure to specify exactly which fundamental rights had to be reconciled. It is not the dilution of the Charter Article 8 right that has caused the debate now but the apparent supremacy given to it—in the context of the Luxembourg judgment—because nowhere was the Charter Article 11 freedom of speech right mentioned or "reconciled".

6.3.2 *Google Spain*

Particularly when matters involved celebrities—and internet search links— **6–012**
the actual result in *Google Spain* (rather than the reasoning) should have come as no great surprise. Google in France had repeatedly claimed it was difficult to remove egregious material from its systems yet it been ordered to block links to images from the former *News of the World* video of the "orgy" involving Max Mosley.[85] It contended that the search engine was merely a platform delivering links to independent content.[86] The court decided Google must find a way to remove links to the nine images of Mr Mosley with the prostitutes.[87] Google said it would require building a new software filter to

[82] In the Act the Government chose to use this to exempt the data protection provisions in circumstances required by law or made in connection with legal proceedings (s.35).

[83] R. Callender Smith "Discovery and compulsion: how regulatory and litigation issues relating to intellectual property rights are challenging the fundamental right to the protection of personal data" *Queen Mary Journal of Intellectual Property* 2013 Vol. 3 No 1, 11–16.

[84] R. Callender Smith 15–16.

[85] Google had a decision from Paris's Tribunal de Grande Instance, arguing that it was being required to set up a "censorship machine" that could damage internet freedom.

[86] On filtering and blocking see also Sophie Stalla-Bourdillon "Online monitoring, filtering, blocking. . . .What is the difference? Where to draw the line?" C.L.S.R. 29 (2013), 702–712.

[87] It was also ordered to pay Mr Mosley €1 (84p) in damages and €5,000 in other legal fees: *http://www.telegraph.co.uk/technology/google/10431605/Google-ordered-by-French-court-to-drop-sex-images-of-ex-F1-chief-Max-Mosley.html* Automatically recognising these nine images and stopping them appearing on a Google images search was within the expertise of an "averagely experienced programmer" according to expert witness Professor Viktor Mayer-Schönberger of the Oxford Internet Institute. See also Mr Mosley's lawyer's blog post on this topic: *http://inforrm.wordpress.com/2013/11/13/google-go-down-in-paris-how-did-it-come-to-this-dominic-crossley/*

catch new versions of the posted images continuously and remove them.[88] Mr Mosley pointed out that Google could remove them automatically as it did for content such as child pornography.[89] Pre-*Google Spain* this confirmed that the persistence of individual celebrities with substantial financial and legal resources—with the stamina for the litigation required in different jurisdictions—could successfully test and challenge the law in relation to the misuse of their personal information in the context not just of the domestic press and media but also on the internet.[90] It is, after all, on the internet where the damaging linkage occurs.

Google Spain created global attributed celebrity status for Mario Costeja González, providing this most up-to-date data protection example of the *Streisand* effect. As a result of the decision celebrities of all categories may seek shelter in the incorrectly categorised "right to be forgotten" elements of the decision.[91] But—as has already been pointed out—the role an individual has played in public life will be one of the factors in determining whether:

> "the interference with his fundamental rights is justified by the preponderant interest of the general public in having [via a search link] access to the information in question".[92]

6–013 Curiously the concept of "playing some part in public life" is not further articulated in the decision. Neither were any Charter Article 11 freedom of speech considerations. This leaves unnecessary uncertainty together with the danger that what equates to the "public interest" bar remains vague and has been set too low. The court found *Google Spain* was established in Spain as a controller (not processor) and that the activities of *Google Search* (also a controller) were "inextricably linked" to those of *Google Spain*. [93]

Specifically:

> ". . ..it cannot be accepted that the processing of personal data carried out for the purpose of the operation of the search engine should escape the obligations and guarantees laid down by

[88] An interesting argument in the light of publicised developments in the UK on 18 November 2013 by Google and Microsoft of software they have developed that filter out child abuse searches: *http://www.ft.com/cms/s/0/2c37bd70-5020-11e3-9f0d-00144feabdc0.html#axzz2l1nFrPCL*

[89] Mr Mosley has sued Google in Germany and elsewhere, seeking to get the company to use automatic filters that eliminate any thumbnail images of the sex video, as well as links in search results.

[90] On 29 July 2014 Mr Mosley announced his High Court claim against Google Inc and Google UK in respect of continuing misuse of private information and DPA breaches: *http://www.pressgazette.co.uk/max-mosley-sue-google-continuing-publish-sex-party-images*

[91] Google's Chief Legal Officer, David Drummond, announced the creation of an advisory "council of experts" to make recommendations about how it should deal with requests for the removal of links from search results and explained its post-judgement approach on 10 July 2014 in *The Guardian*. The criteria included whether information related to a politician, celebrity or other public figure; if it was from a reputable news source, and how recent it was; whether it involved political speech; questions of professional conduct which might be relevant to consumers; the involvement of criminal convictions which were not yet spent; and if the information was being published by a government. *http://www.theguardian.com/commentisfree/2014/jul/10/right-to-be-forgotten-european-ruling-google-debate*

[92] C – 131/12 *Google Spain* [97].

[93] C – 131/12 *Google Spain* [45 – 60]: arguably it overstated or misrepresented the law.

> Directive 95/46, which would compromise the Directive's effectiveness and complete protection of the fundamental rights and freedoms of natural persons which the Directive seeks to ensure. . .."[94]

The individuals who are likely to benefit from this decision are aspiring celebrities who can—with forethought—have information which is old and no longer accurate in the *Google Spain* sense removed prior to their first appearances or before their profile shows that they are playing some part in public life.

By the end of March 2015 Google's European operations had received over 250,000 requests to remove 70,000 links since the Luxembourg judgment in May 2014.[95] An insight into the broader context of the volume of material on the internet is that there are

> ". . ..about 60 trillion web pages posted onto the internet of which about 30 billion are indexed and so accessible via a search engine. Over 1.2 trillion searches a year are made. Each web page is identified by a unique string of characters known as the Uniform Resource Locater."[96]

6.3.3 *Google Spain* and the EU's Article 29 Working Party Guidelines

6–014 The EU's Article 29 Working Party[97] in November 2014 adopted Guidelines in respect of *Google Spain* which, to the displeasure of the USA among others, has an unavoidable extra-territorial effect. It determined that de-listing decisions must be implemented in such a way as to guarantee the effective and complete protection of data subjects' rights. EU law could not be circumvented by

> ". . ..limiting de-listing to EU domains on the grounds that users tend to access search engines via their national domains [which] cannot be considered a sufficient means to satisfactorily guarantee the rights of data subjects according to the ruling. In practice, this means that in any case de-listing should also be effective on all relevant domains, including .com."[98]

The Article 29 Guidelines contain 13 main criteria:

1. Does the search result relate to a natural person—i.e. an individual? And does the search result come up against a search on the data subject's name?
2. Does the data subject play a role in public life? Is the data subject a public figure?

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[94] C – 131/12 *Google Spain* [58].

[95] *http://www.telegraph.co.uk/technology/google/11036257/Telegraph-stories-affected-by-EU-right-to-be-forgotten.html*

[96] *Mosley v Google Inc* [2015] EWHC 59 (QB) [31]: information from the witness statement of Google's solicitor.

[97] The Article 29 Working Party is made up of a representative from the data protection authority of each EU Member State together with the European Data Protection Supervisor and the European Commission. It was launched in 1996. Its main missions are to give expert advices to the EU States regarding data protection, promote the consistent application of 95/46/EC in all EU States as well as Norway, Liechtenstein and Iceland and to give to the Commission an opinion on community laws affecting the right to protection of personal data.

[98] *http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf*

3. Is the data subject a minor?
4. Is the data accurate?
5. Is the data relevant and not excessive?
    a. Does the data relate to the working life of the data subject.
    b. Does the search result link to information which allegedly constitutes hate speech/slander/libel or similar offences in the area of expression against the complainant?
    c. Is it clear that the data reflect an individual's personal opinion or does it appear to be verified fact?
6. Is the information sensitive in the meaning of Article 8 of the Directive?
7. Is the data up to date? Is the data being made available for longer than is necessary for the purpose of the processing?
8. Is the data processing causing prejudice to the data subject? Does the data have a disproportionately negative privacy impact on the data subject?
9. Does the search result link to information that puts the data subject at risk?
10. In what context was the information published?
    a. Was the content voluntarily made public by the data subject?
    b. Was the content intended to be made public? Could the data subject have reasonably known that the content would be made public.
11. Was the original content published in the context of journalistic purposes?
12. Does the publisher of the data have a legal power —or a legal obligation— to make the personal data publicly available?
13. Does the data relate to a criminal offence?

6.3.4 *Google Spain* in European Courts

6–015 Since the CJEU *Google Spain* decision there have been four publicised cases in EU States[99] other than the UK that have considered and applied it. Three were in Holland and the fourth, most recently, in Spain itself.

In the first Dutch case the owner of an escort agency, convicted of "attempted incitement of contract killing" and sentenced to six years' imprisonment in 2012, wanted to have links removed to online publications linking him to the conviction (which was under appeal). Although Google was willing to remove part of the search results, the search engine refused to comply fully with his request. The complainant asked the court to order the removal of other search results as well. The court in Amsterdam upheld Google's approach on the basis that *Google Spain* did not

> "protect individuals against all negative communications on the Internet, but only against 'being pursued' for a long time by 'irrelevant', 'excessive' or 'unnecessarily defamatory' expressions".[100]

[99] Up to 12 June 2015.

[100] *http://www.mediareport.nl/persrecht/26092014/google-spain-judgment-in-the-netherlands-more-freedom-of-speech-less-right-to-be-forgotten-for-criminals/*

In the second, the Amsterdam court ruled in favour of Google again on the basis that the right of removal was not meant to suppress links to unpleasant news reporting. The complainant was a partner in the international accountancy firm KPMG who had had a building dispute two and a half years' earlier which had forced him to live in a shipping container on his country estate because his builder had changed the locks on his property. Refusing his request the judge emphasised that the purpose of the right of removal was not to be used to suppress unpleasant news.[101]

In the third, a convicted killer—having served his sentence—tried to erase all online links between himself and the crime.[102] The father of the victim and a public interest group[103] had been publishing material about him and the murder online. Google had earlier acquiesced to his requests to remove links to his name and the crime.[104] The Court, in preliminary proceedings, declined to order that the material be taken off-line.[105] The Court, using the Dutch Personal Data Protection Act (PDPA), ruled against him because—although there had clearly been processing of the murderer's personal data by the public interest group—the processing was "necessary" for the legitimate purpose in keeping alive the memory of what had happened. In terms of the balancing exercise:

> "A conviction for a serious offence goes hand in hand with negative publicity; such publicity is in general permanently relevant to the person of the convict. However, the opposite right to be forgotten as a perpetrator of a serious crime becomes more weighty as the event lies further back in time, and the perpetrator has further redeemed his 'debt' to society in general and to the surviving relatives in particular."

The murder happened only 10 years ago and the claimant was still subject to a hospital order, apparently not having shown any understanding of the "gruesome nature of his acts," making his interest limited. In terms of the victim's father's—and the public interest group's—Article 10 rights then they should only be restricted in exceptional cases. The Court decided that there was "a great interest in having access to information about serious offences".[106]

In the fourth example the Spanish National High Court held that Google was not responsible for the processing of personal data on a blog hosted on the Google-owned *Blogger*. It reversed a decision issued by the Spanish Data Protection Authority (DPA). The claimant was a Spanish citizen who found

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[101] *https://inforrm.wordpress.com/2015/03/12/second-dutch-google-spain-ruling-decision-not-meant-to-suppress-news-reporting-joran-spauwen/*

[102] *http://www.mediareport.nl/en/press-law/05062015/google-spain-in-the-netherlands-iii-does-convicted-murderer-have-right-to-be-forgotten/*

[103] The Dutch Federation of Surviving Relatives of Victims of Violent Crime.

[104] On this point about the lack of transparency of such Google decisions, see also the open letter sent to Google Inc on 14 May 2015 by 80 academics (including the author): *http://www.theguardian.com/technology/2015/may/14/dear-google-open-letter-from-80-academics-on-right-to-be-forgotten?CMP=share_btn_fb*

[105] *http://federatie-nabestaanden-geweldslachtoffers.nl/LFNG/PDF-media/Vonnis%20KG%20nabestaanden%20d.d.%201%20mei%202015.pdf*

[106] The court also held that anonymising the name of suspects or convicts was only a "journalistic tradition" in the Netherlands and did not amount to an "enforceable standard".

himself linked to a blog with information about a crime he had committed many years ago and which was, in UK terms, "spent". The Spanish DPA had ordered Google to remove this linking information and that was upheld by the National High Court. But the National High Court held that the blog owner—and not Google—was responsible for the processing. Google could not be ordered to remove the blog content within a procedure for the protection of the data subject's right to erasure and to object. On this basis, if the platform is not the controller of the processing, then other user generated content sites such as *YouTube* or social networking sites might also fall outside the scope of the right to be forgotten.[107]

6.3.5 *Google Spain* in English litigation

6–016 The first case to come before the English courts, following *Google Spain*, dealt with linkage and jurisdiction to entertain the claim. *Hegglin*[108] related to the internet "trolling" of a Hong Kong-based businessman with UK connections. The claimant wanted Google to ensure that abusive material posted about him did not appear in search results on or Google-controlled websites.[109] He relied on sections 10 and 14 of the DPA in respect of his right to prevent data processing likely to cause damage and distress, and rectification, blocking, erasure and destruction, to require Google to remove material about him placed on the internet by an anonymous individual. After initial litigation the matter settled in November 2014.[110] Google had made "significant efforts" to remove the material from its hosted websites and search results. One of the live issues before the matter was settled was a costs estimate of £2.36 million of which £1.68 million would have been Google's. Edis J found Google's cost estimate for the litigation "surprising" as can be seen below.[111]

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[107] *https://ispliability.wordpress.com/2015/03/05/spain-the-right-to-be-forgotten-does-not-apply-to-blogger/*

[108] See *Hegglin v Person(s) Unknown & Anor* [2014] EWHC 2808 (QB) (31 July 2014), *Hegglin v Person(s) Unknown & Google Inc* [2014] EWHC 3793 (QB) (14 November 2014), *Hegglin v Person(s) Unknown & Google Inc* [2014] EWHC 3798 (QB) and *http://www.medialawyer.press.net/article.jsp?id=10217173*

[109] *Hegglin v Person(s) Unknown & Anor* [2014] EWHC 2808 (QB) (31 July 2014) per Bean J: [1].The claimant is a businessman and investor who previously lived in London and worked at Morgan Stanley in London but is currently resident in Hong Kong. He continues to have very close connections with the United Kingdom where he has a house and carries out substantial business. He is a director of a company which is in the process of preparing to list on the London Stock Exchange. [2]. An anonymous individual, or possibly group of individuals, has been posting on a large number of internet websites abusive and defamatory allegations about the claimant. It is alleged by way of example that he is a murderer, a Nazi, a Ku Klux Klan sympathiser, a paedophile, a corrupt businessman who has accepted bribes from state officials, an insider trader, and that he has laundered money on behalf of the Italian Mafia. There is no evidence to suggest that any of this is true.

[110] *http://www.bbc.co.uk/news/uk-30172110*

[111] *Hegglin v Person(s) Unknown & Google Inc* [2014] EWHC 3793 (QB) (14 November 2014) per Edis J: [12] The Claimant's total budget comes to £604,405 and that is broken down in costs incurred (as at that date) of £283,395 and costs estimated hereafter of £321,010. In each case these figures include disbursements. The Second Defendant's budget totals £1,681,310.41 and the costs to the date of the budget are £910,339.43 and from that date to the end of the trial are £770,970.98. It will be seen that the Second Defendant's costs are very much higher than those

Then came *Mosley v Google Inc*.[112] Mitting J explained the background:

> "[1] On 28th March 2008, a prostitute took video footage of the claimant on a concealed camera provided to her by a *News of the World* journalist while he was engaged in private sexual activity in a flat in Chelsea. Still images from the footage were published prominently in the *News of the World* newspaper on 30th March 2008, and edited footage was displayed on the *News of the World* website on 30th and 31st March 2008. The newspaper and website were viewed by millions of people.
>
> [2] After a trial in July 2008, in a judgment handed down on 24th July 2008, Eady J found that the claimant had a reasonable expectation of privacy in relation to sexual activities which had been infringed by publication of the images and footage, and awarded him £60,000 compensatory damages and a permanent injunction restraining NGN Limited, publishers of the *News of the World*, from republishing them. No injunction was made against persons who were not parties to the action.
>
> [3] The claimant hoped that the successful outcome of his litigation and the deterrent effect which it would have on persons minded to republish the images or footage would lead to a gradual loss of interest in these events. To a degree, this has happened; but persons other than NGN still maintain posts of the images on websites accessible by search engines on the internet."

Mitting J declined to strike out Mr Mosley's claim concluding, at [55]:

> ". . ..it seems to me to be a viable claim which raises questions of general public interest, which ought to proceed to trial".

Mr Mosley's claim against Google will never go to trial because the parties settled in May 2015.[113] This is perhaps unsurprising against the backdrop of a similar settlement in *Hegglin* and the way in which the matters were articulated fully by the Court of Appeal in *Vidal-Hall*. This settlement leaves unanswered a number questions about the application of data protection rights in the online world. For instance, can the Right to be Forgotten operate so as to force internet search engines not only to de-index individual URLs on request but also to block access to the offending data globally?[114]

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of the Claimant and also that a greater proportion was incurred prior to the date of the budget. [13] I find the figures provided by the Second Defendant surprising. This is a 5 month period and a factually simple (although legally complex) case. It seems to me that the difference between the two budgets raises a concern about the proportionality of the Second Defendant's overall figure and that figure itself, viewed in isolation, also suggests that it is not proportionate to the true nature of the dispute.

[112] *Mosley v Google Inc* [2015] EWHC 59 (QB).

[113] *http://next.ft.com/7aab1264-faff-11e4-9aed-00144feab7de#axzz3aUgcFwPt*

[114] Internet Search Engines (ISEs) already do this when images of child pornography are identified. See also Anya Proops *http://www.panopticonblog.com/2015/05/18/mosley-v-google-rip/* where she raises the issue of data subjects—like Mr Mosley—who garner significant public attention within the online environment. "The difficulty for such individuals is that online stories or comments about them can proliferate on the internet at such a rate that they cannot practicably achieve the online amnesia they crave. No sooner have they requested that the relevant internet search engine remove a number of privacy-invasive links, then the story has sprung up in a raft of other different locations on the net, with the result that the individual is effectively left trying to capture lightening in a bottle."

6.4 THE REGULATOR

6–017 Originally named the Data Protection Registrar he became the Data Protection Commissioner[115] before finally arriving at his present title of Information Commissioner[116] to reflect his role under the Freedom of Information Act 2000 (FOIA). He has duties to educate and inform the public about data protection as well as specific regulatory powers.[117] In his regulatory role he can serve enforcement, information, and monetary penalty notices, and bring prosecutions. He has an important role in European cooperation and the associated obligations under related conventions and is also responsible for encouraging good practice and codes of practice. He is required to lay an annual report before Parliament dealing with the exercise of his functions under the Act.[118]

Here four specific areas of his work are examined—in the context of the celebrity privacy issues—which have been subjected to greater public scrutiny. These are the issues arising from *Operation Motorman 1* and *2 (Motorman)*, the Subject Access provisions within s.53 of the Act, his role in civil court proceedings and his power to issue monetary penalty notices (MPNs) and to prosecute.

6.4.1 *Motorman*

6–018 The history of *Motorman*[119] is set out over 12 pages in the Leveson Report.[120] It involved the Commissioner's officials, from 2002 onwards, investigating the activities of a private detective called Steve Whittamore. They uncovered a mass of documentation detailing an extensive trade in personal information. When analysed it showed a clear audit trail between the requests, supply and payment for personal information about celebrities of all categories and others. Mr Whittamore's customers included a significant number of journalists employed by a range of newspaper and magazine titles.[121]

The implications of this material were so significant that the Commissioner presented two reports to Parliament summarising the investigations' findings: *What Price Privacy?* and *What Price Privacy Now?* The reports also called

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[115] 1 March 2001.

[116] 30 January 2002.

[117] His powers and role are set out in Part VI of the Act.

[118] In 2006 he used his power to lay other reports before Parliament when he raised the problems about the unlawful trade in personal data in *What Price Privacy?* and *What Price Privacy Now?* arising from *Operation Motorman 1 and 2*: see 6.4.1.

[119] Ironically it was named after the large operation carried out by the British Army in Northern Ireland on 31 July 1972. That aimed to retake the "no-go areas" controlled by Irish republican paramilitaries that had been established in Belfast, Derry and other large towns.

[120] Leveson Vol. I Ch 3, 257–269.

[121] The database that was created—which includes the names of all the celebrity "targets" and the journalists making the requests—referred to in 3.3, 259 of that Chapter was the subject of a successful FOIA appeal decision against the Commissioner published on 29 November 2013: *Christopher Colenso-Dunne v IC (EA/2012/0039)*. The disclosure ordered, however, is embargoed until the conclusion of trials still to take place at the Central Criminal Court. The Information Commissioner is appealing this decision to the Upper Tribunal.

for stricter penalties for those engaged in unlawful activities, in particular for breach of s.55 of the Act. Such changes are still awaited.

No journalists were ever interviewed by the Commissioner in relation to *Motorman*.[122] The Commissioner intended to prosecute Mr Whittamore and five others under s.55 of the Act. However the CPS first prosecuted them—and others—with corruption offences.[123] Given the conditional discharges received by the accused the Commissioner discontinued his prosecutions on public interest grounds. Leveson LJ commented, because the maximum sentence for a breach of s.55 was a financial penalty, that it was not an unrealistic decision.

The negative impression created by *Motorman* about the Commissioner's rigor and vigour in this area in matters relating to enforcement activity connected to journalists —despite the fact that his room for action was hampered by CPS activity over which he had no control—was inevitably reinforced by DI Owen's evidence during the Leveson Inquiry.[124]

That *Motorman* was the tip of an iceberg of data protection failures impacting on celebrities and others is borne out by July 2014 statistics. These showed that more than 100 detectives investigated allegations of hacking, bribery and other crime by British newspaper journalists and 46 police officers had investigated phone hacking. A further 53 police investigated payments by newspapers to police and other public officials. Since *Motorman* there had been 210 arrests and interviews under caution, including 96 of journalists, 26 of police officers and 13 of private investigators. This produced 71 charges, 19 guilty pleas, 7 acquittals and 15 journalists and public officials being sentenced for offences ranging from phone hacking to misconduct in a public office. The total cost of those investigations was £30m, a large bill for misconduct at one end of the spectrum and ineffective regulatory action at the other.[125]

[122] In his evidence about *Motorman* to the Leveson Inquiry on 17 November 2011, former DI Alexander Owens—a Senior Investigating Officer from 1999–2005 at the ICO—said the serial breaches of the Act came from access to personal data held by the DVLA via the Police National Computer (PNC). He felt Richard Thomas, the Commissioner, was unwilling to take on the press involved and that "was a wrong decision. . ..certainly not based on any advice given by Counsel or on any lack of evidence, as ICO would have everyone believe." See also Leveson Vol. III Part E Chapter 3 257–268 and Vol. III Part H Chapter 2 1003–1025, [1.1 – 1.9].

[123] The indictment at Blackfriars Crown Court was amended to include s.55 offences. Mr Whittamore and another investigator pleaded guilty and—for reasons explained in the sentencing remarks by HHJ Samuels—received conditional discharges.

[124] The *Consenso-Dunne* case appeal decided that the names of the journalists on the database who were Mr Whittamore's clients could be released. The Tribunal highlighted a major error that had occurred in the (then) Commissioner's handling of that information request. Mr Colenso-Dunne had been told on 26 September 2011 that the information on the database had not been recorded. The Leveson Inquiry three months later heard detailed evidence in December 2011 from the Commissioner and DI Owens that the database did and always had existed. The Tribunal's critical view of this is in a preliminary ruling in the *Colenso-Dunne* appeal (on 12 November 2012) from [24 – 31]. Particularly [30]: "We only became aware of the ICO's error after the Appellant drew our attention to the evidence presented to the Leveson Inquiry regarding the Spreadsheets."

[125] *http://inforrm.wordpress.com/2014/07/12/revealed-10-police-inquiries-into-illegal-data-techniques-martin-hickman/*

6.4.2 The Subject Access Provisions: s.53 of the Act

6–019 As the result of a series of FOIA requests made by the author, it became apparent that there had only ever been one request for the Commissioner's assistance under this section in the entire life of the Act—in 2003—which was refused (with reasons).[126] The s.53 route is open to all but could be particularly useful for aspiring attributed celebrities with limited budgets. There had been a singular lack of engagement with the public—or publicity —about the route to ask him[127] for assistance.[128] There is a public interest filter in respect of the Commissioner's involvement[129] and if the Commissioner does not want to be involved he is required to let the requestor know that and, if he thinks fit, the reasons for his inaction.[130] The giving of reasons is not mandatory but failure to do so could form the basis of an application for judicial review.[131]

As a result of the Information Requests, it became apparent that the Commissioner considered whether that single case would clarify important points of law or principle, the number of people potentially affected, the nature of the detriment to people potentially affected and whether the issues had a wider impact on the general public before concluding that he would not provide assistance because it did not involve a matter of substantial public importance.[132] The Information Requests, however, resulted in the disclosure of a 2004 policy document.[133] This document—which has no statutory force and was drafted within the Commissioner's office—may explain the reason for the lack of activity. The factors that he may consider when deciding whether or not, and to what extent, to provide assistance are common sense.[134] But, in any case that exceeds:

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[126] By the author *IRQ0458792* on 31 July 2012 and *IRQ0462072* on 5 September 2012, with a third request, *IRQ0467845*, on 10 October 2012.

[127] Section 53 (1) of the Data Protection Act 1998.

[128] DPA 1998 s.53(1): "An individual who is an actual or prospective party to any proceedings under section 7 (9), 10 (4), 12 (8) or 14 or by virtue of section 13 which relates to personal data processed for the special purposes may apply to the Commissioner for assistance in relation to those proceedings."

[129] DPA 1998 s.53 (2).

[130] DPA 1998 s.53 (3).

[131] Schedule 10 of the Act sets out further provisions relating to the Commissioner's assistance under s.53. The reason such provisions exist within the Act seems to be to ensure that individuals faced by the procedural claims under s.32(4), given the complexity of this area, have an "equality of arms" in terms of their Article 6 ECHR rights as no legal aid has ever been available for litigation under the Act.

[132] ICO to Dr Kuan Hon: 6th November 2012.

[133] This makes it clear that the Commissioner will only intervene in a "matter of substantial public importance." This is defined as "a matter of real and significant public importance with repercussions which go beyond the impact on the parties/litigants themselves and which affects the wider public, or raises an important question of principle. The considerations. . ..include: whether the case will clarify an important point of law or principle; the number of people potentially affected; the nature of the detriment to any class of people potentially affected; whether the issues raised by the case have a wider impact on the general public."

[134] They include: the likely cost of assistance, the financial means of the applicant, whether there are alternative resources or funding available to the applicant, whether there is a more appropriate alternative course of action available to the Commissioner (the use of his enforcement powers), the likelihood of the claim succeeding, whether the case falls within an area selected

> "£25,000 (or in which the costs of proceeding to a contested trial or final hearing would exceed £75,000) the Commissioner may refuse, defer or cease the provision of assistance at any time if the proposals put forward by or on behalf of the applicant for progressing the case, including proposals as to cost, do not appear to the Commissioner to be satisfactory".

It is stated clearly in the policy that the Commissioner would need to be satisfied that it was reasonable to provide assistance in light of the *resources* available to him to discharge his statutory functions and the likely future demands on those resources. This policy has, in effect, allowed the Commissioner to delimit his "assistance" to such a degree that he appears to have written himself out of acting at all. This makes s.53 a moribund and almost unused power within the Act. It may not be Charter Article 8 compliant.

In a move that further distances the Commissioner from complaints or concerns he receives under the Act he announced a Consultation that closed at the end of January 2014[135] in respect of a "new approach to data protection concerns".[136] His office received 40,000 written enquiries or complaints, and 214,000 phone calls in 2012/13 from members of the public. In only 35% of these instances, had data protection legislation actually been breached. He intends to encourage individuals to address their concerns to the organisation complained about so that his office can focus on "those who get things wrong repeatedly" and take action against those who commit serious contraventions of the legislation.

> "We may make an assessment under s.42 of the DPA where we think this adds value or where the customer has asked us to do so. We may simply offer advice to both parties and ask the organisation to take ownership of their customer or client's concern. We will decide how we can best tackle each concern on a case by case basis."

However s.42 states that "any person who is, or believes himself to be, directly affected by any processing of personal data" may make a request for an assessment "as to whether it is likely or unlikely that the processing has been or is being carried out in compliance with the provisions" of the Act. On receiving such a request the Commissioner "shall make an assessment".[137] That duty is an absolute one and whether it has been carried out must also be communicated to the person who made the request.[138] Avoiding that statutory duty as well as his obligations under the Directive and EU Charter of Fundamental Rights responsibilities could lead to a judicial review in this area.

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by the Commissioner for special attention, the likelihood of a settlement being reached prior to commencement of proceedings, complexity of the case in law and/or fact, the availability to the Commissioner of sufficient resources and/or funding, the detriment that has been/is being caused to the applicant, the conduct of the applicant in pursuing the claim, the conduct of the data controller in defending the claim, whether the data controller is representative of a certain sector and—finally—the size and resources of the data controller.

[135] *http://ico.org.uk/about_us/consultations/closed_consultations*

[136] The changes took effect from 1 April 2014.

[137] s.42 (1).

[138] s.42 (4). This section transposes Article 28 (4) of the Directive.

6.4.3 *Law Society and others v Kordowski*[139]

6–020 The Commissioner's lack of action was exposed to the full glare of judicial attention—together with comments on the Commissioner's inaction in respect of his powers under the Act—in *Law Society and others v Kordowski*.[140] The Law Society, and those firms it represented, successfully claimed that being listed and named on a website purporting to list "solicitors from hell" was defamatory, harassment, and breached the DPA. Tugendhat J noted that the DPA contained detailed provisions[141] about how the Commissioner should promote the observance of the requirements of the Act by data controllers. The provisions were in addition to the rights conferred on individuals by the Act.[142] The Chief Executive of the Law Society had written to the Commissioner to complain about the website. On 6 January 2011 the Commissioner replied in a three-page letter explaining why he felt unable to intervene. The Commissioner was not represented and did not attend the hearing. Tugendhat J said that he appreciated the burden that the law may have placed on the Commissioner and that it might be more appropriate for complainants to pursue their own remedies through the courts. Equally, the Commissioner could properly decline to act.

> "But where there is no room for argument that processing is unlawful (as is the case with the Defendant, given the numerous judgments against the Defendant referred to in this judgment), it seems to me to be more difficult to say that the matter is not one which could be dealt with under Part V."

Now this has been articulated, the use or lack of use of s.53 of the Act raises significant issues for the Commissioner. There are clearly resource issues, more pressing now given current and on-going financial stringency. However the data protection activity and responsibilities of the Commissioner's office is the source of a significant income-generating portion of his budget.[143] In his July 2014 report to Parliament the Commissioner identified the main risks for his future work as Government budget constraints, implementing the EU's data protection Regulation, unspecified "reputational risks" to his office and a rising workload.[144] There was no reference to s.53 of the Act.

6.4.4 Enforcement

6–021 The Commissioner's enforcement powers include prosecutions and the ability to issue Civil Monetary Penalty Notices (MPNs).[145] Unlawfully obtaining or

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[139] *Law Society and others v Kordowski* [2011] EWHC 3182 (QB)

[140] *Law Society and others v Kordowski* [2011] [76–101].

[141] In Part V of the Act, under the title 'Enforcement', and Part VI under the headings 'Functions of Commissioner'.

[142] *Law Society and others v Kordowski* [93].

[143] The 2013/14 accounts show that the Data Protection income stream was £16,528,000 (2012/2013: £16,055,000): *http://ico.org.uk/about_us/performance/~/media/documents/library/Corporate/Research_and_reports/annual-report-2013-14.pdf*

[144] Ibid: Governance StatementAQ 54–58.

[145] 1,970 MPNs were issued in 2013/2014 (3,130 2012/2013) bringing in £820,000 (£2,572,000 2012/2013).

accessing personal data is a criminal offence under s.55 of the Data Protection Act 1998.[146] The offence is currently only punishable by a fine of up to £5,000 in a Magistrates Court or an unlimited fine in a Crown Court. As previously discussed, successive Commissioners have called for more effective deterrent sentences, including imprisonment, to be available to the courts to stop the unlawful use of personal information. Under s.77 of the Criminal Justice and Immigration Act 2008, the Justice Secretary has the power—so far unused—to introduce new regulations that would add custodial sentences to s.55. Calls to activate the powers have been repeated—without success—by the House of Commons Justice Committee.[147] What the Commissioner has done instead, absent of powers of imprisonment, is to seek compensation orders to ensure that the profits from misappropriation and misuse of personal data are traced and clawed back, over and above any fine imposed by the court.[148]

As a result of the Parliamentary challenge mounted in the "MPs' Expenses" case[149] the relevant information for disclosure required a degree of redaction to exclude the personal and sensitive personal data of some of those associated with the MPs. The information needed to be scanned first in an un-redacted form and then redacted. The company subcontracted to do this for the House of Commons—by an oversight—was not required to sign a confidentiality agreement. An individual connected with that company made copies of the CDs containing the un-redacted personal information and offered those to various media publications first on a "pay per view" basis and then to the *Daily and Sunday Telegraph* for exclusive use. The Commissioner considered whether the circulation of the CDs and use of sensitive personal information on them by the media contravened s.55 of the Act. That section provides that:

> "a person must not knowingly or recklessly, without the consent of the data controller, obtain or disclose personal data or the information contained in personal data. . .. [unless] in the particular circumstances the obtaining, disclosing or procuring was justified as being in the public interest."[150]

The (then) Commissioner decided that these egregious media disclosures would be met with a public interest defence described above both from the CD supplier and the media and that it was not in the public interest for him to consider taking action under the Act.[151]

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[146] The Commissioner adopted the Code for Crown Prosecutors and is currently reporting to the Home Affairs Committee on a joint investigation being conducted with the National Crime Agency into breaches of s.55 of the Act by private investigators (Operation Spruce): *http://data.parliament.uk/writtenevidence/WrittenEvidence.svc/EvidencePdf/5914*

[147] Justice Committee proceedings 21 March 2013: *http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/962/96205.htm*

[148] For the illegal acquisition of 500,000 T-Mobile telephone records, and their subsequent sale, two men were ordered to pay a total of £73,700 compensation on conviction at Chester Crown Court in 2011 with imprisonment in default. *http://ico.org.uk/enforcement/~/media/documents/pressreleases/2011/t-mobile_news_release_20110610.ashx*

[149] *Corporate Officer of the House of Commons v Information Commissioner, Brooke, Leapman and Ungoed-Thomas* [2008] EWHC 1084 (Admin).

[150] s.55 (2) (d).

[151] Richard Thomas confirmed this reasoning in relation to s.55 to the author shortly after the event.

Under sections 55A and 55B of the Act[152] the Commissioner may, where there has been a serious contravention of s.4(4) of the Act, serve a monetary penalty notice on a data controller requiring payment of a monetary penalty not exceeding £500,000.[153] There is statutory guidance about this topic on the Commissioner's website.[154] Those who have had MPNs levied on them and who are recorded on the Commissioner's website include 20 local authorities, three police authorities, 11 health and social care bodies, five companies, five financial services companies and two Government departments.[155] While the current focus of MPNs is on inadequate security in relation to personal data and the legislation, and not on media activity, that latter are remains an area of potential development for the future.

6.5 Permitted Interference

6–022 Six chapters[156] of Volume III of the Leveson Report deal with the media and the Act. Some of those observations and suggestions will be examined in greater detail later and separately. As a general comment, however, while the press itself may temporise over regulatory structures and paradigms there is arguably a much greater challenge to the way in which it may be permitted to operate in terms of the collection, retention and publication of personal data about celebrities and others in the future.[157] This results from evidence received, comments made and recommendations formulated by Leveson about altering the perceived inequalities in the proportionality of the Article 8 and Article 10 balancing exercise which results from the application of s.32 of the Act. As was pointed out, the development of this aspect of the Act's case law had been to "push personal privacy law in media cases out of the data protection regime and into the more open seas of the Human Rights Act."[158] That had happened because of the "slowness of the legal profession to assimilate data protection law" and, tellingly in the case of the judiciary, judges' greater familiarity with and preference for the "latitude afforded by the human rights regime over the

[152] Introduced from the Criminal Justice and Immigration Act 2008 and effective from 6 April 2010.

[153] The top limit for MPNs—when initially consulted on by the Ministry of Justice—would have been £2 million. The eventual limit of £500,000 came about when it was realised that Government departments were likely to be significant offenders.

[154] *http://ico.org.uk/enforcement/fines* It should be read in conjunction with the Data Protection (Monetary Penalties and Notices) Regulations 2010 and the Data Protection (Monetary Penalties) Order 2010.

[155] In November 2013 the Ministry of Justice received an MPN of £140,000 for releasing personal data of prisoners in a Category B prison and in January 2014 an MPN of £185,000 was served on the Department of Justice in Northern Ireland for allowing a filing cabinet containing details and files relating to a terrorist incident to be sold at auction.

[156] The entirety of Part H covering six chapters and 114 pages (997–1111).

[157] Although, on 16 July 2014, the Commissioner told lawyers and the media that the s.32 exemption would remain despite the proposed EU Data Protection Regulation. He stated that, if and when the Regulation was finally approved, EU member states would still be left to decide what their own rules should be. This approach appears to ignore the distinction between EU Regulations and EU Directives: *http://www.medialawyer.press.net/article.jsp?id=9998971*

[158] Leveson Vol. III Part H 2.12, 1070.

specificity of data protection".[159] That development was undesirable, Leveson suggested, because the data protection regime was "much more predictable, detailed and sophisticated in the way it protects and balances rights"[160] and "significantly reduced the risks, uncertainties and expense of litigation concomitant on more open-textured law dependent on a court's discretion".[161]

> "Where the law has provided specific answers, the fine-nibbed pen should be grasped and not the broad brush. The balancing of competing rights in a free democracy is a highly sophisticated exercise; appropriate tools have been provided for the job and should be used."[162]

For reasons of relevance and lack of space it is not proposed to examine the exemptions within the Act that relate to national security, the prevention and detection of crime, regulatory functions, taxation, health, social work, employment and such areas as business management planning and corporate finance.

6.5.1 Section 32: "Journalistic, literary or artistic material"

6–023 By s.32(1) of the Act personal data which are processed only for the "special purposes" are exempt if (a) the processing is undertaken with a view to the publication of any journalistic, literary or artistic material, (b) the data controller reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and (c) the data controller reasonably believes that, in all the circumstances, compliance with that provision is incompatible with the special purposes.[163] Section 32(3) states that, in considering whether the belief of a data controller was or is a reasonable one, "regard may be had to his compliance with any code of practice".[164] Where, at the relevant time[165] the data controller claims, or it appears to the court, that any personal data to which the proceedings relate are being processed *only* for the special purposes, and with a view to the publication[166] of any journalistic, literary or artistic material which, at the time 24 hours immediately before the relevant time, had not previously been published by the data controller, then the court "shall stay the proceedings until either of the conditions in subsection (5) is met".[167] This exemption currently recognises the importance of Article 10

[159] Leveson Vol. III Part H 2.12 This observation, in polite terms, suggests that the judiciary itself is not sufficiently comfortable with the provisions of the Act.
[160] Leveson Vol. III Part H 2.12.
[161] Leveson Vol. III Part H 2.12.
[162] Leveson Vol. III Part H 2.12, 1071.
[163] By s.32 (2) this relates to (a) the data protection principles except the seventh data protection principle; (b) section 7; (c) section 10; (d) section 12, and (e) section 14(1) to (3).
[164] Such as the Press Complaints Commissions' Code, or one designated by the Secretary of State: see See Data Protection (Designated Codes of Practice) (No. 2) Order 2000/1864.
[165] Under section 7(9), 10(4), 12(8) or 14 or by virtue of section 13 of the Act.
[166] s.32 (6) "publish", in relation to journalistic, literary or artistic material, means make available to the public or any section of the public.
[167] s.32 (5): the conditions are (a) that a determination of the Commissioner under section 45 with respect to the data in question takes effect, or (b) in a case where the proceedings were stayed on the making of a claim, that the claim is withdrawn.

ECHR—freedom of speech—in the Act, reflecting Article 9 of 95/46/EC. It acknowledges that journalists and the media must be allowed to process data about individuals without having their activities, including newsgathering, investigations and publication, stifled by the Act's requirements. However the Act does not define what the public interest means. What it does say is that, in considering whether a data controller's belief was "reasonable", then there may be reference to any relevant code that falls within the Statutory Instrument.

Two of the leading cases that explored how the courts have interpreted s.32 have already been identified: *Campbell* and *Douglas v Hello*. In terms of arguments within these two cases on issues relating to the Act, it is the reasoning they provide when s.32 works to prevent a successful claim of s.13 damage and distress that is of interest. Under s.2 of the Act "sensitive personal data"[168] may include—depending on the context—photographs taken of an individual.[169] Such data cannot be processed unless one of the conditions in Schedule 3 of the Act is met. Section 3 of the Act contains an important definition of "special purposes": as stated earlier this means for journalism or art or for literary purposes.[170] Combined with s.4 (4), s.27 (1) and s.32 the effect is that—in certain circumstances—the processing of data for the special purposes is exempt from all but one of the data protection principles, concerning data security.

6–024 In *Campbell* the first instance judge, Morland J, followed a detailed route for his decision. Firstly he considered whether the personal data was "sensitive personal data" within s.2. He found that it was. Then, he considered whether the defendant was exempted from liability under s.32. His reasoning on this point (struck down by the Court of Appeal), made on the basis of looking at Directive 95/46, practitioner texts and *travaux préparatoires*,[171] was that s.32 covered *only* pre-publication processing. Given that the s.32 exemption did not apply, had there been a contravention of the first data protection principle under s.4(4)? He found there had been such a contravention and concluded that Piers Morgan, the defendant editor, had failed to establish the s.13(3) defence.[172] In terms of compensation Ms Campbell was awarded £2,500 for both breach of confidence and the data protection breach—the latter subsumed and dependent on the breach of confidence claim in the House of

[168] Including racial or ethnic origins of the data subject, political opinions, religious beliefs or other beliefs of a similar nature, trade union membership, physical or mental health, sexual life and offences allegedly or actually committed together with their disposal or sentence by a court. Tax and other fiscal matters are excluded.

[169] Particularly a photograph—irrespective of ethnicity—that showed Ms Campbell leaving an NA meeting, a matter touching generally on her physical and mental health.

[170] That s.3 of the Act "(a) for the purposes of journalism; (b) artistic purposes; and (c) literary purposes" is a particularly broad and media-protective definition was reinforced domestically by the Supreme Court in *Sugar v BBC* [2012] UKSC 4 and in EU jurisprudence by Case C-73/07 *Tietosujvaltuutettu v Satakunnan Markkinopörssi.*

[171] See Tugenhat and Christie *The Law of Privacy and the Media* 2nd edn (Oxford University Press 2011) [6.104].

[172] "In my judgment the Defendant has utterly failed to establish a section 13 (3) defence. Indeed in his evidence Mr Piers Morgan made it clear that in his opinion the Claimant had lost all rights to privacy." Morland J [121].

Lords—and then a further £1,000 aggravated damages for a second publication of slightly different details. In *Douglas* Lindsay J found that there were no grounds that *Hello* could have reasonably believed that publication of a private wedding event was in the public interest.[173] In respect of the DPA damages, £50 was awarded.

The Court of Appeal in *Campbell* construed s.32 broadly—and as sequential steps —with the defendant being required to (and succeeding in) meeting all the requirements of subsections (1) (a), (b) and (c).[174] The information formed "a legitimate, if not essential part of the journalistic package designed to demonstrate that Ms Campbell had been deceiving the public". The public interest reasons identified were her possession of Class A drugs, that she was a role model for young people, that she had held herself out as someone who never used drugs—drug use being prevalent in the fashion industry—and that she had lied about her drug use so permitting the media to put the record straight. This reasoning was not tested further because the claim under the Act was "silent" in the House of Lords. The final decision was arguably distorted because the issues about the protection of privacy in personal information became absorbed into and parasitic on the outcome of the breach of confidence exercise balancing Articles 8 and Article 10. They deserved to be treated as separate entities. The Court of Appeal's reasoning, itself, is questionable. It had found that the Directive and the Act were aimed at the processing and retention of data "over a sensible period"[175] although this phrase is not referred to anywhere. Rather, the fifth data protection principle provides that personal data are not to be kept for longer than is necessary for the purpose for which they are being processed. The remedies available for breaches of the data protection principles were stated to be "not appropriate for the data processing which will normally be an incident of journalism".[176] Yet all the remedies with which the Court of Appeal was concerned—like rectification and erasure—were discretionary ones.[177] Also, that it was impractical for the press:

> "to comply with many of the data processing principles and the conditions in Schedules 2 and 3, including the requirement that the data subject has given his consent to the processing."[178]

6–025 In principle there is nothing manifestly impractical in the press complying with the data processing principles. In particular, the data subject's consent—which Part II of Schedule I may require for the processing to be lawful—is tempered by what is practicable. That the requirement to satisfy a condition in Schedule 3 would "effectively preclude publication of any sensitive personal data" since otherwise there "would be a string of claims for distress under s.13" for which "there would be no answer. . .even if the publication in

[173] *Douglas v Hello!* [2003] EWHC 786 Ch [230–239]. Even if the exemption had been available, Lindsay J found that *Hello* had broken the PCC Code.

[174] When the case went to the House of Lords, Counsel for the parties agreed that the data protection issue should stand or fall on the result of the rest of the case. As a result there was no further exploration in the House of Lords of the DPA.

[175] *Campbell v MGN Ltd* [2002] EWCA Civ 1373 [121].

[176] *Campbell v MGN Ltd* [122].

[177] *P v Wozencroft (Expert Evidence: Data Protection)* [2002] EWHC 1724.

[178] *Campbell v MGN* [122].

question had manifestly been in the public interest"[179] is the kind of "floodgates" judicial reasoning[180] that has hampered the development of the Act generally. To suggest that the requirement to satisfy a condition in Schedule 3 is an unwarranted restriction on the press creates a climate where unrestricted press publication of the most private of personal information—"sensitive personal data"—without redress ignored the very thing the Directive strives to protect. It transpired that much of the phone-hacked data was this kind of sensitive personal information.[181]

Section 32 of the Act will always be fact-sensitive. Surreptitiously taken photographs of celebrities are always going to attract particular scrutiny.[182] Any personal information that is obtained through a subterfuge or by deception may not have been processed "fairly"[183] in terms of the first data protection principle.[184] This was a point pressed by Robert Jay QC in questions to Richard Thomas and Christopher Graham (past and current Commissioners) in respect of illegally obtained ex-directory celebrity telephone numbers.[185] He wanted to know why, in the light of information about this kind of activity from *Operation Motorman*, the Commissioners had not served s.43 Information Notices on newspaper titles under the Act and in pursuance of their duty under s.51 to promote good practice. The answers were, from Mr Thomas: "I can't think of any occasions I was personally involved in where this power was used" and from Mr Graham:

> ". . .if the point is . . .that Section 32 covers the writing of this piece, but it doesn't cover the obtaining of the evidence, I find that, well, a challenging distinction about which I would need to think further".

When the additional hurdle of lawful processing is factored in the apparent burden on the media appears onerous. Practically this is not the case because of the structure of the way this section operates.

6.5.2 The Dynamics of s.32

6–026 If the tests in s.32(1) are met, and the newspaper—as data controller—reasonably believes that compliance with the relevant data protection

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[179] *Campbell v MGN Ltd* [122–124].

[180] Described at 6.2.4 to 6.2.7.

[181] The circumstances in which such material could legitimately be used is set out in The Data Protection (Processing of Sensitive Personal Data) Order 2000 (SI 2000/417).

[182] On this point, the arguably unperceivable differences—save the conflicting results—between *von Hannover 1* (2005) 40 EHRR 1 and *von Hannover 2* 40660/08 [2012] ECHR 228 turn on whether the photographs were taken surreptitiously: R. Callender Smith "From von Hannover (1) to von Hannover (2) and Axel Springer AG: do competing ECHR proportionality factors ever add up to certainty?" 2013 *Queen Mary Journal of Intellectual Property* Vol.2 No.4 388–392.

[183] Note the conflict that now exists on this between *Von Hannover I* and *Von Hannover II* noted above and the issues raised by phone hacking pre- and post-HRA 1998.

[184] A recent example is the "blagging" call made by two Australian radio's *2DayFM* presenters on 5 December 2012 to the King Edward VII hospital in London where the Duchess of Cambridge was a patient.

[185] Respectively Day 14, 9 December 2011, evidence transcript p 18 line 24 and p 19 line 1 and Day 32, 26 January 2012, p 31 lines 3–7.

provision means that either publication of the material which would be in the public interest to publish would not be possible or that he would be unable to do so effectively or fully, then he is not bound by the particular data protection provision (except principle 7, the security principle). This allows the editor to disregard the prohibition on processing sensitive personal data, the requirement for legitimacy of processing and the prohibition on overseas transfer if there is a reasonable belief that the s.32(1) tests are made out. The balancing test—assessing whether the publication is in the public interest and whether the relevant data protection provision would be incompatible with publication—is likely to be difficult where the editor seeks to avoid compliance with these fundamental provisions but the effect of s. 32(4) puts off the examination of all of this until after publication of material.

This inbuilt restriction on prior restraint continues to apply to any processing which is undertaken "with a view to publication" and lasts for as long as there is an intention to publish. This allows the media to resist proceedings brought by an individual to enforce rights under sections 7, 10, 12 or 14(1) – (3). The media can insist that the individual's proceedings are halted until the Commissioner has made a determination that the processing is no longer carried out for the special purposes or is not carried out only for the special purposes. The practical effect of this is to allow the media to have proceedings stayed until after publication of the relevant material.

This introduces a novel situation, which does not appear to be reflected in any other area of English law, where specific factual issues are transferred from the jurisdiction of the court to a regulatory official—the Commissioner—for an external determination on whether the exemption was correctly applied. The Commissioner's determination[186] is limited to whether the personal data were or were not being processed only for the special purposes. If he decides that the special purposes test is not met then he can lift the stay on the court proceedings. At that stage the media can appeal to the Information Rights Tribunal against that determination. As one commentator has noted:

> "It is not apparent why Parliament decided that the determination has to be made by the Commissioner. It would be far simpler for the courts to make appropriate determinations as to whether the processing was being carried out for the special purposes. The court seized of the matter would be able to hear witnesses on the claim and cross-examination on the issue. The Commissioner is not in a position to do this."[187]

Even if, on complaint by a celebrity data subject, the Commissioner considered issuing a s.44 notice[188] on the media to enable him to make an advance determination under s.45 he would need to have reasonable grounds for suspecting the media of malpractice in respect of that specific individual. In effect, the Commissioner faces a difficult evidential burden before he can even seek information from the media. The media, however, can assert the exemption in court proceedings as of right without exposing their processes and

[186] Under s.45 of the Act.

[187] Rosemary Jay *Data Protection Law and Practice* 4th edn (Sweet & Maxwell 2012) 580.

[188] A special information notice under s.44 can only be served where one of two conditions applies. Either the Information Commissioner has received a request under s.42 or a stay has been claimed under s.32.

procedures to the scrutiny of the court before claiming the statutory stay. The proportionality of the effect of this is particularly strained—even in defence of the media's Article 10 rights—because the right of the media to appeal the Commissioner's s.45 determination to the Information Rights Tribunal (with further appeals possible against the Tribunal's decision) adds in additional time that could be measured in years rather than weeks or months.

6.5.3 The Origins of s.32

6–027 Philip Coppel QC wrote a 17-page opinion for the Leveson Inquiry[189] that was highly critical of the way in which s.32 had evolved. His approach highlighted the concerns of Lord Lester of Herne Hill, in the House of Lords debate on the Bill, warning that it failed to implement Directive 95/46, that it was not Article 8 compliant and "authorised interference by the press with the right to privacy in breach of Article 8 of the ECHR."[190]

Agreeing with Lord Lester, the Opinion concluded that the practical effect of the *Campbell* litigation had been that breach of privacy claims were now principally brought under the HRA, rather than under the Act because:

> "Data protection law is technical and unfamiliar to most judges. . ..applications for summary judgment on such claims are, for the moment at least, unlikely to find favour."[191]

The Leveson Report summarised Mr Coppel's evidence about s.32 as:

> ". . ..where journalism is concerned undoubtedly, once you're in section 32 territory, then the protection which is given to an individual's privacy almost entirely falls away. All you have to do is touch section 32 in some way, shape or form and the contest which the Act is supposed to embody between the right of expression, freedom of [expression], and an individual's personal privacy has all been tilted one way. In other words, the journalist is made arbiter of the balance, and the balance in turn falls to be made on the basis of matters exclusively within the knowledge of the journalist, including matters inaccessible because of the extensive protection provided for journalists' sources. He goes on to argue that s.32 'does not recognise any right to privacy. It's there, its sole objective is to cut away at the right of privacy, and at the end of it, certainly after the decisions of the court, there is nothing left of that right.'"[192]

The Report concluded that specific revisions to s.32 should be made and that the existing limitations on the subject access right designed to safeguard third party information should be resolved by a provision to the effect that the right of subject access was not intended to displace the general law on the inaccessibility of journalists' sources.[193] This portion of the Report—while suggesting the kind of privacy accommodations that needed to be crafted in law and in Codes of Practice to rebalance the Article 8 and Article 10 equation—creates currently unmet challenges for any government seeking to take the suggestions forward in legislation. Equally the media may face a similar problem in articulating why the recalibration exercise to create proportionality in this forum, given the spotlight turned on it by Leveson, should not take place.

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189 Dated 28 June 2012.
190 [61] of the Opinion.
191 Quoted at [68] from *Imerman v Tchenguiz & ors* [2009] EWHC 2024 (QB).
192 Leveson Report Vol. 3 Part H [2.7–2.8] at 1070.
193 Leveson Report Vol. 3 Part H [2.59–2.60] at 1082.

That is all for the future (if it happens at all) and no Government-sponsored draft legislation in this area is currently on the horizon.

The tone of the Commissioner's response[194] to the Leveson Report made it clear that his office was not keen to mix its current responsibilities—and those that might eventually emerge from the EU's Data Protection Regulation—with those of a back-stop press regulator. In the event the s.32 consultation was closed in August 2013, there having been only 16 responses,[195] and the Commissioner decided simply to issue general guidance to the media—which is not binding—on data protection.

6.6 SUMMARY

6–028 The data protection regime in the UK is still in a state of flux and development. Looked at positively it is a slowly maturing set of principles and civil remedies which should aid celebrities and private individuals to protect their privacy and reputations as well as the integrity and security of personal data and sensitive personal data held and being processed about them. Until recently the practical realities did not match this potential.

The roots of the Leveson Inquiry—the determined and industrial-scale of the illegal and unlawful attempts on behalf of certain media to hack into and monitor the movements of and personal data about the royal family, members of the royal household and a raft of other celebrities—lie in an ineffective and limited investigation by the Commissioner in *Operation Motorman*.

The data protection regime has not served celebrities well until very recently, particularly in terms of phone hacking. Successive Commissioners' views about whether illegally obtained ex-directory phone numbers were within or outside current s.32 protection demonstrated a confusion which is unsatisfactory. The regime had clearly failed to accommodate celebrity needs and expectations in terms of their privacy. It had not been much more effective in the context of litigation and judicial interpretation.

While much of the press focus now concentrates on its self-created regulator IPSO there had been less media coverage about what that Report stated about the lack of vigour and vigilance in terms of the protection of personal data by the Commissioner at the time.

At a domestic level the recently-decided litigation and jurisdictional issues should help provide additional clarity to untested areas involving proportionality generally and specifically to celebrity data protection rights. *Google Spain*—and its transforming effect of English case law—is as significant for its jurisdictional aspects as the practical effects of the result itself.

The UK's data protection regime is struggling to become mature and effective. As it tries to do this there is, on the horizon, the prospect of substantial changes as a result of the EU's proposed Data Protection Regulation. That

[194] 7 January 2013: *http://ico.org.uk/news/~/media/documents/consultation_responses/ico_response_to_leveson_report_012013.ashx*

[195] *http://ico.org.uk/news/blog/2013/~/media/documents/library/Data_Protection/Research_and_reports/framework-consultation-summary-of-responses.pdf*

lack of stability—in anticipating its final content and the eventual regime it may create—adds additional uncertainty and lacks focus within the current regime. As a regime to protect celebrity privacy by litigation, coupled with effective enforcement by the Regulator, it has all the elements to become an effective remedy for the future. At least Naomi Campbell created the spark that others since have been able to kindle into a potent fire in terms of DPA litigation.

CHAPTER 7

DEFAMATION ACT 2013 AS A PRIVACY REMEDY

7.1 Introduction

7–001 As was stated earlier in this book the context of what follows in relation to defamation is narrow and viewed in relation to the perceived early effects of the Defamation Act 2013.[1] It may seem counterintuitive to deal with defamation as a celebrity privacy remedy at all. After all, at its heart, defamation is an assertion by the apparently injured party that he or she has been wronged by particular allegation or set of allegations in a publication. The defamatory allegation needs to be particularised and, in doing so, involves the inevitable re-publication engendered by the action taken by the claimant. In itself, this is something which is likely to draw additional attention to what is claimed to be defamatory. If the publisher of the defamatory words is going to rely on the defence of truth at trial of the action then, by virtue of the established 19thcentury rule in *Bonnard v Perryman*, the courts are currently unlikely to issue an injunction to prevent re-publication of the defamatory statement until the action is concluded.[2] Using the protective shield of harassment, however, can avoid the effects of this rule.[3]

Practically, this places at the end of the whole process any remedy that the successful claimant might have in damages together with the possibility of an injunction to prevent any further publication of the defamatory material. It means that the trial of the issue can only result in further a public exploration of the apparently defamatory statement, something which is a considerable distance away from the kind of private exploration of the issues that most claimants—celebrity or otherwise—would prefer.

It is for this reason that, if a particular statement or publication involves private information, then most claimants will seek to characterise that material as private information rather than defamatory information so that the chances of securing an interim injunction to prevent *any* publication of the information are increased. As will be seen shortly, mischaracterisation of an action in this area by a claimant can have the additional and unintended effect of creating additional publicity if what was hoped for was an interim

[1] Three of the major practitioners' texts that provide the detail in comprehensive form are *Gatley on Libel and Slander* 12th edn (Sweet & Maxwell 2013), *Collins on Defamation* (OUP 2014) and *Duncan and Neill on Defamation* 4th edn (LexisNexis 2015).

[2] *Law Society v Kordowski* [2011] EWHC 3185 (Q.B.).

[3] *Brand & Goldsmith v Berki* [2014] EWHC 2979 (Q.B.).

injunction to prevent private information being revealed at all. This can occur when, on scrutiny by the court, the claim is found more properly to be characterised as defamatory information—or at least not private information[4]—for which no injunctive remedy is available in the face of the defence of truth.[5]

The rule in *Bonnard v Perryman* may eventually have to bow to the leavening effect of Lord Steyn's "ultimate balancing test" between Article 8 private life and the countervailing Article 10 freedom of speech rights as the law develops.[6] English case law—reflecting a line of decisions from the ECtHR in Strasbourg—now recognises that the right to an individual's reputation is indeed one which is protected by Article 8.[7] The argument that has to be addressed and resolved in the future is how its practical effect is to be adjusted if the rule in *Bonnard v Perryman* over-balances and over-values Article 10 in a way which jars with the required proportionality assessment between the two apparently equal rights.[8]

7–002 Defamation actions, however, clearly retain their attractions as a privacy remedy on the celebrity claimants' side of the litigation equation.[9] A successful claimant's action means there will be a public judgment which vindicates the celebrity's reputation together with an award of damages.[10] Where

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[4] *YXB v TNO (No 2)* [2015] EWHC 826 (QB): the case involved the Manchester United FC player Marcos Rojo. See also: *http://www.dailymail.co.uk/sport/football/article-3026050/I--threatened-three-years-jail-daring-expose-Manchester-United-star-Marcos-Rojo.html* This case picks up on and emphasises what was said in *Terry v Persons Unknown* [2010] EWHC 119 (QB) about the need for proper evidence from a claimant seeking a privacy injunction. Material non-dislosure may be a reason for discharging an interim injunction in privacy and may also be a highly relevant factor in considering whether any further injunction should be re-imposed.

[5] *RST v UVW* [2009] EWHC 2448 (QB); *Terry v Persons Unknown* [2010] EWHC 119 (QB) and *Starr v ITV & others* (October 2012: unreported) when, on 3 October 2012, Freddie Starr obtained an ex parte injunction from the duty QBD Judge, Laura Cox J, preventing the media making any reference to a libellous allegation made against him by a woman following revelations about Jimmy Savile. The injunction was overturned the following day by Tugendhat J because, in the light of the rule in *Bonnard v Perryman*, it should never have been granted. Starr also had to pay £10,000 indemnity costs in respect of the media. The CPS subsequently investigated the allegations and Starr was not prosecuted: *http://www.theguardian.com/uk/2012/oct/04/freddie-starr-itv-injunction?newsfeed=true*.

[6] *In re S* [2004] UKHL 47 [17].

[7] *Guardian News & Media* [2010] 2 WLR 325, Lord Roger at [37–42], reflecting on the ECtHR decision in *Karakó v Hungary (Application No 39311/05)*.

[8] See *Merlin Entertainments v Cave* [2014] EWHC 3036 (QB) [41] where Laing J said—in the face of repeated publication of defamatory statements in respect of the safety of rides in an adventure park—that the real question then is "whether the conduct complained of has extra elements of oppression, persistence and unpleasantness" which "are distinct from the content of the statement" and it therefore crosses the line to constitute harassment. See also *Brand and Goldsmith v Berki* [2014] EWHC 2979 (Q.B.); *QRS v Beech* [2014] EWHC 3057 and [2014] EWHC 3319 (QB).

[9] Since the beginning of 2015—and although there is some duplication as individual actions move through their procedural challenges—there have been more than 20 BAILII-reported libel hearings recorded in *Inforrm's* Table of Cases *https://inforrm.wordpress.com/table-of-cases-2/* These clearly outweigh other reported media law cases for the same period such as those in respect of Data Protection Act 1998 breaches (1), the Freedom of Information Act 2000 (1), Misuse of Private Information (3), Phone Hacking (1) and the Protection of Harassment Act 1997 (2).

[10] General damages are capped at around £250,000. Special and exemplary damages exist but are rarely claimed or awarded.

defendant publications admit liability then Apologies and Statements in Open Court are also effective celebrity remedies where these form part of the settlement of the action.[11] The courts cannot force defendants to publish apologies or join in the making of Statements in Court, although these are frequently agreed terms in such settlements.

However disputes, even within this apparently straightforward process, can arise as a recent example which went to the Court of Appeal demonstrated. In *Associated Newspapers v Murray*[12] the author JK Rowling's claim for libel was met with an unqualified offer of amends in accordance with the Defamation Act 1996 ss.2–4 which she accepted. She successfully contended that an article published in the *Daily Mail* bore the meaning that she "had given a knowingly false account of her time as a single mother in Edinburgh in which she had falsely and inexcusably accused her fellow churchgoers of behaving in a bigoted, un-Christian manner towards her, of stigmatising her and cruelly taunting her for being a single mother." She proposed making a unilateral statement in open court but D argued that part of the proposed statement was not consistent with the pleaded meaning, addressing matters going to damages that were not pleaded at all. Tugendhat J dealt with the application on paper and concluded that she could read it in open court.[13]

At the Court of Appeal the issues had narrowed considerably. The focus was on whether Tugendhat J had been wrong to have granted permission for the Respondent to use the word "dishonest" in the statement. As it did not appear in the meaning complained of (and in respect of which the offer of amends had been made) *Associated Newspapers* argued unsuccessfully that the word gave "an impermissible 'moral colour' to the meaning the Defendant conceded the article bore" and that this was "unfair to the defendant".

Lady Justice Sharp delivering the unanimous opinion of the court found that the use of the word "dishonest" did not change the position.

> "The allegation complained of is that the claimant had given a knowingly false account of her time as a single mother in which she falsely and inexcusably accused her fellow churchgoers of behaving badly towards her. This pleaded meaning is accurately and unambiguously set out in the draft statement, where, as can be seen, it is stated in terms that this is what the article alleged. . .. It is plain beyond sensible argument. . ..that anyone hearing the statement being read, or reading it could be in no doubt that this is the meaning complained of. Nor would such a notional third party be misled as to the defendant's position. A later passage from the unilateral statement, about which the defendant does not complain, expressly records that the defendant accepts as 'completely false and indefensible' 'the allegations' i.e. the accurately recorded pleaded meaning. The premise of the defendant's argument on this appeal is therefore a flawed one.[14]
>
> In my opinion, the one word to which the defendant objects does not change the position. The sentence of which it is a part, is no more than the expression in ordinary and less formal language of the correctly identified pleaded meaning. It is indubitably true that the word 'dishonest' is not actually used in the pleading, but . . ..it is impossible to see how the claimant could have given an account which she knew to be false (and which contained false and

[11] *Winslet v Associated Newspapers Ltd* [2009] EWHC 2735 (QB) and Practice Direction 53 [6.2]. This remedy allows others to publicise the fact that the defamation claim has settled and to publish the Statement without any liability for repeating the defamatory material.

[12] *Associated Newspapers v Murray* [2015] EWCA Civ 488.

[13] *Murray v Associated Newspapers Ltd* [2014] EWHC 1170 (QB).

[14] *Associated Newspapers v Murray* [2015] EWCA Civ 488 [22].

inexcusable allegations against her fellow churchgoers) without being dishonest. References to different hypothetical examples, and to the use of the word 'dishonest' in other contexts, do not take the defendant's case on this point any further."[15]

As has been indicated defamation, as a cause of action, underwent radical statutory rationalisation and restructuring with the Defamation Act 2013. Prior to its enactment there had been general concerns about the way the existing law of defamation balanced freedom of expression with the protection of reputation. There had been additional concerns about reducing costs and making the action itself more accessible. Defamation itself obviously had needed to adapt to the new online environment with all the challenges that it contained in terms of jurisdiction, anonymity and the extensive dissemination of content. As a result, part of the purpose of the Defamation Act 2013 was to clarify and ostensibly to increase the accessibility of the law of defamation while, at the same time, introducing substantive changes including those designed to provide a framework for tackling defamation on the internet.

Many of the existing common law defences were specifically abolished but it was emphasised,[16] from the start, that courts could and should consider the established case law as a guide to the practical interpretation of the Act as its provisions were subsequently tested in litigation following on from the date it came into effect on 1 January 2014.[17] Although there has yet to be an avalanche of litigation that establishes the outer boundaries of the new statutory action, there have been a number of significant cases during 2014 and the first half of 2015—particularly involving celebrities—which are helpful in showing the direction of travel which the development of the new definitions, procedures and defences may take.

Some brief basic principles are set out first, the protected statutory right is then examined and then the permitted statutory interferences, in the form of the defences or statutory protection, are explored.

7.2 Basic Principles

7–003 The law recognises that everybody has a right, during their lifetime, to the protection of their personal and professional reputation from unjustifiable attacks. Generally, a claimant must bring a defamation action within one year from the date of publication.[18] If the defamatory statement is published in a permanent form then it is libel.[19] Individuals need to be alive to bring

[15] *Associated Newspapers v Murray* [2015] [23].
[16] Explanatory Notes to Defamation Act 2013.
[17] While the Defamation Act 2013 applies to causes of action occurring after its commencement on 1 January 2014 the pre-existing libel law applies to defamation cases where the events complained of took place before its commencement so 2015 may still see the reporting and resolution of such earlier causes of action.
[18] This time can be extended by republication. See, most recently, the unfortunate series of events in June 2014—following an earlier settlement in April 2014 between the same parties—involving *The Times* and the solicitors Hodge, Jones & Allen LLP *http://inforrm.wordpress.com/2014/11/26/news-statement-in-open-court-times-apologises-to-hodge-jones-allen-and-agrees-to-pay-damages/*
[19] This includes a wax effigy: *Monson v Tussauds* [1894] 1 QB 671, an advertisement: *Tolley v Fry*

a defamation action.[20] If it relates to transient forms, such as the spoken word or gestures, the defamatory statement is slander. Libel and slander are actionable in different ways: only libel is examined here.

Publication on the internet can create a libel claim, even if defamatory posts on a social media site are quickly removed or are only seen by a limited audience.[21] As will be seen later, s.5 of the Defamation Act 2013 introduced a new defence for website operators who act promptly and follow the statutory procedures.[22] Theatrical performances constitute publication in permanent form and may be libellous,[23] as are television and radio broadcasts.[24]

There are four basic elements that a claimant needs to prove to demonstrate successfully that they have been defamed. Firstly, that the statement is defamatory; secondly, that it refers to the claimant; thirdly—since the Defamation Act 2013 came into force—that the "serious harm" test has been met—and finally, that the statement has been published to a third party. The precise definition of "defamatory" has historically remained flexible, allowing the cause of action to adapt to changing times and altering values.[25] Actionable statements include those which injure a claimant's reputation by—among other things—suggesting dishonesty, incompetence, unfitness, criminal or moral wrongdoing, damage his standing in the community or which leave him open to abuse or criticism.[26]

The distinction between a statement which is potentially defamatory and one which is "mere" or "common" abuse and which is not defamatory is,

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[1931] AC 333 and the soundtrack synchronised to an early film: *Youssoupoff v MGM Pictures* (1934) 50 TLR 581.

[20] Death, even though a libel action has started, extinguishes the claim.

[21] In *Applause Store Productions Ltd v Raphael* [2008] EWHC 1781 (QB) the defendant was found to have libelled the claimant when he created a fake, defamatory *Facebook* profile in the name of the claimant, and in *Cairns v Modi* [2012] EWHC 756 (QB), Chris Cairns, a former New Zealand cricketer, successfully sued Lalit Modi for libellous remarks that Mr Modi posted on Twitter (which was seen by 65 people) to the effect that Mr Cairns fixed cricket matches. Bean J awarded general damages of £75,000 and an additional £15,000 to reflect the "sustained and aggressive assertion" of the plea of justification, an award that was upheld on appeal: *Cairns v Modi and KC v MGN Limited* [2012] EWCA Civ 1382. If nothing else, this award shows the financial consequences of relying unsuccessfully on the rule in *Bonnard v Perryman*. On 16 January 2015 at the Central Criminal Court Mr Cairns pleaded not guilty to perjury and perverting the course of justice by inducing fellow cricketer Lou Vincent, during a Skype call, to provide a false witness statement. The trial took place at Southwark Crown Court in October 2015.

[22] Defamation (Operators of Websites) Regulations 2013/3028.

[23] Theatres Act 1968 s.4 (1).

[24] Broadcasting Act 1990 s.166.

[25] For instance homosexuality was illegal until 1967. Part of the defamatory "sting" that in 1956 allowed the celebrity US pianist Liberace to recover £8,000 from the *Daily Mirror* and its columnist Cassandra (William Connor) – when he described Liberace as ". . .the summit of sex—the pinnacle of masculine, feminine, and neuter. Everything that he, she, and it can ever want. . . a deadly, winking, sniggering, snuggling, chromium-plated, scent-impregnated, luminous, quivering, giggling, fruit-flavoured, mincing, ice-covered heap of mother love"—was the phrase "fruit-flavoured". "Fruit" was US slang for "gay".

[26] See *Sim v Stretch* [1946] 2 All ER 1237 when Lord Atkin [1240] suggested that statements were defamatory when they "tend to lower the plaintiff in the estimation of right-thinking members of society generally". In *Youssoupoff v MGM Pictures Ltd* (1934) 50 TLR 581 defamatory words were characterised as amounting to "an attack on a man's reputation or character; they must tend to disparage him in the eyes of the average sensible citizen."

unsurprisingly, a narrow one which has considerable practical implications. This was demonstrated in the 2014 "Plebgate" three-party libel action involving the former Conservative Chief Whip, Andrew Mitchell MP, *The Sun* and PC Tony Rowland.[27] There, in a curious reversal of linguistic reasoning, Mr Mitchell was happy to be attributed with having used the word "fucking" in respect of PC Rowland but denied using the epithet "pleb" because he regarded that as defamatory.[28] PC Rowland, in his evidence, said he was unworried whether or not he had been called a "pleb".[29] This case presented a practical example of the utility of holding a preliminary hearing to decide the meaning of the words complained of rather than leaving them at large to be determined during a full trial. The judgment from Mitting J is an example of just how much greater clarity exists in the factual reasoning process when it is made the subject of a judicial determination rather than the unreasoned conclusion of an answer to a question put to a jury.

7–004 Once the meaning is established the parties may then be in a position to settle. The statutory regime established within the Defamation Act 2013 encourages this approach, well-demonstrated in a decision just before the Act came into force. In *Lord McAlpine of West Green v Bercow* [2013] EWHC 1342 (QB),[30] Tugendhat J determined, at an interlocutory stage, the meaning of a tweet sent by Ms Bercow[31] at around the time of a *BBC Newsnight* broadcast which had led to false suggestions that Lord McAlpine was a paedophile.[32] He held that the phrase "innocent face" was "insincere and ironical"[33] and that the tweet was not a genuine request for information.[34] The case then settled without going to trial because he decided

> "that the Tweet meant, in its natural and ordinary defamatory meaning, that the Claimant was a paedophile who was guilty of sexually abusing boys living in care".[35]

As the *Mitchell* case demonstrated, s.11 of the Defamation Act 2013 also effectively abolished jury trial for defamation cases. The effects of this change are discussed more fully and separately.[36]

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[27] *Mitchell v NGN & Rowland v Mitchell* [2014] EWHC 4014 (QB) & [2014] EWHC 4015 (QB).

[28] Plebeian: (in ancient Rome) a commoner; in this contemporary context, a member of the lower social classes.

[29] PC Rowland's case was that Mr Mitchell said to him, as the MP tried to exit through a security side gate with his bicycle: "Best you learn your fucking place. You don't run this fucking government. You're fucking plebs." The PC replied: "Please don't swear at me, sir. If you continue to do so I will have no option but to arrest you under the Public Order Act." During the trial he told Mitting J that, during the exchanges with Mr Mitchell, the word "pleb"—which he claimed not to have known the meaning of at the time—had been an "irrelevance", because he was more concerned about the swearing.

[30] *Lord McAlpine of West Green v Bercow* [2013] EWHC 1342 (QB).

[31] At the time, the wife of the Speaker of the House of Commons, John Bercow MP.

[32] The tweet read "Why is Lord McAlpine trending? *Innocent face*".

[33] *Lord McAlpine of West Green v Bercow* [2013] EWHC 1342 (QB) [84].

[34] Whether that is the correct characterisation is arguable but the matter settled. See *https://inforrm.wordpress.com/2013/05/24/case-law-mcalpine-v-bercow-no-2-sally-bercows-tweet-was-defamatory-hugh-tomlinson-qc/#more-21410* and *https://inforrm.wordpress.com/2013/07/03/the-search-for-meaning-sally-bercow-and-sally-morgan-owen-ororke/*

[35] *Lord McAlpine of West Green v Bercow* [2013] EWHC 1342 (QB) [90].

[36] At 7.3 in this Chapter.

There are well-established principles on how to determine the meaning of defamatory words.[37] These are:

> ". . ..(1) The governing principle is reasonableness. (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. (3) Over-elaborate analysis is best avoided. (4) The intention of the publisher is irrelevant. (5) The article must be read as a whole, and any 'bane and antidote' taken together. (6) The hypothetical reader is taken to be representative of those who would read the publication in question. (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which 'can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation'. . .. (8) It follows that 'it is not enough to say that by some person or another the words might be understood in a defamatory sense'."

The reference to "bane and antidote" in the passage above prevents the "cherry picking" of certain phrases, photographs or captions from the totality of the article.[38] Words can have a natural, ordinary meaning on one level yet contain a defamatory innuendo.[39] An example of the latter occurred in *Lewis v Daily Telegraph*:

> ". . ..to say of a man that he was seen to enter a named house would contain a derogatory implication for anyone who knew that that house was a brothel but not for anyone who did not".[40]

Whether the words are or are not *capable* of being defamatory is a question of law. Whether they are defamatory is a matter of fact. In addition, the defamatory words need to have been published to a third party.

Finally, in this brief outline of the basic principles, it is also necessary for the claimant to prove that he is the person referred to. Often this is simple. Partial identification, however, is no bar to an action.[41] This can extend the scope of defamatory damage, as in *Riches v News Group Newspapers*,[42] when

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[37] *Jeynes v News Magazines Ltd* [2008] EWCA Civ 130 [14] per Sir Anthony Clarke MR.

[38] *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65 where the faces of two well-known soap opera actors—who played Harold and Madge Bishop, a respectable married couple, in the popular Australian television serial *Neighbours*—were superimposed on the bodies of models striking pornographic poses to illustrate a story about how the makers of a pornographic computer game had misused the actors' images in their game.

[39] *Jones v Skelton* [1963] 1 W.L.R. 1362. Lord Morris of Borth-y-Gest [1370]: "The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge, but is a meaning which is capable of being detected in the language used, can be a part of the ordinary and natural meaning of words."

[40] *Lewis v Daily Telegraph* [1964] AC 234, Lord Devlin [278]. Also *Tolley v JS Fry & Sons* [1931] AC 333: Cyril Tolley, a well-known amateur golfer, recovered damages when his image was used in a chocolate advertisement because of the innuendo that he had been paid for the endorsement and prostituted his amateur status.

[41] *Knupffer v London Express Newspaper Ltd* [1944] AC 116 at [119]: "Where the plaintiff is not named, the test which decides whether the words used refer to him is the question whether the words are such as would reasonably lead persons acquainted with the plaintiff to believe that he was the person referred to." Also *E Hulton & Co v Jones* [1910] AC 20 and *Newstead v London Express Newspaper* [1940] 1 KB 377.

[42] *Riches v NGN* [1986] QB 256.

ten police officers from Banbury CID successfully argued that a report alleging that a member of Banbury CID had raped a woman was defamatory for all of them.[43]

The classic approach to identification in respect of a group of people or a class comes from the test enunciated by Viscount Simon LC in *Knupffer v London Express Newspaper*.[44] He observed:[45]

> "Where the plaintiff is not named, the test which decides whether the words used refer to him is the question whether the words are such as would reasonably lead persons acquainted with the plaintiff to believe that he was the person referred to. There are cases in which the language used in reference to a limited class may be reasonably understood to refer to every member of the class, in which case every member may have a course of action. A good example is *Browne v DC Thomson & Co*,[46] where a newspaper article stated in Queenstown 'instructions were issued by the Roman Catholic religious authorities that all Protestant shop assistants were to be discharged,' and where seven pursuers who averred that they were the sole persons who exercised religious authority in the name and on behalf of the Roman Catholic Church in Queenstown were held entitled to sue for libel as being individually defamed. Lord President Dunedin in that case said: "I think it is quite evident that if a certain set of people are accused of having done something, and if such accusations are libellous, it is possible for the individuals in that set of people to show that they have been damnified, and it is right that they should have an opportunity of recovering damages as individuals."

The importance of deciding exactly what a defamatory class statement would reasonably be understood to mean—given its context—has a further significance because of the dangers of the risk of what amounts to a "chilling effect" arising out of the fact that

> ". . ..discussion of matters of public concern may be inhibited if the law is too ready to hold that an individual is identified by an attack on a group in which the individual is not named".[47]

7.3 Jury Trial and s.11 of the Defamation Act 2013

7–005 Previously—in the more expansive tradition of defamation's historical[48] and procedural roots—the trial judge decided whether a statement was capable of bearing a defamatory meaning and the jury decided whether, on the facts of the case, it was defamatory. Now the procedure allows the parties to have

[43] Just how finite the identifiable group needs to be is unlikely ever to be fixed as a particular number and will always depend on the facts of the case. It would be surprising, for instance, if it included the entire 25 man squad of a Premier League football team

[44] *Knupffer v London Express Newspaper* [1944] AC 116 [121–122].

[45] *Knupffer v London Express Newspaper* [1944] 119–120.

[46] *Brown v DC Thompson & Co* (1912) SC 359.

[47] Tugendhat J in *Tilbrook v Parr* [2012] EWHC1946 (QB) [16].

[48] An excellent summary of the historical origins—rooted in ecclesiastical tradition—of the law of defamation can be found in Chapter 2 of David Rolph's *Reputation, Celebrity and Defamation Law* (Ashgate 2008). His starting point is 1222 and the ecclesiastical jurisdiction in the Constitution *Auctoritate Dei Patris* passed by the Council of Oxford. Translated from the Latin, the key portion reads: "We excommunicate all those who, for the sake of hatred, profit or favour, or for whatever cause, maliciously impute a crime to any person who is not of ill fame among good men, by means of which at least purgation is awarded to him or he is harmed in some other manner." (Helmholz 1971, 256).

a reasoned judicial decision on the defamatory meaning of the words, something never available with any decision from a jury.[49]

Section 11 of the Defamation Act 2013 provides as follows:

> **Trial to be without a jury unless the court orders otherwise**
>
> (1) In section 69(1) of the Senior Courts Act 1981 (certain actions in the Queen's Bench Division to be tried with a jury unless the trial requires prolonged examination of documents etc) in paragraph (b) omit "libel, slander".

The effect of this is reinforced by CPR 26.11(2) which provides:

> "A claim for libel or slander must be tried by Judge alone, unless at the first case management conference, a party applies for trial with a jury and the court makes an order to that effect."

The first case dealt with under the new regime created by the Act was *Yeo v Times Newspapers*.[50] At the time of the claim the Conservative MP Tim Yeo was Chairman of the House of Commons Energy and Climate Change Committee. He maintained that publication of a *Sunday Times* Insight piece in June 2013 meant that, in breach of the rules of the House of Commons, he was prepared to act, and had offered himself as willing to act, as a paid Parliamentary advocate who would push for new laws to benefit the business of a client for a fee of £7,000 a day; and approach Ministers, civil servants and other MPs to promote a client's private agenda in return for cash.

In *Yeo*, Warby J delineated the parameters of the significant operative elements in respect of this change in the law. These were that the starting point for actions which included libel were reversed and such actions operated within a statutory regime where they "shall be tried without a jury unless the court in its discretion orders it to be tried with a jury".[51] His reasoning is considered in some detail because of the conclusions about the effect of the statutory ouster of the presumption of jury trial in this civil area.

He noted that, historically, there had been an imbalance of the virtues of the jury trial.[52] A principle identified in pre-amendment authorities could not "hold sway" after the amendment to the extent that it rested on the existence of a constitutional right to trial by jury, or a presumption in favour of such a mode of trial.[53]

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[49] Criticism of this approach can be found in Alan Richards *Libel Juries: How Tim Yeo and Mr Justice Warby buried the Seven Bishops*. He argues: "Nowhere is that [abolition of the jury trial] indicated in the Act or the notes accompanying it where only money-saving seems to be involved. Warby J has reversed the whole constitutional principle underlying the former right to jury trial for defamation. The point of that right – and the point of the *Seven Bishops* case—is that where there is public interest, then it is for the public, represented by twelve jurors, to make the decisions about that public interest, to establish the facts of the case and to assign guilt. The important principle is that a jury cannot and should not be held to account for it, not that they ought to be." *http://inforrm.wordpress.com/2014/09/03/libel-juries-how-tim-yeo-and-mr-justicewarby-buried-the-seven-bishops-alan-richards/*

[50] *Tim Yeo MP v Times Newspapers* [2014] EWHC 2853 (QB).

[51] *Tim Yeo MP v Times Newspapers* [2014] [42].

[52] *Tim Yeo MP v Times Newspapers* [2014] [43].

[53] *Tim Yeo MP v Times Newspapers* [2014] [45]. In effect, the decisions in *Rothermere v Times*

"Many legal actions involve prominent figures or issues of considerable public and national interest or both and many of these are brought in the Queen's Bench Division so that the discretion under s 69(3) of the 1981 Act is available in respect of them. As noted above it appears that an order for jury trial is unknown in such cases. Parliament has now chosen to accord defamation cases the same status, so far as jury trial is concerned, as these other kinds of claim. I conclude that the statutory amendment means that much of the reasoning in *Rothermere* has lost its force, as has that part of the *Aitken* principle that derives from the passages just mentioned. Parliament no longer regards jury trial as a right of 'the highest importance' in defamation cases. It is no longer a right at all.[54]

The government itself cannot now sue in defamation: *Derbyshire CC v Times Newspapers Ltd* [1993] AC 354. Even if the claimant is a person who 'holds power or authority in the state' that now gives neither the claimant nor the defendant any special claim on jury trial. The fact that the case involves 'questions of great national interest' no longer constitutes an 'important consideration' in favour of a jury. All these factors, if present, will be relevant but will now be of no greater intrinsic weight in a defamation case than they would be in any other class of case that enjoys no right to trial by jury. As to the importance of jury trial in a case which concerns 'a prominent figure in national life', Tugendhat J's analysis of *Rothermere* identifies the true criterion. This is whether, despite all the modern safeguards of judicial impartiality, there are in the particular case such grounds for concern that judge might show involuntary bias towards one or other of the parties on grounds of their status or rank that 'a judge might not appear to be as impartial as a jury': *Cook* [108]. Such cases will be rare."[55]

7–006 In the case itself no skills, knowledge, aptitudes or other attributes likely to be possessed by a jury which would make it better equipped than a judge to grapple with the issues had been identified. There were "real risks of a jury verdict being unclear or misunderstood or both".[56] He highlighted three advantages for having this trial without a jury:

". . ..the advantage of a reasoned judgment; proportionality; and case management. The last of these includes the prospect of early rulings on meaning, fact and comment and some points of concern arising from the interplay of the various defences."[57]

In terms of proportionality, there was a greater predictability in the decisions of a professional judge and the fact that a judge gave reasons.[58] Trial by jury invariably took longer and was more expensive because there was no scope for the pre-reading of the evidence as would happen in a judge-alone trial.[59] Also, the case management arguments in favour of non-jury trial had been reinforced by the amendment made to the definition of the overriding objective in 2013 when the words "and at proportionate cost" were added.[60] He concluded:

". . ..The factors supporting the statutory presumption in favour of an order for trial by judge alone are powerful and are not outweighed by those relied on as supporting jury trial, which are unpersuasive. . ..Neither party is a public authority. Mr Yeo, whilst holding an influential position, is not in government and exercises no state power. I have already held that there is no risk of 'involuntary bias towards those of their own rank and dignity' such as referred to by

Newspapers Ltd [1973] 1 W.L.R. 448, 453 and *Aitken v Preston* [1997] E.M.L.R. 415 have lost their force.

[54] *Tim Yeo MP v Times Newspapers* [2014] [47].
[55] *Tim Yeo MP v Times Newspapers* [2014][48].
[56] *Tim Yeo MP v Times Newspapers* [2014] [53].
[57] *Tim Yeo MP v Times Newspapers* [2014] [58].
[58] *Tim Yeo MP v Times Newspapers* [2014] [66].
[59] *Tim Yeo MP v Times Newspapers* [2014] [67].
[60] *Tim Yeo MP v Times Newspapers* [2014] [75].

> Blackstone in the passage relied on by Lord Denning. An order for trial without a jury is more proportionate, there are major potential case management advantages, and the significance of the issues raised means in any event that a reasoned judgment is important.[61]
>
> . . ..there may be cases in which it would be desirable to introduce a jury to avoid any perception of 'involuntary bias'. This is not the time to attempt any definition of when that might be. An instance could however be a libel claim brought by a judge, of which there have been examples in recent history though none that have reached trial. There could be other cases not involving 'rank or dignity' but subject matter."[62]

The case of *Starr v Ward* is an example of how the judicial reasoning process — and the resulting transparency in fact-finding—applied to the defamation action claiming £300,000 damages brought by the former celebrity comedian, Freddie Starr.[63] At issue were defamatory remarks made by the defendant in interviews she gave to the BBC on 14 November 2011, an ITV programme broadcast on the 3 October 2012 and in her eBook memoir "Fan Story".

Ms Ward was described by Nicol J as having had a troubled family background including, she claimed, sexual assault by her step-father. She had shoplifted and, when she was about 14, she was sent to an Approved School. She and others girls from the school met and were sexually abused by Jimmy Savile in return for cigarettes and the opportunity to attend Savile's TV shows "Jim'll Fix It" and "Clunk Click". One episode of "Clunk Click" was filmed on 7 March 1974 where Ms Ward and about four other girls from the school attended as part of the studio audience. On that date Ms Ward was 15. One of the guests on that episode of "Clunk Click" was Freddie Starr. He was 32 at the time and was well known as a comedian and entertainer. After the show, Ms Ward said that she and the other girls from the school met with Savile and Mr Starr.

> "Precisely what took place then is hotly disputed between the parties and I will need to return to it but, in very brief terms, Ms Ward's case is that Mr Starr felt her bottom. She protested vigorously. She says that he then made a crude remark referring to the flatness of her chest. She found this deeply humiliating. Mr Starr denies touching or attempting to touch Ms Ward. He denies saying anything humiliating."[64]

7–007 Nicol J considered the evidence he had heard and concluded that, on the balance of probabilities, Ms Ward's account was true for the following nine reasons:

> "i) It is, of course, a matter which took place a long time ago. But I find that the Claimant's remark to the Defendant, 'you're a titless wonder' was a striking one. It lodged in her memory.

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[61] *Tim Yeo MP v Times Newspapers* [2014] [79].

[62] *Tim Yeo MP v Times Newspapers* [2014] [80].

[63] *Starr v Ward* [2015] EWHC 1987 (QB). This was the fourth libel trial of 2015. The other three were *Rai v Bholowasia* [2015] EWHC B2 (QB), *Asghar & Anor v Ahmad & Ors* [2015] EWHC 1118 (QB) and *Ma v St George's Healthcare NHS Trust* [2015] EWHC 1866. None of these actions were against the mainstream media. *Mitchell v NGN* [2014] EWHC 4014 (QB) in November 2014 was the last media defamation case. In *Starr v Ward* the comments complained of were broadcast by ITV and the BBC. Mr Starr chose not to sue them and brought proceedings only against her. Ms Ward was upset that the broadcasters did not provide her with any support in her defence of the claim although, three days before the trial started—and as a result of an intervention by the BBC's Director General—there was an offer of £85,000 as a contribution to her costs.

[64] Ibid [2 – 5].

She was sensitive about her appearance (as are many teenage girls) and this remark in a crowded room which included some of the other girls at her school was understandably humiliating. I reject the submission. . ..that the Defendant had confused the Claimant with some other celebrity.

ii) I find as well that the Defendant's account of what led up to this remark by the Claimant is also more likely to be true than not, that is the Claimant touched or grabbed her bottom and she recoiled. The recoil, at least, was seen by Susan Bunce. Ms Bunce did not see what caused the Defendant to behave in this fashion. I have considered Mr Dunham's submission that it may have been the Claimant's smell which the Defendant associated with her step-father, but I have decided that it was more likely than not the smell, plus the sexual advance which grabbing of the Defendant's bottom was.

iii) The Defendant was being given Lithium at Duncroft at this time. She has accepted that this affected her memory. On peripheral matters her account has varied. Thus she said at some points that the Claimant's smell included a component of alcohol. She has accepted that she may have been wrong about that. In her BBC interview she said she was 14 at the time. We know that she was in fact 15. But in its core elements, her account has been consistent.

iv) In her BBC interview the Defendant had said 'I had a famous person who would try, he smelled awful, he smelled of sweat and alcohol and it made me heave just to be near him, so I certainly didn't want him to do anything to me'. Mr Dunham emphasised the word 'try' and suggested that the Defendant had later in her ITV interview sexed up what was previously described as an attempt to an actual grope. I reject this argument. In the first place, in the BBC interview she did not go on to explain what was 'tried'. In her evidence she said that the Claimant had tried to complete the 'goose', but got no further than grabbing her bottom. Secondly, the account which the Defendant gave in her FanStory words (and which was written in about 2008 so well before the BBC interview) was that the Claimant's hands 'wandered incessantly' and the meaning attributed to this in the Particulars of Claim was that the Claimant had groped and sexually assaulted her. Next, I do not accept that Mr Williams- Thomas encouraged the Defendant to elevate an 'attempt' to a 'grope' for the purpose of the ITV interview. I agree with his response that that would have been unprofessional. Mr Williams-Thomas, like Ms MacKean and Mr Jones, impressed me as a professional reporter and broadcaster. It would also be a curious thing to do in relation to a person who was not the focus of the programme he was making and where the difference between an attempted grope and an actual grope was not of the highest magnitude. I do not attach significance to the Defendant's omission to use the word 'goose' until she gave evidence. It is not a common idiom now and she would be right to consider that her audience (whether readers of FanStory, watchers of 'Newsnight' or viewers of the ITV interview) would be mystified if she used it.

v) As I have said, I find that in truth the Claimant has no recollection of what actually happened on this evening. He originally said that he could not remember being on a show with Jimmy Savile at all. I accept that the Claimant has appeared on several thousand TV shows and he could not be expected to remember each one, but his response when initially approached was to deny his appearance categorically—not to say he could not remember. He then said that he had left immediately after the show. In his evidence he said he may have stayed for a short time with him manager, Mr Cartwright. Later in his evidence he said that his wife remained as well with him and Mr Cartwright. There has been no evidence from either Mr Cartwright (whose absence in the USA would not have prevented him providing a witness statement) or the Claimant's wife at the time (who could have been witness summonsed if she was unwilling to attend voluntarily).

vi) In his evidence, Mr Starr accepted that he had a voracious sexual appetite in 1974. Slapping a girl's bottom is what people did in the 1970's, he said. It did not mean anything and was acceptable. He revelled in the reputation of being a 'cheeky bastard' as he put it in his autobiography. He agreed that he did make jokes about women's breasts. 'Every man does it, even my 15 year old son', he said in evidence. He was asked about a passage in his autobiography which recounted his first meeting with Sandy, whom he later married in the mid-1970s. The book recorded him as saying to this woman to whom he had not previously spoken and, when learning her name, 'Hello Sandy. Can I play with your fur purse?' He said in his evidence this was inaccurate. In fact he had asked if he could play with her fur clitoris.

vii) In his witness statement, the Claimant said 'my humour was and remains the opposite of humiliation'. That is difficult to reconcile with an extract which Mr Price played from one of the Claimant's shows in which he takes two women from the audience on to the stage: one beautiful; the other, not so. The audience is repeatedly invited to laugh at the latter. Mr Starr emphasised that this was an adult show to which children were not admitted. That may be and

it may explain why the jokes could be sexually frank. But it also showed that the Claimant felt free to raise a laugh at another person's embarrassment about her body.

viii) The Claimant's response was to say that his behaviour towards young girls was different. He said he didn't like younger women. In his interview for 'This Morning' he had said 'I always kept away from girls because I knew it spelt trouble'. In his evidence he said the cut off point was 22 or 23. However, his behaviour on the very same occasion as the Defendant spoke about tells a different story. Susan Bunce was a small 15 year old. He picked her up, held her in the air and gave her a long passionate kiss. Later in the evening he offered to drive her home. There was, according to Ms Bunce, a conversation about her age in which she allowed the Claimant to believe that she was 18. In her evidence she said that this took place before the Claimant had kissed her. Even if this was the case, it would mean that the Claimant's cut off below which he avoided girls was lower than he was prepared to admit. However, I prefer the account which Ms Bunce gave in her more detailed interview with the police. In this she said the conversation about her age took place only after the incident in which she and the Claimant had kissed. I also accept the evidence of witness C. When she, also a 15 year old school girl, asked for a memento, he offered her a tuft of his pubic hair. I reject the claim that this was impossible because of the tightness of his trousers or the width of his belt. Ms Bunce had described him as wearing loose trousers when he invited her to look in his pocket for a packet of cigarettes. He had obviously changed from the trousers he had been wearing during the 'Clunk Click' show.

ix) The accounts of the Defendant, Witness C and Ms Bunce appear to be independent of each other. There is no evidence to the contrary. Indeed, Ms Bunce was called in the Claimant's support. Ms Bunce did not see what the Claimant did and said to Witness C. Witness C and the Defendant gave no evidence about what took place between Ms Bunce and the Claimant. I do not find this surprising. There were lots of people in the room. Each of these three remembered most clearly what happened to her. The accounts of Ms Bunce and Witness C however, provide support as to the Claimant's behaviour towards 15 year old girls that night. They contradict the Claimant's evidence that below 22 or 23 was the cut off for his interest in women. They support the Defendant's account that it included girls of 15."[65]

Those detailed findings would never have been articulated and set out so clearly if a jury had been involved in the trial of the action. However, if the action had been brought in earlier decades at the height of Freddie Starr's celebrity, all the historical evidence is that juries then favoured findings for such individuals with awards of significant damages, admittedly against media defendants rather than individuals like Ms Ward. In that sense—and because Ms Ward was represented on a Conditional Fee Agreement (CFA)—the picture is very different since the changes brought in by the Defamation Act 2013.

7.4 The Protected Right

7–008 Section 1 of the Defamation Act 2013 marks the first radical change from the pre-existing law. It creates a new threshold test for determining whether a statement is defamatory. The "serious harm" test provides that a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.[66] Additionally, in the context of this section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss.[67]

[65] Ibid [110].
[66] S.1(1) Defamation Act 2013.
[67] S.1(2) Defamation Act 2013. This is, on the face of it, a more demanding threshold than the

The new statutory "serious harm" requirement received its first significant judicial examination in *Cooke v MGN*.[68] In January 2014 the *Sunday Mirror* story had run a story about a landlord—Mr Paul Nischal—arising out of the broadcasting of the Channel 4 series *Benefits Street*.[69] Mr Nischal had complained to the Press Complaints Commission and the newspaper had adjusted its online material appropriately to reflect this complaint. Ms Cooke and the housing association maintained that the reference to them was defamatory in the context of the article as a whole. A week after the publication the newspaper published an apology to Ms Cooke and the housing association.[70] It fell to Bean J to decide whether the words complained had any defamatory meaning and, if so, whether the publication caused or was likely to cause serious harm to the reputation of either or both of the claimants within the meaning of s.1 of the Defamation Act 2013. He held that the ordinary and natural meaning of the words was defamatory.[71]

Conversely, it is possible to have situations where a statement might not be deemed likely to cause serious harm at the date of issue but was likely to cause serious harm at the date of publication. This would be an issue for claimants where evidence of actual serious harm was not forthcoming but where the likelihood of serious harm lay in the immediate aftermath of the story. The issue—in this situation—would be whether a case should be struck out where that likelihood of serious harm had dwindled by the time of the claim being issued. In addition, the serious harm requirement does not mean that a claimant in every case will be required to adduce evidence from the outset to demonstrate the harm suffered because the court might be able to draw such an inference from the very fact of publication of a serious allegation to a wide audience.

7–009 Section 1(1) of the Act, which states that a statement is not defamatory unless its publication has caused or is likely to cause serious harm to a

previous common-law tests found in *Thornton v Telegraph* [2010] EWHC 1414 (QB) and *Jameel v Dow Jones* [2005] EWCA Civ 75.

[68] *Cooke v MGN* [2014] EWHC 2831 (QB).

[69] The headline was "Millionaire Tory cashes in on TV Benefits Street". The libel action was brought by Ms Ruth Cooke, Chief Executive of a housing association which also rented property there. The *Sunday Mirror* stated: "Three more homes in the road where residents claim they have been portrayed as scroungers and lowlife by Channel 4 are owned by the Midland Heart housing association. Its chief Ruth Cooke, 45, earns £179,000 a year and lives in a large house in Stroud, Glos."

[70] "Midland Heart and Ruth Cooke: An Apology. Last week the *Sunday Mirror* included Midland Heart Housing Association and its Chief Executive Ruth Cooke in our article "Millionaire Tory cashes in on TV Benefits Street." Midland Heart is a not for profit housing and care charity, and any surplus made by it is reinvested into its homes for the benefit of its customers. Midland Heart and Mrs Cooke take their responsibility to support customers and the communities they live in very seriously. We did not intend to include them in the article and wish to apologise to both Midland Heart and Mrs Cooke for our mistake."

[71] This was on the basis that that Midland Heart, whose Chief Executive was Ruth Cooke, was a landlord of rented properties on James Turner Street to tenants in receipt of housing benefit at rents of up to £650 per month, that Midland Heart made money from the misery of James Turner Street residents and that Ms Cooke was personally responsible for the conduct of the housing association. It suggested that she had herself profited from such conduct because she was paid £179,000 a year and lived in a large house in Gloucestershire.

claimant's reputation, leads naturally towards a process where the courts will adopt a two-stage approach. First is the objective question about the meaning of the statement, judged by the notional understanding of the ordinary reasonable reader. Then, secondly, comes the gravity of the meaning which ought logically also to be judged by the standard of reasonable members of society. If the statement's meaning reaches the required level of seriousness then the question is whether, on the facts of the particular case, the publication in question has caused or was likely to cause serious harm to the claimant's reputation. Here other factors—such as the status of the publication and the nature of the audience to which it is addressed, or the terms and timing of any correction—may come into play as matters of evidence.

> "In some cases, where the allegation is grave, the natural inference may be that its publication has caused immediate and serious harm as to the claimant's reputation. And, in an appropriate case, evidence may be available to reinforce that inference. Equally, there may be cases where the evidence shows that, no matter how serious the allegation, the publication has not caused and is not likely to cause any serious harm to the claimant's reputation."[72]

So in *Ames v Spamhaus*[73] and *Lachaux v Independent Print Ltd*[74] Warby J and Nicola Davies J decided, respectively, that there should be preliminary issue hearings to deal with the questions of meaning in each case, particularly on whether the publications had caused serious harm to the reputations of the claimants.

In the *Ames* case the claimants were two successful California-based entrepreneurs who had set up a direct email marketing company in the US which was acquired by a UK company for which they continued to work until December 2013. They claimed that the defendants had published a series of libellous allegations against them in England and Wales on their website suggesting unlawful activities in connection with spam.[75] The defendants applied to strike out the claim on the basis that the claimants had no pre-existing reputation in the UK, and there had been very limited publication of the words complained of, so no real and substantial tort had been committed within the jurisdiction and that no serious harm had been—or was likely to be—caused to the claimants' reputations. The court held that each of the claimants had a real prospect of establishing that the publication had caused serious harm and it was not an abuse of the court. As Warby J noted:[76]

> "This wording [s1(1) of the Act] . . ..introduces an additional requirement. The use of the word 'serious' obviously distinguishes the statutory test from the common law as stated in *Thornton*. The threshold identified in *Thornton* was that the statement should 'substantially' affect attitudes in an adverse way, or have a tendency to do so. The *Jameel* test also requires a tort to be 'substantial'.[77] As Bean J noted in *Cooke v MGN Ltd*. . .. examination of the Parliamentary

[72] Correctly predicted, ahead of the actual development of the case law which followed *Cooke*, in *Duncan and Neill on Defamation* 4th edn (LexisNexis 2015) 4.10.
[73] *Ames v Spamhaus* [2015] EWHC 127 (QB).
[74] *Lachaux v Independent Print Ltd* [2015] EWHC 915 (QB).
[75] *Ames v Spamhaus* [2015] EWHC 127 (QB) [1]: "This is a case about spam, which for present purposes is adequately defined as unwanted email sent in bulk. It can also be described as the internet version of junk mail."
[76] *Ames v Spamhaus* [2015] [49–55].
[77] *Jameel (Yousef) v Dow Jones* [2005] EWCA Civ 75.

history of the section shows that the word 'serious' was chosen deliberately in place of the word 'substantial'. It follows that the seriousness provision raises the bar over which a claimant must jump, as compared with the position established in the two cases mentioned. These points are spelled out in the Explanatory Notes to the section. . ..

In these circumstances it seems to me that an assessment of whether a defamation claim in respect of publication on or after 1 January 2014 should be dismissed on the grounds that the actual or likely harm to reputation is too slight to justify the claim, or grounds that include this proposition, should normally start with consideration of the 'serious harm' requirements in s 1. The court should ask itself whether one of those requirements is satisfied or, as appropriate, is arguably, or has a real prospect of being, satisfied. If the answer is no, then there is no tort at all and the claim will inevitably be dismissed. If the answer is yes, it may be hard to establish that the tort alleged fails the "real and substantial tort" test.

I accept. . ..that s 1 does not supersede *Jameel*. There may be defamation cases in which the pursuit, or continued pursuit, of the claim cannot be justified as a necessary and proportionate interference with freedom of expression even though the publication has caused serious harm to reputation, or such harm is likely. . .. But in a defamation case where the issues raised on an application to dismiss include whether the publication has been harmful enough to reputation to justify the pursuit of the litigation, it risks confusion to ask first whether the tort is real and substantial and only then to look at the 'serious harm' requirements. The approach should be the other way around.

Parliament has not defined what 'serious' means, but has left it to the judges to apply what is an ordinary word in common usage. . ..The factors relevant to whether serious harm has been caused or is likely will be the same in my judgment as those which come into play in assessing whether a tort is real and substantial for *Jameel* purposes. . ..

The word 'likely' in s 1 is also undefined. As is well-known, this is a word capable of various meanings. Neither party identified any Parliamentary materials which could assist as to what it means in this context. The word appears in another statutory context relevant to publication cases: s 12(3) of the Human Rights Act 1998 prohibits the court from restraining the exercise of freedom of expression before trial unless it is 'satisfied that the claimant is likely to establish that publication should not be allowed'. In that context the ordinary meaning of 'likely' is 'more probable than not', though a lower standard of likelihood may be required in some circumstances, as where there is a slight risk of very serious damage. . ..

Parliament must be taken to have known this, and it may be for that reason that in *Cooke* it was common ground that serious harm will, generally, be 'likely' within the meaning of s 1 only if it is more probable than not. . ..

It is of course for a claimant to prove that serious harm to reputation has been or is likely to be caused. In *Cooke* at [41] Bean J declined to accept that 'evidence' will be required in every case. What he meant by 'evidence' is clear from his recital of the submissions made by the defendants, which included the proposition that there has to be evidence of 'tangible adverse consequences', such as adverse reactions to the publication expressed on social media, or other 'visible republication or comment': see [42] at (a), (d), (e) and (f). Bean J rejected this, accepting that serious harm can be inferred without evidence of adverse reaction from readers. This is plainly right. There may be circumstances in which one would naturally expect to see tangible evidence that a statement had caused harm to reputation, but as practitioners in this field are well aware, it is generally impractical for a claimant to seek out witnesses to say that they read the words complained of and thought the worse of the claimant. . .."

7–010 This decision is also significant because Warby J held that the issue of serious harm is likely to be better dealt with by way of a preliminary issue hearing particularly when there are issues of fact relating to the extent of publication allowing, also, questions of meaning to be dealt with at the same time. It will be a rare case where the serious harm test is satisfied but the claim is nevertheless found to be an abuse.

In the *Lachaux* case separate (but similar) actions were brought against three publishers[78] on the basis that the allegations were defamatory both at common law and under s.1 of the Act. Within the publications were

[78] *Huffington Post* (AOL) UK, *The Independent* and the *London Evening Standard*.

allegations of domestic violence and issues in relation to the custody of a child and the treatment of the claimant's former wife. At issue was whether the Court should order that the issues of whether the Claimant was referred to, "serious harm", *Jameel* abuse and the meaning itself should be tried as preliminary issues or whether the issues could be deferred until after a case management conference and cost budgeting hearing. Following Warby J's decision in *Ames*, and granting the Defendants' applications, Nicola Davies J considered that the issues between the parties were sufficiently clear from correspondence, given that the burden of proving the issue of "serious harm" fell on the Claimant.

> "It is clear from the Explanatory Note to the 2013 Act that the effect of section 1 and the requirement of 'serious harm' is to create a higher hurdle for the claimant and one that is at the threshold of any defamation action. I agree with the approach taken and guidance given by the court in *Cooke* and *Ames* above namely that it is appropriate to determine 'serious harm' as a preliminary issue. I regard the issue of 'serious harm' as a threshold condition in any action brought pursuant to the provisions of the 2013 Act. It is moreover, an issue which can be evaluated, in appropriate circumstances, without recourse to any pleaded Defence. The claimant brings the action, it is for him to set out his case on this threshold condition. In this case he has had ample time and opportunity to do so. Witness statements can be before the court to assist in the determination of this issue. I am satisfied that there is before this court sufficient fact and detail in all three actions so as to permit it to determine the question of serious harm as a preliminary issue.
>
> The three issues of reference (identification), serious harm and real and substantial tort are all interlinked. If the claimant cannot be identified then he cannot be caused harm. Until serious harm is made out there can be no real or substantial tort. Factually, matters which are relevant to the question of serious harm, for example the connection which the claimant has with the United Kingdom, whether he is identified in the Particulars of Claim which describe him as a French national, make no reference to his occupation as a foreign trader, do not plead his full name – only that he is the ex-husband of Afansa Lachaux – are all interlinked with reference and an abuse argument as to whether there is a real and substantial tort. In my view, common sense together with observance of the overriding objective, requires early determination of serious harm, reference and *Jameel* abuse so as to enable a determination to be made as to whether these claims should continue. Such a hearing would be at one with the ethos of the 2013 Act namely early identification of issues, where appropriate determination of the same, with consequent saving of time and money. A contention by the claimant that in this case such a course does not take account of the concept of cost budgeting and that such a hearing should await service of further pleadings and a case management hearing, flies in the face of common sense and the aims of the overriding objective."[79]

That final comment—in terms of the overriding objective—suggests that, depending on the outcome of this first trial where "serious harm" will be determined as a preliminary issue (compete with evidence being adduced, disclosure and cross-examination), it may well be that in future cases—where issues have been sufficiently clarified in pre-action correspondence—there will be little need for defences, cost budgets, or case management conferences prior to a trial of preliminary issues being sought and ordered.

7–011 The *Lachaux* case—for decisions on its preliminary issues including "serious harm"—came before Warby J in July 2015.[80] His detailed and careful findings and conclusions go a long way—by providing the high level of analysis invested in the judgment in respect of this new area of defamation law—to

[79] *Lachaux v Independent Print Ltd* [2015] EWHC 915 (QB) [21–22].
[80] *Lachaux v Independent, Evening Standard and AOL* [2015] EWHC 2242 (QB).

mark out the practical pathway for future consideration of what is meant by "serious harm" and how that impacts on defamation claims in the future.[81]

As detailed earlier Mr Bruno Lachaux was an aerospace engineer and a French national working in the UAE. The articles related to events there—including proceedings against his ex-wife Afsana—for "kidnapping" their son. The articles were based on claims made by her about him.

The key points of this comprehensive decision[82]—for the purposes of this book—relate to whether "reference" to a claimant is an essential element of defamation and the meaning of "serious harm" is a requirement in s. 1(1) of the Defamation Act 2013.

In terms of "reference"—an objective test within defamation law—it is met if reasonable people would understand the words to refer to the claimant even though the claimant is not specifically named. Further, if the words would be so understood by such people

> ". . .. it is not necessary for the claimant to prove that there were in fact such people, who read the offending word; so an individual defined by name in Cornwall has a cause of action even if he was unknown in that county at the time of the publication".[83]

In terms of the "serious harm" requirement he emphasised that he had approached the issue with "an open mind" putting aside the conclusions arrived at in *Cooke* and *Ames*. He took as his starting point a consideration of the language used by Parliament and the context in which that language had been used. That context included the existing common law.[84]

> "In my judgment this approach leads to the clear conclusion that in enacting s 1 (1) Parliament intended to do more than just raise the threshold for defamation from a tendency to cause 'substantial' to 'serious' reputational harm. The intention was the claimants should have to go beyond showing a tendency to harm reputation. It is now necessary to prove as a fact on the balance of probabilities that serious reputational harm has been caused by, or is likely to result in future from, the publication complained of."[85]

Warby follows this constructional point through to its logical and practical conclusion.

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[81] *Lachaux v Independent, Evening Standard and AOL* [2015] [5]: "The agreed readership figures for the two *Post* articles together are some 4,800. For the ILP articles the agreed readership figures for the print copies are 154,370–231,555 (the *Independent*) and 523,518–785,277 (the *'i'*). The *Independent* article had 5,655 unique visitors online. The *Evening Standard* readership figures are 1.67–2.5 million for the print edition and 1,955 unique visitors online." [143–154]: He found that four of the five publications did create "serious harm" to the reputation of Mr Lachaux: *The Independent* and the *"i"*, the *London Evening Standard* and the first of two articles in *HuffingtonPost*.

[82] It comprises 190 main paragraphs over 44 pages.

[83] *Lachaux v Independent, Evening Standard and AOL* [2015] EWHC 2242 (QB) [15].

[84] *Lachaux v Independent, Evening Standard and AOL* [2015] [44]. "Thus, Parliament is presumed to have been aware of the *Thornton* definition of what is defamatory, the rules as to how a defamatory meaning may be proved, the presumption of damage, and the other common law rules outlined above. The *Jameel* jurisdiction, being a creature of judicial decision-making, albeit pursuant to statute, is to be treated for this purpose as a common law rule. Parliament also legislates. . .. in the presumed knowledge of existing statute law, and the meaning that has been ascribed to it by the courts."

[85] *Lachaux v Independent, Evening Standard and AOL* [2015] [45].

> "I accept that my construction of s 1 (1) means that libel is no longer actionable without proof of damage, and that the legal presumption of damage will cease to play any significant role. These, however, are necessary consequences of what I regard as the natural and ordinary, indeed the obvious meaning of s 1 (1). They are, moreover, consequences which had in practice already been brought about by previous developments."[86]

He summarised the situation thus:

> ". . ..my conclusion is that by s 1 (1) Parliament intended to and did provide that a statement is not defamatory of a person unless it has caused or will probably cause serious harm to that person's reputation, these being matters that must be proved by the claimant on the balance of probabilities. The court is not confined, when deciding this question, to considering only the defamatory meaning of the words and the harmful tendency of that meaning. It may have regard to all the relevant circumstances including evidence of what has actually happened after publication. Serious harm may be proved by inference, but the evidence may or may not justify such an inference."[87]

He points out that a consequence of s.1 is that the status of the publication could change from non-defamatory to defamatory.

> "A cause of action may lie inchoate until serious harm is caused or its future recurrence becomes probable. . .. A similar position prevails at common law in respect of slanders which are not actionable without proof of special damage. Another consequence is that a publication may in principle change from being defamatory to being not defamatory (and hence not actionable), for instance by reason of a prompt and full retraction and apology."[88]

7–012 Noting that the advent of social media had "notoriously increased public online denunciation by strangers" he observed that the impact of publication was never simply confined to the initial readers.

> "It will always, to some degree, include people to whom the sting is passed on via the 'grapevine' including, today, social media. As to that, there was some debate at the hearing as to whether the impact of such republication by electronic means had been taken into account in. . .. calculations. It seems to me that one can be confident that it had not, as there are ways in which electronic republication can occur which would not be captured. . .. I do not discount, however, repetition by email or word-of-mouth. I do not believe that the 'grapevine' is nowadays wholly visible to the onlooker. . .."[89]

He went on to say that he thought it was of "rather greater significance" that the general discussion had tended to leave out—"as if it was unimportant" – "the impact of publication on the claimant's reputation in the eyes of people who do not already know the claimant".[90]

Finally, s.1 (2) of the Act states that—for the purposes of the section—harm to the reputation of "a body that trades for profit is not 'serious harm' unless it has caused the body serious financial loss".

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[86] *Lachaux v Independent, Evening Standard and AOL* [2015] [60]. "The HRA and the emergence of the *Jameel* jurisdiction which substantially eroded if they did not wholly undermine these common law rules. Since *Jameel* it has no longer been accurate other than technically to describe libel is actionable without proof of any damage. I cannot see this as a substantial argument against my construction of the statute."

[87] *Lachaux v Independent, Evening Standard and AOL* [2015] [65].

[88] *Lachaux v Independent, Evening Standard and AOL* [2015] [68].

[89] *Lachaux v Independent, Evening Standard and AOL* [2015] [139].

[90] *Lachaux v Independent, Evening Standard and AOL* [2015] [140].

This book, and this chapter of the book, is about the privacy remedies available to celebrities and not corporations or other trading bodies. As such, the topic as it relates to such corporations and trading bodies will not be explored further.[91]

7.5 The Permitted Inference

7–013 The areas of permitted interference—the defamation defences which allow the legitimate publication of defamatory statements in the circumstances where they operate—have been given substantive statutory form in the Defamation Act 2013.

7.5.1 The Statutory Defence of Truth (Section 2)

7–014 The Act, by virtue of s.2, replaces the old common law defence of justification (which it abolishes).[92] Its purpose, as explained in the Explanatory Notes, was intended "broadly to reflect the current law while simplifying and clarifying certain elements".[93] Defending defamatory remarks by relying on the fact that they were substantially true had been a long-established part of the English common law in this area. Historically, until the Rehabilitation of Offenders Act 1974 and the introduction of "spent" convictions, there had been no cause of action for malicious publication of the truth.[94]

Section 2 provides as follows:

> **"2. Truth**
>
> (1) It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true.
>
> (2) Subsection (3) applies in an action for defamation if the statement complained of conveys two or more distinct imputations.
>
> (3) If one or more of the imputations is not shown to be substantially true, the defence under this section does not fail if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not seriously harm the claimant's reputation.
>
> (4) The common law defence of justification is abolished and, accordingly, section 5 of the Defamation Act 1952 (justification) is repealed."

The core element of this defence is set out, unequivocally, in the single sentence that comprises s.2(1).[95] Its focus on the requirement of "substantial"

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[91] Paragraph 12 of the Explanatory Notes to the Act states that the requirement for serious harm is consistent with the new serious harm test in s.1(1), reflecting the reality that bodies trading for profit are already prevented from claiming damages for issues like injury to feelings. It does mean, however, that charities—which do not have to "trade for profit"—do not have to show actual or likely serious financial loss if they can otherwise establish a cause of action.

[92] It also repeals s.5 of the Defamation Act 1952.

[93] Explanatory Notes [13].

[94] The Faulks Committee report of 1975 had recommended that the defence of justification be renamed "truth".

[95] Section 2 (1) reflects the common law as established in *Chase v NGN* [2002] EWCA Civ 1772. This case established that the defendant was not required to prove the literal truth of every statement contained in the words complained of. It was enough to establish the essential or substantial

truth accurately reflects the former common law position. Section 2 (2) and (3) deal with situations where—if the statement complained of consists of two or more distinct imputations and the defendant can prove the substantial truth of one or more of them (but not all of them)—the defence can still succeed.

An example of the breadth of the defence—in its pre-Act form of justification and in relation to the celebrity notoriety of criminals—is the case of *Hunt v Times Newspapers*.[96] The action arose from *The Times'* allegation that Mr David Hunt was the head of an organised crime network who had become involved in a dispute about the ownership of plots of the land between other criminals. It stated that he had previously attacked a man and then intimidated him into withdrawing charges and that he had arrived at a court hearing in London with a "group of heavies" and attacked one of the criminals interested in the land and his minders. It was agreed that the article carried three potentially defamatory meanings, namely that Mr Hunt (i) was the head of an organised crime group involved in murder, drug trafficking and fraud; (ii) was responsible for the attack and intimidation of one man; (iii) had threatened to kill another man, attacked him and his minders and then intimidated the witnesses. The justification defence succeeded in relation to (ii) because sufficient facts had been established to prove the truth of it. Mr Hunt had been responsible for a violent attack on a man who had later withdrawn his statements due to pressure which amounted to intimidation from him. It also succeeded in relation to (iii) because Mr Hunt had threatened another man and then orchestrated an attack on his minders. The words "head of an organised crime group" correctly implied that the person described was at the head of a network which was involved in a range of criminal activities, and was ready to use violence to exercise control over subordinates and others.

7–015 Separately and recently the Court of Appeal dealt with another old-style justification[97] defence in a pre-Act claim which came on appeal after the Act came into force in *Cruddas v Calvert*.[98] The celebrity focus of this action related to the claimant, Mr Peter Cruddas, who was the former Treasurer of the Conservative Party. The Insight team of *The Sunday Times*, posing as potential donors to the Conservative Party, had recorded him by covert video in a "cash for access" story. He sued for libel and malicious falsehood. *The Sunday Times* was unsuccessful, before Tugendhat J, with its defence to the libel claim relying on a plea of justification.[99] He

truth of the central defamatory "sting" of the words. The defence could still successfully be prayed in aid despite the fact that other, immaterial details in the offending statement, could not be proved to be true.

[96] *Hunt v Times Newspapers* [2013] EWHC 1868 (QB).

[97] Section 5 of the Defamation Act 1952, in force at the material time, was subsequently repealed by the Defamation Act 2013. Section 5 of the Defamation Act 1952 provided: "In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges."

[98] *Cruddas v Calvert* [2015] EWCA Civ 171.

[99] In relation to the malicious falsehood claim, the Defendants denied malice, relied upon their justification defence to rebut falsity of the allegations (apart from criminal corruption) and

awarded the claimant £180,000 (including £15,000 aggravated damages) for the libel.[100]

The Court of Appeal held that the "cash for access" meaning was substantially true because Mr Cruddas was effectively saying that if the journalists donated large sums they would have the opportunity to influence Government policy and could gain unfair commercial advantage through confidential meetings with the Prime Minister and other senior ministers. This was unacceptable, inappropriate and wrong. *The Sunday Times*, however, had failed to justify two other meanings.[101]

7.5.2 The Statutory Defence of Honest Opinion (Section 3)

7–016 Section 3 of the Act establishes the new statutory defence of honest opinion. It replaces the old common law defence of "fair comment". Most significantly it removes the old common law requirement that comment had to be on a "matter of public interest". This makes the statutory defence available for opinions on any fact or matter and, as such, broadens the protection given in this area from the limits imposed by the previous law.

Section 3 provides as follows:

"3 Honest opinion

(1) It is a defence to an action for defamation for the defendant to show that the following conditions are met.

(2) The first condition is that the statement complained of was a statement of opinion.

(3) The second condition is that the statement complained of indicated, whether in general or specific terms, the basis of the opinion.

(4) The third condition is that an honest person could have held the opinion on the basis of—

  (a) any fact which existed at the time the statement complained of was published;

  (b) anything asserted to be a fact in a privileged statement published before the statement complained of.

(5) The defence is defeated if the claimant shows that the defendant did not hold the opinion.

(6) Subsection (5) does not apply in a case where the statement complained of was published by the defendant but made by another person ("the author"); and in such a case the defence is defeated if the claimant shows that the defendant knew or ought to have known that the author did not hold the opinion.

(7) For the purposes of subsection (4)(b) a statement is a "privileged statement" if the

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contended that the publication was not likely to cause the Claimant pecuniary damage within s.3 Defamation Act 1952. Malicious falsehood is not dealt with further, beyond this footnote, as it rarely features as a significant celebrity privacy remedy. It has an unusual feature as a tort: the single meaning rule does not apply as a result of the case of *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2010] EWCA Civ 609. In that case Ajinomoto made a claim for malicious falsehood, in respect of words used on packaging. There was no separate claim for libel. At first instance, the trial judge held that the words on the packaging had two reasonably possible meanings, of which one was true and the other was false. The judge held that the single meaning rule applied and adopted the meaning which was true. The Court of Appeal, reversing the judge, held that the single meaning rule did not apply to claims for malicious falsehood and that both the possible meanings of the words on the packaging should be considered.

[100] Given the size of the libel damages Tugendhat J made no separate award for the malicious falsehood claim.

[101] Damages were adjusted to £50,000 (including £7,000 aggravated damages).

person responsible for its publication would have one or more of the following defences if an action for defamation were brought in respect of it—

(a) a defence under section 4 (publication on matter of public interest);
(b) a defence under section 6 (peer-reviewed statement in scientific or academic journal);
(c) a defence under section 14 of the Defamation Act 1996 (reports of court proceedings protected by absolute privilege);
(d) a defence under section 15 of that Act (other reports protected by qualified privilege).

(8) The common law defence of fair comment is abolished and, accordingly, section 6 of the Defamation Act 1952 (fair comment) is repealed."

For this defence to be effective in relation to statements of opinion—and its focus is on protecting opinion rather than fact—there are three essential elements which must be demonstrated objectively. Firstly, it must be clear that the statement of opinion—considered in its totality in the context of the article—is opinion or comment. Secondly, the comment itself must have a sufficient factual basis without being something plucked randomly or fancifully from thin air. Thirdly, the maker of the statement must be able to show that a reasonable, honest person might hold the same view. Further development of case law under the Act is awaited.[102]

In practical terms, for media commentators and newspaper columnists, this defence provides substantial protection for expressions of opinion which are often trenchant and pointed, particularly in terms of the activities of celebrity figures who may be the focus of the published remarks.[103] This is particularly relevant where the celebrity figure is the claimant who has in fact sought publicity or put works into the public domain where—by doing so—comment is a natural consequence of those actions.[104]

7.5.3 The Statutory Defence of Publication on a Matter of Public Interest (Section 4)

7–017 This statutory defence replaces the *Reynolds* defence which, when it was formulated in 1999, was a significant development within the common law in respect of favouring the media's freedom of expression.[105]

[102] Leading pre-Act cases concerning fair comment were *British Chiropractic Association v Singh* [2010] EWCA Civ 350; *Joseph v Spiller* [2010] UKSC 53 and *Lait v Evening Standard Ltd* [2011] EWCA Civ 859. It was from *Singh* that it was suggested that the defence be re-named "honest opinion". In *Joseph*, slightly earlier, the Supreme Court's suggested label was "honest comment". All these cases favoured the publishers relying on the defence.

[103] If all the conditions are fulfilled, it is for the claimant to show that the defendant did not in fact hold the opinion complained of: this is a subjective test.

[104] There is an inherent danger, which may be explored in subsequent case law, that the *prima facie* strength of the defence fails to recognise the Article 8 ECHR right of claimants to their reputations and—as such—requires the leavening and balancing influence of issues of proportionality in the context of the basis on which the comment was made. The 4th edn of *Duncan and Neill on Defamation* (13.26 footnote 2) identifies an example of what could occur in this area if a claimant, who has been convicted of an offence, was able to show—prior to the publication of the statement of opinion about him by the defendant—that the conviction had been quashed on appeal.

[105] *Reynolds v Times Newspapers* [2001] 2 AC 127. This is a celebrity defamation case in the truest sense because Albert Reynolds was the Taoiseach (Prime Minister) of Ireland until a political crisis in 1994. *The Times* published an article in Ireland—also then published in UK—about him

In *Flood v Times Newspapers*[106] Lord Phillips noted about the defence generally:

> "Put shortly *Reynolds* privilege protects publication of defamatory matter to the world at large where (i) it was in the public interest that the information should be published and (ii) the publisher has acted responsibly in publishing the information, a test usually referred to as 'responsible journalism' although *Reynolds* privilege is not limited to publications by the media."

In the *Reynolds* case itself it is Lord Nicholls' who identifies its specific elements:[107]

> ". . ..The elasticity of the common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case. This elasticity enables the court to give appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern. Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only.
>
> 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
> 2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.
> 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
> 4. The steps taken to verify the information.
> 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
> 6. The urgency of the matter. News is often a perishable commodity.
> 7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
> 8. Whether the article contained the gist of the plaintiff's side of the story.
> 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
> 10. The circumstances of the publication, including the timing.
>
> This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case. Any disputes of primary fact will be a matter for the jury, if there is one. The decision on whether, having regard to the admitted or proved facts, the publication was subject to qualified privilege is a matter for the judge. This is the established practice and seems sound. A balancing operation is better carried out by a judge in a reasoned judgment than by a jury. Over time, a valuable corpus of case law will be built up."

7–018 A significant problem with the practical operation of the *Reynolds* defence in the case law which developed thereafter was that, while its elements were

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misleading the Irish Parliament. The UK version omitted an explanation that he had given for the events, which was in the original article, but included the headline 'Goodbye gombeen man' and the sub-head 'Why a fib too far proved fatal for the political career of Ireland's peacemaker and Mr. Fixit'. The associated copy stated: "In another age Albert Reynolds could have been the classic *gombeen* man [an extortionate wheeler-dealer who profited from corn prices during the Irish potato famine] of Irish law – the real fixer with a finger in every pie. His slow fall last week, his fingernails scratching down the potential cliff-face, has been welcomed with a whoop of delight by many Irish people who want to see their country dragged out of the past. The full story of this eclipse, however, has sullied Ireland's reputation, damaged its Church, destroyed its peace-making and provided its Unionist neighbours with a fistful of new reasons to avoid the contamination by the South." Mr Reynolds sued in England on the full page report in *The Sunday Times*.

[106] *Flood v Times Newspapers* [2012] UKSC 11.

[107] *Reynolds v Times Newspapers* [2001] 2 AC 127 at [204–205].

clearly set out, it had—in the words of Lord Hoffman—"little impact on the way the law is applied at first instance". This required him to restate its principles.[108] He observed:

> "If the article as a whole concerned a matter of public interest, the next question is whether the inclusion of the defamatory statement was justifiable. The fact that the material was of public interest does not allow the newspaper to drag in damaging allegations which serve no public purpose. They must be part of the story. And the more serious the allegation, the more important it is that it should make a real contribution to the public interest element in the article. But whereas the question of whether the story as a whole was a matter of public interest must be decided by the judge without regard to what the editor's view may have been, the question of whether the defamatory statement should have been included is often a matter of how the story should have been presented. And on that question, allowance must be made for editorial judgment. If the article as a whole is in the public interest, opinions may reasonably differ over which details are needed to convey the general message. The fact that the judge, with the advantage of leisure and hindsight, might have made a different editorial decision should not destroy the defence. That would make the publication of articles which are, *ex hypothesi*, in the public interest, too risky and would discourage investigative reporting."

If the steps taken to gather and publish the information were responsible and fair—"responsible journalism" as he termed it—then the standard for it:

> ". . ..is as objective and no more vague than standards such as "reasonable care" which are regularly used in other branches of law. Greater certainty in its application is attained in two ways. First, as Lord Nicholls said, a body of illustrative case law builds up. Secondly, just as the standard of reasonable care in particular areas, such as driving a vehicle, is made more concrete by extra-statutory codes of behaviour like the Highway Code, so the standard of responsible journalism is made more specific by the Code of Practice which has been adopted by the newspapers and ratified by the Press Complaints Commission. This too, while not binding upon the courts, can provide valuable guidance.
>
> In *Reynolds*, Lord Nicholls gave his well-known non-exhaustive list of ten matters which should in suitable cases be taken into account. They are not tests which the publication has to pass. In the hands of a judge hostile to the spirit of *Reynolds*, they can become ten hurdles at any of which the defence may fail. . .. [but] the standard of conduct required of the newspaper must be applied in a practical and flexible manner. It must have regard to practical realities."[109]

Against this background, s.4 of the Act provides:

> **"4 Publication on matter of public interest**
>
> (1) It is a defence to an action for defamation for the defendant to show that—
>
> (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
>
> (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.
>
> (2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.
>
> (3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.
>
> (4) In determining whether it was reasonable for the defendant to believe that publishing

[108] *Jameel (Mohammed) v Wall Street Journal Europe* [2006] UKHL 44 [38].
[109] *Jameel (Mohammed) v Wall Street Journal Europe* [2006] [55–56].

the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.

(5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.

(6) The common law defence known as the Reynolds defence is abolished."

7–019 The requirement for an effective defence under s.4(1)(a) rests on the fact that the statement at the root of the action was, or formed part of, a statement on a matter of public interest. Public interest, significantly, is left undefined in the Act.[110] Lord Hoffman considered that the Press Complaints Commission Code of Practice—now translated directly into the Independent Press Standards Organisation (IPSO) code—could provide "valuable guidance" on the issue of responsible journalism generally.[111] The IPSO Editors' Code provides that:[112]

"The public interest

. . ..

1. The public interest includes, but is not confined to:
   i) Detecting or exposing crime or serious impropriety.
   ii) Protecting public health and safety.
   iii) Preventing the public from being misled by an action or statement of an individual or organisation.
2. There is a public interest in freedom of expression itself.
3. Whenever the public interest is invoked, the Regulator will require editors to demonstrate fully that they reasonably believed that publication, or journalistic activity undertaken with a view to publication, would be in the public interest and how, and with whom, that was established at the time.
4. The Regulator will consider the extent to which material is already in the public domain, or will become so.
5. In cases involving children under 16, editors must demonstrate an exceptional public interest to over-ride the normally paramount interest of the child."

For s.4(1)(b) to provide effective protection there are two elements that must be satisfied. Firstly, the defendant must have "believed" that publishing the statement was in the public interest. The burden of proof rests on the defendant and is likely to require, in practice, specific evidence from an individual of some standing involved in the editorial decision to publish. That, in turn, opens up that individual—giving that evidence—to the prospect of cross-examination on the issue of whether it was, in fact, actually a reasonably held belief. Secondly, the defendant must have "reasonably" believed that it was in the public interest to publish the statement in question.[113] This suggests

[110] The Explanatory Notes suggest that the Public Interest is "a concept which is well-established in English Common law". Lord Bingham's formulation (in the Court of Appeal in *Reynolds*) is likely to remain the keystone: "By that we mean matters relating to the public life of the community and those who take part in it, including within the expression 'public life' activities such as the conduct of government and political life, elections. . .. and public administration, but we use the expression more widely than that, to embrace matters such as (for instance) the governance of public bodies, institutions and companies which give rise to a public interest in disclosure, but excluding matters which are personal and private, such that there is no public interest in their disclosure."

[111] *Jameel (Mohammed) v Wall Street Journal Europe* [2006] UKHL 44 [55].

[112] *https://www.ipso.co.uk/IPSO/cop.html*

[113] *Blackstone's Guide to The Defamation Act 2013* edited by James Price QC and Felicity McMahon (OUP 2013) (5.54–5.55) points out that this "appears to conflate the second and

strongly that an element requiring that there has been objectively responsible journalism will remain.[114]

The judicial care exercised in this new statutory area, particularly when the defendant is unrepresented, was demonstrated recently in *Barron v Vines*.[115] The facts arose out of comments made about Labour MPs for the Rotherham area by the leader of the UK Independence Party (UKIP) group on Rotherham Metropolitan Borough Council (RMBC) in an interview on Sky News. The comments followed an independent inquiry into child sexual exploitation in Rotherham which reported in August 2014 and concluded that some 1,400 children had been abused over a 16-year period.[116] At one stage in the interview the defendant stated:

> "Those fourteen hundred kids had been abused and been let go by the Labour Council and the Labour MPs. They knew what were going off, most . . . not Sarah [Champion MP], because she's only the new girl on the block. But certainly the other two, not telling me they did not know. In fact [Denis] MacShane [for former MP] in his book has openly said so. So yes people need reminding. We cannot forget that they let the kids down and they're still letting them down. There's still no arrests, what's going on?"

7–020 The claimant MPs, Sir Kevin Barron and John Healey, sued on these words. Warby J concluded that the defendant had failed to plead defences of any substance that would—in themselves—prevent the action being struck out. However he noted the following in relation to whether the defendant might have a defence of publication on a matter of public interest under s.4 of the Act available to him, even though he had not raised it:[117]

> "It is, in general terms, a matter of high importance to afford political speech protection from the chilling effects which the law of defamation can have. As I noted in *Barron v Collins* [2015] EWHC 1125 (QB) at [54], this defence is potentially available to meet the need to allow trenchant expression on political matters. The defence can apply in cases where, as here, the defamatory statement contains allegations of fact which cannot be defended as true. In principle it seems it may be capable of protecting expressions of opinion even though the defence of honest opinion is not available – though commentators have observed that it is hard to envisage circumstances where this would be so.
>
> . . ..It is not necessary to receive more evidence about the circumstances than I have been provided with on this application to conclude that the first of the statutory requirements is plainly satisfied in this case. The question of how much politicians knew about the long-running child sexual abuse in Rotherham and whether they failed the victims to any extent are unquestionably matters of high public interest. The issue becomes considerably more complex when it comes to the second requirement of s 4(1).

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third stages of Lord Hoffmann's tests as set out in *Jameel*" but "with no separate requirement of responsible journalism being set out in the Act, it is the reasonable belief test that must now bring in factors relevant to the previous common law test. The extent to which editorial judgement is relevant at that stage is less clear, particularly with Lord Hoffmann's statement in *Jameel* that the standard of responsible journalism was an 'objective' matter."

[114] The Explanatory Notes make it clear that 'the intention in this provision [section 4 (1)] is to reflect the existing common law as most recently set out in *Flood v Times Newspapers'* [29]. Highlighted [at 5.39 and 5.46–5.47] was the fact that the publisher's conduct before publication, including the steps taken to guard against publication of untrue defamatory material, would be highly material to the question of the reasonableness of belief that the publication was in the public interest.

[115] *Barron v Vines* [2015] EWHC 1161 (QB).

[116] Conducted by Professor Alexis Jay OBE.

[117] *Barron v Vines* [2015] EWHC 1161 (QB) [59–65].

Because the Defendant has not been advised to raise, and has not raised, this matter the evidence and information that I have about his state of mind and the other relevant circumstances is somewhat limited. He has said quite clearly and emphatically that he did not intend to suggest any knowledge or failures by the claimants before 2012. It might be said that he therefore cannot have believed, let alone reasonably believed, that it was in the public interest to make "the statement complained of", which bore a quite different meaning. It may well be, however, that in this context the term "statement complained of" means the words used rather than the imputation which they conveyed. "Imputation" is the word used in the 2013 Act to refer to what is otherwise referred to as "meaning". On this view, a reasonable belief that it is the public interest to make statement A could be the basis for a defence, even if the words used unintentionally conveyed meaning B. That would seem more consistent with the previous law.

I have expressed these views in somewhat tentative and provisional form for two reasons. First, because the defence under s 4 is a new statutory defence, which has yet to be the subject of any decision. Although the Explanatory Notes to the Act suggest that it was based on and intended to reflect the principles of the pre-existing Reynolds defence, there is inevitably some room for argument about its exact scope and application to particular facts. Secondly, on these applications there has been no such argument, for reasons that will be obvious from what I have already said. The evidence also may have been more limited than it would have been had the prospect of such a defence been considered by or on behalf of the Defendant. I am also conscious of the speed with which this matter has proceeded.

In the end, although I do not consider that any tenable defence has been put forward so far, I am left with a distinct feeling of unease at the prospect of granting summary judgment in a matter of this kind, against an unrepresented litigant, without giving him a further opportunity to take professional advice on the specific question of whether this as yet untested statutory defence may arguably be available to him. In all the circumstances I have decided to adjourn the claimants' summary judgment application for a suitable period of time, to enable the Defendant to take advice and, if so advised, to prepare and submit a draft Amended Defence and further evidence, limited to the one question that I have identified as potentially deserving of further consideration."

In the event, having allowed the parties time to consider the effect of his decision, the defendant made it clear to Warby J that he did not want to rely on the defence or to defend the matter further.[118]

7.5.4 The Statutory Defence for Operators of Websites (Section 5)

7–021 The purpose of s.5, in an internet age where rapid, forthright and often defamatory comments are posted by users, is to give an unconditional defence to the operators (providers) of the websites. The defence is for the website operators who follow the statutory procedure in respect of comments posted by identifiable authors unless it can be shown that the operator has acted with malice.

The pre-existing common law in respect of internet publication had become inconsistent and, in that sense, uncertain.[119] The Electronic Commerce (EC

[118] *Barron v Vines* [2015] [69]: "After the handing down of this judgment in draft, and having taken time to consider his position, the Defendant told me that he did not wish to take advantage of the opportunity I had decided he should have. Nor did he wish to appeal. He accepted my judgment. After questioning the Defendant I was satisfied that this was a fully informed decision made after consideration of his options, and in the knowledge of the implications of the position he was adopting."

[119] *Godfrey v Demon Internet* [2001] QB 201 at 208–209 held that an Internet service provider (ISP), which allowed subscribers access to discussion forums, was a distributor in the same class as booksellers and libraries. In *Bunt v Tilley* [2006] EWHC 407 (QB) Eady J held that it would be wrong to attribute liability at common law to a passive medium of communication, such as an ISP and that an ISP's position was not analogous to that of a distributor of defamatory material. ISPs were "information society service" providers within the definition of the e-Commerce

Directive) Regulations 2002[120] provides a defence to website operators in respect of defamatory posts provided the operator played only a passive role and then acted expeditiously to remove anything that was defamatory when given notice.

The provisions of s.5 are as follows:

"5 Operators of websites

(1) This section applies where an action for defamation is brought against the operator of a website in respect of a statement posted on the website.

(2) It is a defence for the operator to show that it was not the operator who posted the statement on the website.

(3) The defence is defeated if the claimant shows that—

(a) it was not possible for the claimant to identify the person who posted the statement,

(b) the claimant gave the operator a notice of complaint in relation to the statement, and

(c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.

(4) For the purposes of subsection (3)(a), it is possible for a claimant to "identify" a person only if the claimant has sufficient information to bring proceedings against the person.

(5) Regulations may—

(a) make provision as to the action required to be taken by an operator of a website in response to a notice of complaint (which may in particular include action relating to the identity or contact details of the person who posted the statement and action relating to its removal);

(b) make provision specifying a time limit for the taking of any such action;

(c) make provision conferring on the court a discretion to treat action taken after the expiry of a time limit as having been taken before the expiry;

(d) make any other provision for the purposes of this section.

(6) Subject to any provision made by virtue of subsection (7), a notice of complaint is a notice which—

(a) specifies the complainant's name,

(b) sets out the statement concerned and explains why it is defamatory of the complainant,

(c) specifies where on the website the statement was posted, and

(d) contains such other information as may be specified in regulations.

Regulations and had the "mere conduit", "caching" and "hosting" defences of Regulations 17, 18 and 19, where they were without knowledge of their customers' postings. In *Metropolitan International Schools Ltd v Designtechnica and Google Inc* [2009] EWHC 1765 (QB) Eady J developed the common law so that it provided immunity for Google from liability for defamatory content of "snippets" shown within search results. This was something that the Government had omitted to do when considering an expansion of the protection afforded by the E-commerce Regulations. In *Tamiz v Google Inc* [2013] EWCA Civ 68 the Court of Appeal determined that the host of a blogging platform and website was a publisher after the point at which it received notice of the defamatory statement but might not be a publisher prior to that notification.

[120] Implementing Directive 2000/31. Regulation 17 provides a defence to ISPs which were mere conduits providing their customers with access to the Internet; Regulation 18 provides a defence where stored copies of a webpage are "cached" to facilitate faster browsing and Regulation 19 in relation to storage. Regulation 19 provides the "storage" defence provided that the operator (a) had no actual knowledge of the unlawful nature of the information stored, and was not aware of facts and circumstances from which that unlawfulness would have been apparent; or upon gaining such knowledge or awareness, acted "expeditiously" to remove or disable access to the information and (b) the person who provided the information stored was not acting under his authority or control.

(7) Regulations may make provision about the circumstances in which a notice which is not a notice of complaint is to be treated as a notice of complaint for the purposes of this section or any provision made under it.
(8) Regulations under this section—
(a) may make different provision for different circumstances;
(b) are to be made by statutory instrument.
(9) A statutory instrument containing regulations under this section may not be made unless a draft of the instrument has been laid before, and approved by a resolution of each House of Parliament.
(10) In this section "regulations" means regulations made by the Secretary of State.
(11) The defence under this section is defeated if the claimant shows that the operator of the website has acted with malice in relation to the posting of the statement concerned.
(12) The defence under this section is not defeated by reason only of the fact that the operator of the website moderates the statements posted on it by others."

7–022 To gain the protection of the statutory defence the website operator only needs to establish that it did not post the statement complained of on its website. It is up to the claimant thereafter to defeat the defence either by proving malice or by proving that it was not possible to identify the poster and that—having given notice of complaint in relation to the statement—the website operator failed to respond to it in accordance with the regulations.[121] The terms "operator of a website", "posted" and "moderates" are not defined in the Act. Although one of the obvious purposes of s.5 is to help claimants identify and sue authors of defamatory material on websites, it also allows authors the opportunity to defend their postings before the postings are summarily removed.[122]

There is, however, a cautionary case from the Grand Chamber of the ECtHR in Strasbourg in the form of *Delfi v Estonia*.[123] Delfi, one of the largest news portals in Estonia publishing up to 330 articles daily, allowed readers to comment on them. It had a policy to limit unlawful content and operated a filter as well as a notice and take down system. On 24 January 2006 it published an article headed "SLK Destroyed Planned Ice Road". Within two days the article attracted 185 comments, 20 of which contained personal threats and offensive language directed against the majority shareholder of SLK.[124] On 9 March 2006 L's lawyers requested that Delfi remove the

[121] The regulations are the Defamation (Operators of Websites) Regulations 2013 SI 2013/3028. These detail the complaints procedure to be followed. The effect of Section 5 (6) of the act and Regulation 2 is that the claimant must include a significant amount of detail in the notice of complaint. This includes specification of where on the website the statement was posted, the meaning the claimant attributes to it and the aspects of the statement which the claimant believes to be factually inaccurate or which are opinions not supported by fact. If the notice of complaint is defective then the website operator's duty is restricted to telling the claimant that the notice is defective, specifying what the claimant must do to comply with the Act and the Regulation.

[122] There is also an over-arching new defence under s.10 of the Act. The effect of this is that the court does not have jurisdiction over any claim brought against a person who was not the author, editor or publisher of the statement unless it is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher. This put the onus on the claimant to show either that the original author cannot be identified or that for some other good reason it is not realistic to expect him to bring a claim against that person.

[123] *Delfi AS v Estonia* (Application no. 64569/09).

[124] Ice roads are public roads over the frozen sea which are open between the Estonian mainland and some islands in winter. The abbreviation "SLK" stands for AS Saaremaa Laevakompanii

offensive comments and claimed damages.[125] The comments were taken down immediately. L wanted damages for the six weeks before this happened. The Estonian Supreme Court upheld damages of €320. It rejected Delfi's argument that it was exempt from liability under the EU E-Commerce Directive (Directive 2000/31/EC)—and the domestic legislation which implemented that Directive—because of the editorial control and filtering Delfi exercised in respect of its news portal.

The Grand Chamber, by 15 votes to 2, held that the €320 fine was not an Article 10 freedom of speech violation.

> "The Court notes at the outset that user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression. That is undisputed and has been recognised by the Court on previous occasions (see Ahmet Yıldırım v. Turkey, no. 3111/10, § 48, ECHR 2012, and Times Newspapers Ltd (nos. 1 and 2) v. the United Kingdom, nos. 3002/03 and 23676/03, § 27, ECHR 2009). However, alongside these benefits, certain dangers may also arise. Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds, and sometimes remain persistently available online. These two conflicting realities lie at the heart of this case. Bearing in mind the need to protect the values underlying the Convention, and considering that the rights under Article 10 and 8 of the Convention deserve equal respect, a balance must be struck that retains the essence of both rights. Thus, while the Court acknowledges that important benefits can be derived from the Internet in the exercise of freedom of expression, it is also mindful that liability for defamatory or other types of unlawful speech must, in principle, be retained and constitute an effective remedy for violations of personality rights."[126]

Further:

> "The Court accordingly finds that, as a professional publisher, the applicant company should have been familiar with the legislation and case-law, and could also have sought legal advice. The Court observes in this context that the Delfi news portal is one of the largest in Estonia. Public concern had already been expressed before the publication of the comments in the present case and the Minister of Justice had noted that victims of insults could bring a suit against Delfi and claim damages. . .. Thus, the Court considers that the applicant company was in a position to assess the risks related to its activities and that it must have been able to foresee, to a reasonable degree, the consequences which these could entail. It therefore concludes that the interference in issue was 'prescribed by law' within the meaning of the second paragraph of Article 10 of the Convention."[127]

As one commentator has noted, the Court's concern about the internet as a vehicle for dangerous and defamatory material seems to have coloured its approach to the Article 10(2) analysis and the balancing of Articles 10 and 8.

> "In recognising that the various forms of media operate in different contexts and with different impact, the Grand Chamber has not recognised the importance of the role of intermediaries of all types (and not just technical intermediaries) in providing a platform for and curating information. While accepting that the internet may give rise to different 'duties and responsibilities', it seems that the standard of care required is high."[128]

(Saaremaa Shipping Company). SLK provided a public ferry transport service between the mainland and certain islands. L. was a member of the supervisory board of SLK at the material time.

[125] *Delfi AS v Estonia* [16]. The damages claim was for approximately €32,000 and the offensive comments are listed in this paragraph.

[126] *Delfi AS v Estonia* [110].

[127] *Delfi AS v Estonia* [129].

[128] Professor Lorna Woods *http://blogs.lse.ac.uk/mediapolicyproject/2015/06/16/the-delfi-as-vs-estonia-judgement-explained/*

Because the Grand Chamber found Delfi had control over user generated content that seemed to be a major factor in determining its liability.

> "The concurring opinions go to great length to say that a view which requires the portal only to take down manifestly illegal content of its own initiative is different from a system that requires pre-publication review of user generated content. This may be so, but both effectively require monitoring (or an uncanny ability to predict when hate speech will be posted). Indeed, the dissenting judges say that there is little difference here between this requirement and blanket prior restraint (para 35). Both approaches implicitly reject notice and take down systems, which are used – possibly as a result of the e-Commerce Directive framework – by many sites in Europe. This focus on the content has led to reasoning which almost reverses the approach to freedom of expression: speech must be justified to evade liability. In this it seems to give little regard neither to its own case law about political speech, nor its repeated emphasis on the importance of the media in society."[129]

7.5.5 The Statutory Defence for Peer-Reviewed Statements in Scientific or Academic Journals (Section 6)

7–023 Academic celebrity can bring with it dangers and pitfalls, not least because the positions taken by particular academics on controversial topics can often become news items in themselves.[130] This new statutory defence of qualified privilege grew from calls for it from scientists and academics who had faced prospective defamation actions.[131]

Section 6 of the Act provides:

> **"6 Peer-reviewed statement in scientific or academic journal etc**
>
> (1) The publication of a statement in a scientific or academic journal (whether published in electronic form or otherwise) is privileged if the following conditions are met.
>
> (2) The first condition is that the statement relates to a scientific or academic matter.
>
> (3) The second condition is that before the statement was published in the journal an independent review of the statement's scientific or academic merit was carried out by—
>
> (a) the editor of the journal, and
>
> (b) one or more persons with expertise in the scientific or academic matter concerned.
>
> (4) Where the publication of a statement in a scientific or academic journal is privileged by virtue of subsection (1), the publication in the same journal of any assessment of the statement's scientific or academic merit is also privileged if—
>
> (a) the assessment was written by one or more of the persons who carried out the independent review of the statement; and
>
> (b) the assessment was written in the course of that review.

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[129] Ibid.

[130] A recent US example is the New York District Court case of *Catalanello v Kramer* 13 Civ. 7121 (SDNY) where a law professor—in a law review article and a related lecture—analysed the actions of the claimant financier who had fired an employee (in a legal action that subsequently settled). Professor Kramer's article in the Washington Law Review was entitled "Of Meat and Manhood: The New Sex Discrimination". The analysis related to sexual harassment, gender discrimination and homosexuality. The claim was dismissed in part because the Professor had fair-reporting privilege in respect of the case.

[131] In particular Dr Simon Singh (*British Chiropractic Association v Singh* [2010] EWCA Civ 350), the medical whistle-blower Dr Peter Wilmshurst (the claim against him was brought by a US-based company NMT Medical and was struck out when the claimant failed to pay £200,000 in security for costs) and Dr Ben Goldacre, the author of *Bad Pharma* (*Matthias Roth v Guardian News and Media and Ben Goldacre* [2008] EWHC 398).

(5) Where the publication of a statement or assessment is privileged by virtue of this section, the publication of a fair and accurate copy of, extract from or summary of the statement or assessment is also privileged.
(6) A publication is not privileged by virtue of this section if it is shown to be made with malice.
(7) Nothing in this section is to be construed—
  (a) as protecting the publication of matter the publication of which is prohibited by law;
  (b) as limiting any privilege subsisting apart from this section.
(8) The reference in subsection (3)(a) to "the editor of the journal" is to be read, in the case of a journal with more than one editor, as a reference to the editor or editors who were responsible for deciding to publish the statement concerned."

As a general comment, the reality is that none of the academic litigation cases that gave rise to the section—like *Singh* and *Goldacre*—would have benefited from it. None of them concerned defamatory statements published in peer-reviewed journals. The defence can be lost if the claimant can show that the publication was made with malice.[132] It is likely that the attitude taken by courts to this defence in the context of those who fairly, accurately and honestly report peer-reviewed statements or assessments from academic and scientific journals will be that any pre-existing malice in the original authorship and publication of the article will not "infect" their use of such reports. An open question, generally, relates to the degree of expertise required of the person with "expertise in the scientific or academic matter concerned". This could lead to a battle of experts in respect of challenging the expertise of the independent reviewer by virtue of s.6(3)(b).

7.5.6 The Statutory Defence for Reports Protected by Privilege (Section 7)

7–024 This section of the Act amends, rationalises and extends some of the provisions of the Defamation Act 1996 in relation to the important protected areas of absolute and qualified privilege.[133] Much of what appears in newspapers and other media news reports is protected by one or other of these two defences of absolute or qualified privilege to a degree where it is so natural and instinctive to contemporary reportage that its significance is often forgotten. The privileges span what is said in Parliament, the courts, in local council meetings, information given by the police and—increasingly important because of the speed and egregious nature of worldwide communications—reports of what happens in foreign courts and other national and international organisations. Celebrities are often the focus of such reports, particularly and inevitably when they relate to police investigations and court proceedings.

The key difference between the two forms of privilege is straightforward. Statements covered by absolute privilege mean there can be no successful claim in respect of defamatory words at all even if the statements published

[132] In the sense that the author could be shown to have acted with "ill will" or "improper motive". That test for malice is the one established in common law as capable of defeating the defence of qualified privilege.
[133] Section 7 of the Defamation Act 2013 amends Sections 14 and 15 and Part II of Sch 1 of the 1996 Act.

are untrue or malicious. Examples are words spoken in Parliament and in other national assemblies or by witnesses in court. They include

- judicial and quasi-judicial proceedings;
- fair, accurate and contemporaneous reports of judicial and other proceedings;
- statements made by one officer or state to another in the course of duty; and
- statements that are given absolute privilege by statute.

The "qualification" that separates absolute privilege from qualified privilege is that the privilege will be lost if the claimant can show that the defendant was actuated by malice in publishing the words that are complained of. The public policy which has underpinned the defence of qualified privilege for the last 150 years was reiterated most recently in *Reynolds v Times Newspapers.*[134] Lord Nicholls stated:

> "Over the years the courts have held that many common form situations are privileged. Classic instances are employment references, and complaints made or information given to the police or appropriate authorities regarding suspected crimes. The courts have always emphasised that the categories established by the authorities are not exhaustive. The list is not closed. The established categories are no more than applications, in particular circumstances, of the underlying principle of public policy. The underlying principle is conventionally stated in words to the effect that there must exist between the maker of the statement and the recipient some duty or interest in making the communication. Lord Atkinson's dictum in *Adam v Ward* [1917] AC 309, 334, is much quoted:
>
> > 'a privileged occasion is. . .. an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.'
>
> The requirement that both the maker of the statement and the recipient must have an interest or duty draws attention to the need to have regard to the position of both parties when deciding whether an occasion is privileged. But this should not be allowed to obscure the rationale of the underlying public interest on which privilege is founded. The essence of this defence lies in the law's recognition of the need, in the public interest, for a particular recipient to receive frank and uninhibited communication of particular information from a particular source. That is the end the law is concerned to attain. The protection offered to the maker of the statement is the means by which the law seeks to achieve that end. Thus the court has to assess whether, in the public interest, the publication should be protected in the absence of malice."

Public authorities will only be able to rely on the common law qualified privilege defence where it can be demonstrated that the publication was in accordance with the law and necessary and proportionate in a democratic society for one of the legitimate aims set out in Article 8 (2) ECHR—the right to private life—for instance where the statement is necessary to protect the rights of others. Unless that is so the public authority cannot claim to have been under any duty to publish the relevant words. The Court of Appeal emphasised this in *Clift v Slough Borough Council:*[135]

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[134] *Reynolds v Times Newspapers* [2001] 2 AC 127 at 194–195. See also the earlier cases of *Chapman v Lord Ellesmere* [1932] 2 KB 431 and *Blackshaw v Lord* [1984] QB, CA.

[135] *Clift v Slough Borough Council* [2010] EWCA Civ 1484 at [32–36]. The brief facts of that

> "If the council were in breach of Article 8, it would be unlawful to publish the information. If it was unlawful to publish the information, then the Council's duty was not to publish. If the duty was not to publish, the Council could no longer claim to be under a duty to impart the information to those who did not need to know it. Not being under a duty to publish, the foundation of the claim to qualified privilege falls away."

Section 7 (1) of the Act extends the scope of the defence to cover proceedings in any court established under the law of the country or territory outside the UK together with any international court or tribunal established by the Security Council of the UN or by an international agreement. Section 7 (2) inserts the expression "public interest" to replace "public concern" in the 1996 Act. Section 7 (3) to (10) amends the 1996 Act and substantially extends the circumstances in which qualified privilege as a defence to a claim of defamation is available. These changes may not make the amended Schedule 1 of the 1996 Act any clearer to interpret or less complex to comprehend in practice. What s.7 does do is extend privilege to summaries of material as well as reports and copies, extend the international scope of the privilege and to clarify that qualified privilege extends to reports of scientific and academic conferences and press conferences.

7.6 Conclusions

7–025 As a celebrity privacy remedy, defamation has clearly lost none of its historical appeal as is evidenced in its continuing predominance in English privacy litigation. The changes introduced by the Defamation Act 2013 have, if anything, added to its attractions by making the factual areas of the law—such as meaning and "serious harm"—judge focused. This is true not only in the area of preliminary issues but as ones for factual resolution without the prospect of a jury.

The protected right has been robustly upheld in *Cooke* and in the preliminary issues considered in *Ames* and *Lachaux*. *Mitchell*—an unusual triangulation of claimants, defamation issues and defendants—demonstrated the practical utility of judge-led case management on the procedural path to a judge-only trial. While defamation actions remained the preserve of claimants who have the means or the insurance to bring matters to court, this was never an area that supported legally aided suits. Personal finances or access to trade union support and funding for such actions were always the primary drivers in this area. There are also the supplemental supports available through Conditional Fee Agreements (CFAs) and After the Event Insurance (AEI).

There is no sign that defamation claims—of themselves—will fall away

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case were that Ms Clift was a Slough resident who witnessed some anti-social behaviour in a local park. She reported it to the Council's anti-social behaviour co-ordinator. C was dissatisfied with the way the Officer responded to her report and, as a result of expressing that dissatisfaction trenchantly, found herself placed on the Council's Violent Persons' Register for 18 months with a risk rating of medium. This Register was circulated electronically within the Council to its employees and externally to four partner organisations, which included 50 businesses and others that would have no contact with Ms Clift. It also published an email stating that Ms Clift had made repeated violent threats to staff and to 66 employees of the Council.

in the foreseeable future. They may just be claims framed in a different way which, as with privacy claims, may settle earlier rather than move inexorably on to the set-piece battles that historically populated this area of law. They are also likely to involve increasingly more complex issues in relation to internet publication, the liability of search engines and website providers and in respect of digital publications generally. However actions in this area may become more complex with an increase in Data Protection Act 1998 claims as considered in the previous chapter.

CHAPTER 8

CONCLUSIONS

8.1 Privacy Remedies Before 2000

8–001 Before 22 October 2000—the date the HRA came into force—five of the six privacy regimes examined in this book existed. Three had been actively used for the protection of the privacy of celebrities: breach of confidence, copyright and defamation. The Data Protection Act 1998 had been in force since August 1998, replacing the 1984 Act. Neither of those Acts was tested in the celebrity sense until Lord Ashcroft's unsuccessful post-HRA case, which began on 22 June 2001.[1] Protection from harassment was perceived only as a curb against domestic violence and as an anti-stalking measure. Misuse of private information—the new tort catalysed from the mixture of the HRA and breach of confidence—was an action for the future. Cases like *Kaye* had showed the restricted, tired and technical limits of the law when celebrities tried to rely on breach of confidence pre-HRA despite English judicial pronouncements about that cause of action being flexible enough to accommodate issues for the future. There is no evidence—when all the cases are examined—of any judicial timidity or fearfulness of media criticism in maintaining that "breach of confidence can accommodate all celebrity (and other) privacy issues in this area" approach.

Considering the celebrity privacy cases up to this period there are the inevitable litigation themes and topics that have continued to the present. "Kiss and tell" stories (particularly *Argyll*, *Woodward*, *Stephens* and *Barrymore*), pictures—real and digital—from *Prince Albert* to *Hyde Park Properties* and the telephone tapping in *Francome* were staples of the litigation battleground then as now but not in the volume that came before the courts post-2000.

When this general area was examined, one hypothesis tested was whether there was any evidence of the ability of specific ascribed celebrities—such as the monarch and members of the royal family—to drive and shape the English laws of privacy over the 175 years from *Prince Albert*. That case, together with *R v Mylius* and—on any view—a reasonable copyright complaint about the Queen's speech in 1992 being improperly appropriated and pre-published, could not bear the burden of supporting that initial proposition in the years up to 2000.

If anything, the fact that the privacy aspects of *Prince Albert* lay dormant for so long showed a general reluctance on the part of the royal family to

[1] With Michael Tugendhat QC representing him.

use the law to assert its privacy rights. *Probyn v Logan*—using copyright law and DORA to stifle "Daisy" Warwick's "kiss and tell" personal fund-raising venture—was as politically pragmatic as was the criminal libel prosecution of Edward Mylius. They were cases of their time with little to add more generally to the future of celebrity privacy law. Too many other attributed and achieved celebrity cases were part of the mixture in the general development of this area of the law.

What is notable from that period is that, despite England's former Attorney General[2] leading the drafting team for the ECHR in 1948 and with the UK as one of its first signatories of the Convention in 1953, that fact did nothing to advance the status of privacy rights *per se* in English law. It took the HRA to require English courts to recognise, apply and articulate Article 8 and Article 10 rights in English law. There seemed to be an entrenched aversion, in English law, to recognise any concept of privacy law unless it had been previously delineated or it was specifically created by Parliament.

8–002 It is reasonable to consider whether the concept of the kind of privacy all categories of celebrity could expect to be able to protect was limited in the years leading up to 2000. Whether, in effect, the "equitable" approach embedded within breach of confidence actions and copyright actions, created regimes for celebrity categories that were more or less amenable to protection or intrusion. If, as Wacks has argued, the nucleus of the right to privacy is the "safeguarding of private facts"[3] or as Moreham contends it is the state of desired "inaccess" or as "freedom from unwanted access"[4] then it is really only the outlier case of *Kaye* that shows the ragged edges of interference that is unlikely to be permitted when measured against the post-HRA proportionality balancing exercise.[5] *Argyll*, *Woodward*, *Lennon, Stephens* and *Barrymore* are likely to have resulted in the same outcomes now as then. What has changed is the additional protection that would now be accorded to private information. Each of these celebrity cases now would have included a claim in respect of Article 8 misuse of private information to be countered by a media defence that would assert Article 10 freedom of speech issues.

In copyright *Pro Sieben*, in 1998, saw a strong and more positive expression of the balancing of interests that would have sat comfortably two years later within an HRA claim and defence. However the *Hyde Park Properties* result in 1999 is likely to have favoured *The Sun's* Article 10 right to inform the public if the case had been heard the following year. Where matters will stand with *The Sun's* 18 July 2015 pictures and video reproduction of the royal family's 1930s home movie involving Nazi salutes depends on the facts and arguments presented in any eventual litigation in respect of this.

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[2] David Maxwell-Fyffe QC later, as Lord Chancellor, Lord Kilmuir.
[3] See Chapter 1.2.2.4.
[4] See Chapter 1.2.2.3.
[5] See Chapter 2.4.3.

8.2 Privacy Remedies From 2000–2015

8–003 The successive chapters of the book have identified the key celebrity cases and explored the privacy issues contained within them. For consideration now are what developments, themes and trends can be discerned from this body of new case and statute law to support the contention of the book that it has been the litigation efforts of all three categories of celebrity that have been driving the development of the laws of privacy particularly strongly during this 15 year period. There are two discernable periods of development: the first 5 years from 2000–2004 and then from 2005 up to the present. This second period almost mirrors the explosion in UK Internet usage noted at the beginning of the book.[6]

8.3 The Early Years Of The HRA: 2000–2004

8–004 The key celebrity breach of confidence cases during this period took a while to establish consistent themes and to mark the boundaries for the de-coupling of this action in the creation of the new tort of misuse of private information. Chronologically *Douglas* was the first celebrity case. Proceedings began four weeks after the HRA came into force.[7] *Campbell* came three months into the life of the HRA.[8] Significantly both contained DPA claims allied to breach of confidence.[9] *Campbell v Frisbee*, *Theakston* and *A v B & C* and *Archer* represent the other celebrity breach of confidence cases during this period. There is one ECtHR case: *Von Hannover 1*.[10]

This is no tsunami of litigation. Its tidal reach, however, washed through to the Court of Appeal in all but two of the cases and to the House of Lords in *Douglas* and *Campbell*. This concerted appellate persistence is evidence of the wealth and dedication of these attributed or achieved celebrity litigants to assert and establish the parameters of their privacy rights, something that had not been as evident in the pre-HRA litigation save, perhaps, with *Kaye*. Such celebrities had a point to make: Article 8 private life rights were enforceable not just vertically against the State but, much more importantly, horizontally against the media (even, in the *Douglas* case, a media competitor).

In the other privacy regimes *Thomas* established that harassment was a viable cause of action, in principle, to remedy the kind of attributed celebrity notoriety created for Ms Thomas by *The Sun's* series of publications about her. This case and—in the area of copyright—*Ashdown* saw active Article 8 and Article 10 balancing exercises undertaken.

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[6] Chapter 1.1. Footnote 3.

[7] 20 November 2000.

[8] 1 February 2001.

[9] *Ashcroft* is excluded because the DPA and breach of confidence elements failed almost immediately and the litigation settled on the second day of the trial.

[10] The financial resources and stamina required for such celebrity litigation are evident in the chronology of this case which relates to pictures of ascribed celebrity pictures of Princess Caroline of Monaco. It began in Germany in 1993, was lodged as an ECtHR appeal in June 2000 and decided by the Grand Chamber in June 2004, 11 years later.

The structure for the consideration and role of proportionality and the balancing exercise between Articles 8 and 10 emerged at the end of 2004 in a case involving the attributed celebrity notoriety of a mother accused of murdering her 9-year-old son by salt poisoning. The issue in *Re S* was whether her surviving 7-year-old son, who had been taken into care, could be identified in newspaper reports. Lord Steyn and his colleagues in the House of Lords had the advantage that *Campbell* was already decided and citable. The 7-year-old's Article 8 rights were engaged but, as he was not a witness, they were incidental and carried less weight.

Article 10 was engaged and the freedom of the press was of central importance in a democratic society. Criminal trials were public events and full and unrestrained reporting of them promoted the values of the rule of law. The truly proportionate result could not be deduced correctly without separate and independent consideration of each of the rights which, in this case, meant full and unrestricted reporting of the case when the "ultimate balancing test" was then applied.

Where the values under the two articles conflicted, an "intense focus" on the comparative importance of the specific rights being claimed in the individual case was necessary. The legacy of *Re S* was the two practical mechanisms: the "intense focus" and the "ultimate balancing test". This careful formulation and articulation of them by Lord Steyn, on the back of the *Campbell* decision, set the parameters for the developments that then took place in the plethora of celebrity privacy actions which followed in the period leading up to the present.

8.4 Celebrity Privacy Law Matures: 2005–2015

8–005 There are a number of discrete themes that developed during this period which, although identified in the individual chapters, have a cumulative effect when placed in the context of celebrity privacy litigation generally. The general caveat is that, regardless of the category of celebrity, unless it can be shown that a reasonable expectation of privacy exists, the litigation is unlikely to succeed, resulting only in even greater *Streisand*-like exposure. Cases ranging from *Clarkson*, *Ferdinand*, *McClaren*, *Spelman*, *Terry* to *Trimingham* are a reminder of the latter point.

8.4.1 Anonymity and Injunctions

8–006 A key feature that emerged in *Re S* but which found much fuller expression in the next 10 years of celebrity privacy law relates to the use of injunctions and issues of anonymity. Procedurally this development put those representing celebrities of all categories in a position post-HRA of having to satisfy special and more onerous rules under s.12 HRA when Article 10 rights may have been affected.[11] These were enunciated by Lord Nicholls in *Cream Holdings*. Practically, as noted, these are very close to the high balance of probabilities standard that is required at full trial.

[11] Than those that used to exist pre-HRA under *American Cyanamid*.

The tactical utility of the injunction, however, is that it can be granted with a short return date to allow fuller consideration to be given to the issue about whether to maintain it or discharge it. This allows both sides to perfect their arguments with further, relevant evidence. The Court of Appeal in *Browne* developed the formula: the Article 8 and Article 10 analysis follows the separate "intense focus" in terms of engagement and weighing up of the internal factors before then being measured in the light of s.12 HRA.

Figuratively it puts the celebrity litigant's foot on the side of the door of the court that is most likely to shut out immediate publication of the material complained of or at least allow for the maintenance of anonymity until full trial of the action. If there is anonymity until full trial of the action then, if the celebrity is successful, only costs rather than damages are incurred. This is a more protective and effective way of approaching the potential damage created by the publication of private information than the defamation regime. It is also why, post-2004, many of the attributed and achieved celebrities bringing privacy actions disappeared behind initial letters of the alphabet. The 2012 Practice Direction put an end to celebrities obtaining injunctions with their identities anonymised and then leaving the injunctions in place without taking the matters forward to trial when, at that stage, there was little chance of success. This flushed out the *Clarksons* and *Hutchesons* of the world. Significantly no ascribed celebrity members of the royal family have, so far, sought or adopted this course to secure anonymity.

Max Mosley's campaign, and his unsuccessful attempt to persuade the ECtHR that the English media should inform intended targets ahead of publication about the private information on which they intended to rely, actually changed the general practice in this area. It now reflects a *Reynolds*-type approach, borrowed from defamation, to demonstrate "responsible journalism". This is an example of the sheer power of persistence and substantial financial resources this individual celebrity employed to shape privacy law at the procedural, injunctive end. That it works, without undue stifling, can be seen in the two *Spelman* hearings where initial injunctive anonymity gave way to identification on later, fuller, examination of the issues as well as in *Edward RockNRoll* where—although the embarrassing picture was not published—the issues of proportionality were fully and publicly explored. Most recently it was evidenced in *YXB v TNO* where, because of a lack of candour with the court in obtaining the initial injunction, Manchester United player Marcus Rojo was unable to hide his identity after the full hearing between the parties. Additionally it is evidence of the confidence of the media in the judicial formulation and practical application of the "intense focus" and the "ultimate balancing test" in terms of Article 8 and 10 rights.

8.4.2 Data Protection

8–007 The existence of the DPA—combined with the Commissioner as a regulator and enforcer—should have strengthened celebrities' rights to protect their privacy. The gap between the potential and the actual in this area is profound. In celebrity privacy actions of all categories DPA damages had been uniformly insubstantial and nominal with token amounts added on the back

of breach of confidence or misuse of private information claims. It remains to be seen whether the *Steinmetz* litigation—unencumbered by other claims—creates greater clarity in this area. Leveson confirmed what is self-evident: lawyers and the judiciary prefer the "latitude afforded by the human rights regime over the specificity of data protection". Echoing confirmation of that comes in Henderson J's comment in *Steinmetz*—with the opportunity of passing everything over to the Commissioner on the point before him—that the Act was "slightly arcane and complicated". The default position had been to tread the apparently intellectually gentler path of the HRA without resorting to—or at least championing—DPA issues. The effect had been that understanding of the DPA even within this specialist celebrity litigation area was stifled and stunted.

Google Spain has only very recently changed public and media perceptions about the practicalities and utility of the protection of personal data, not necessarily in the most informed fashion. The result in that case, however deficient the CJEU's detailed reasoning, could always have been a possibility had it occurred in England. That there had been no earlier suggestion of it here speaks volumes in its silence. The trio of recent cases—*Hegglin v Google*, *Mosley v Google* and *Google v Vidal-Hall*—reflects the changed landscape and has freed the DPA from its former shackles creating a potentially dynamic privacy remedy.

The ineffectiveness of the Commissioner as a regulator and enforcer—viewed specifically through the lens of celebrity privacy—is demonstrated by the failures of *Motorman* and a lack of general engagement in terms of the kind of subject access provisions that might allow aspiring attributed celebrities to have him test issues on their behalf. Demonstrating more active regulatory oversight by the Commissioner, rather than ineffective enforcement at the edges, might produce a change in that general perception. Where successive Commissioners have shouted most reasonably, loudly and persistently however is to be given a proper set of appropriate prosecution penalties to reflect the gravity of s.55 offences by adding custody to the price of acting unlawfully and not simply allowing fines and compensation to be the cost of doing illegal business. Here it seems that no political party wants to be seen to be the one that enables s.77 of the Criminal Justice and Immigration Act 2008, allowing for custodial penalties to be imposed for breach of s.55.[12] Nothing has yet changed on this front since the May 2015 General Election. However there appears to be nothing to stop the Commissioner from using MPNs to curb the media's corporate misuse of data, in situations where that can be proved. The potential for corporate conspiracy indictments from the CPS in terms of News International's previous activity remains a possibility.

8–008 Perhaps the least proportionate element in the protection of celebrities' personal data from media intrusion comes from the structure and operation of s.32. Arguably the media has excessive Article 10 protection as a result of it. Leveson suggested that its revision could be achieved proportionately by

[12] See Chapter 6.4.4. Footnote 931 and particularly [43 and 44] of the Parliamentary Report which enumerates the Government's reasons for inaction. They appear evasive rather than persuasive.

stating that the right of subject access was not intended to displace the general law on the protection of journalists' sources. Section 32 is unlikely to be the subject of any adjustment at the moment for pragmatic, political reasons. Indeed, in the Commissioner's speech at a forum entitled *Rewriting History—is the new era of data protection compatible with journalism?* he lauded the indestructability of s.32.[13–14]

8.4.3 Damages for Breach of Privacy and Misuse of Private Information

8–009 The cap on damages for misuse of private information, since Mann J's decision in *Gulati v MGN*, has changed radically from the *Mosley* high-watermark of £60,000 in 2008 to the £260,250 awarded to Sadie Frost in 2015 as one of eight representative claimants who had their phones hacked and their personal information misused. There are many other claimants with similar matters outstanding against MGN. It will be instructive to see what happens to this case if and when it reaches the Court of Appeal.

8.4.4 Defamation Act 2013

8–010 Defamation is still alive and is an active privacy remedy. The Defamation Act 2013 has, if anything, added to its attractions by making the factual areas of the law—such as meaning and "serious harm"—judge-focused and jury-absent. Defamation claims have not evaporated and *Yeo v Times Newspapers* was tried in October 2015.

Defamation claims, however, can also involve increasingly more complex issues in relation to Internet publication, the liability of search engines and website providers and in respect of digital publications generally.

8.4.5 Images and Harassment

8–011 Still and video pictures and images have presented, and will continue to present, the greatest interference to all categories of celebrity privacy. Words can tell a tale but pictures can convince the public that a statement is true. *The Sun's* seven-page spread and on-line video of the Queen and her sister as children in the 1930s is the most recent example of this. *Campbell* provided the media with a salutary reminder that the risks associated with actual publication of celebrity pictures can be mitigated by simple possession of them. If the celebrity denies the activity then the individual runs the risk of a follow-up story illustrating the truth behind the lie. That is the proportionate approach. Pictures on the internet, from digital media publications to links and postings by individuals, are powerful, potent and almost impossible to control in their circulation. Overseas publication of private information which is then reflected on the internet is not susceptible to injunctive activity in England.

Celebrities of all categories should consider the privacy laws that may apply to destinations and jurisdictions to which they may travel and work. Similarly the media must now consider how private information obtained about

[13–14] See Chapter 6.5. Footnote 941.

celebrities and their children abroad, apparently lawfully, may give rise to successful actions in English law. The *Weller* first instance decision encapsulates those two strands: the repetitive taking of the photographs was not harassment in California yet the decision goes considerably further than *Von Hannover 1* by the finding of the infringement of the private information rights of the children. While the call for the criminalisation of pictures containing images of children—celebrity or otherwise—is unlikely to gain immediate traction, in one sense it does not need to. Pictures secured that way in England would permit both criminal and civil complaints—with the potential for Restraining Orders—under the provisions of the PHA, something the ascribed celebrities of the royal family have threatened but have yet to take action on.

8.4.6 Jurisdiction

8–012 The signal shift that has occurred since 2010 has been in the willingness of the judiciary to assert domestic or European jurisdiction over data protection, personal information and image rights matters that feed directly into the protection of all categories of celebrities' privacy rights. The pinnacle of this—but, as yet, only a preliminary decision ahead of full trial of the facts of this case—is the Court of Appeal decision in *Google v Vidal-Hall*. If nothing else it opens out the jurisprudence of this area in a positive and dynamic way and begins to test, as does *Google Spain*, the previous jurisdictional impunity of multinational internet search and service providers.[14a] There will always be "work rounds" that allow private information about celebrities to be found by persistent enquirers on the internet.[15] However uncomfortable that decision has been for Google in Europe it has also emphasised—in all EU states including England—the importance and significance of the Charter Article 8 right in the protection of personal data even if its exploration of Charter Article 11 freedom of speech issues was deficient to the point of invisibility.

Martinez, with considerably greater depth to the judicial reasoning, is a CJEU jurisdictional decision that has yet to see its full potential realised by English celebrities seeking to protect their images from interference in other jurisdictions in the EU.

8.4.7 Proportionality

8–013 The concept of proportionality has established a primacy over this area in a relatively short space of judicial time in England, engaging the Supreme Court's attention twice recently in *Bank Mellat* and *Kennedy*. As was noted above, *Re S* provided the touchstone to allow the judicial development of proportionality in celebrity privacy cases and the results—from English case law—seem properly to hold the ring between the celebrities' rights to protection of privacy and the media's right to interfere with that when it is just and proportionate so to do.

It is not, however, like a piece of computer software that produces the

[14a] See also Case C-362/4 *Scheme v Data Protection Commissioner of Ireland.*

[15] For instance by searching for the information on *Google.com* rather than *Google.co.uk*.

same judicial and practical result each time. Each set of facts can be weighed slightly differently by individual judges and—as *AAA* shows—appellate courts are reluctant to set aside first instance judgments that follow the "intense focus" within each of the competing elements before arriving at the "ultimate balancing test".

As a closing thought on proportionality, it is telling that the word itself appears only once in the *Google Spain* decision. That is not in the decision itself but in the preamble of issues to be considered by the court. It is at [63] where the court noted that Google submitted that:

> "by virtue of the principle of proportionality, any request seeking the removal of information must be addressed to the publisher of the website concerned because it is he who takes the responsibility for making the information public, who is in a position to appraise the lawfulness of that publication and who has available to him the most effective and least restrictive means of making the information inaccessible."

8.5 Where may we be in 2020?

8–014 It may be that in five years, by 2020, the proposed EU Data Protection Regulation is in force and active in however many of the States then make up the European Union and the CJEU in Luxembourg will have explained *Google Spain* in subsequent decisions by reference to that new Regulation. The ECtHR in Strasbourg may, or may not have a persuasive if not binding part to play in the development of privacy and freedom of speech issues determined under whatever version of the HRA then exists in England. Negotiations for the EU to accede the Convention have been under way for nearly five years.[16] Entry into force of the final text requires ratification by the EU and all 47 members of the Council of Europe. That could take years to achieve following the CJEU decision in December 2014.[17]

One constant is unlikely to have diminished: media interest in celebrities of all categories. Information of all kinds that intrudes on celebrities' privacy is likely to have increased through new technologies yet to be discovered. Methods of media publication are likely to have become even more predominantly digital, egregious, and internet-based. The importance of this area of law cannot be over-emphasised, dismissed, diluted, or degraded because it is in the proportionate protection of celebrity privacy rights—and the equality of the media's freedom of speech—that we find the elements that ultimately protect the privacy and freedoms accorded to each of us as individuals.

Having begun with an insight from William Shakespeare about the categorisation of celebrities this section of the book closes with another Shakespearean observation. In the light of the photographs from Prince Harry's naked pool-playing partying in the US, it comes from Henry V in the scene

[16] The Draft Accession Treaty comprises 12 Articles and an explanatory report of 20 pages. The Commission referred the matter to the CJEU in September last year (Opinion 2/13) to find out whether it falls foul of EU Treaties.

[17] Opinion 2/13 of the Court (Full Court) 18 December 2014.

immediately after the King's call to arms "*Cry 'God for Harry! England and Saint George!*"".

Boy to Pistol: "*Would I were in an alehouse in London! I would give all my fame for a pot of ale and safety*."[18]

That would, of course, be a safe and secluded alehouse where the clientele had no mobile phones, the landlord banned the media, the paparazzi were not allowed to congregate outside and all CCTV cameras in the premises were switched off.

[18] Henry V 3.2.14.

PART THREE

Privacy and the royal family: constitutional and practical issues

General Introduction to Part Three

Issues specific to the celebrity status of the monarch and the royal family and the privacy of its members are examined in this part of the book. The ascribed celebrity status of the royal family and the media interest in royal births, indiscretions, marriages, infidelities, intrigues and deaths—occasionally featuring in English law over the last 175 years—reflects a valuable historical record of celebrity issues. **Pt–001**

There is one aspect, however, which sets the monarch and the royal family apart from all other celebrity categories in the UK. The monarch has the constitutional capacity—coupled with discreet, below-the-line lobbying leverage on occasions—to change the law. This is not something which can be achieved by any other celebrity category. Pressure groups of celebrities like *Hacked Off* can, figuratively, only knock at the doors of Parliament or present evidence to enquiries like the one conducted by Leveson LJ when lobbying to seek legislative change.[1] Other celebrities can get parliamentarians to lobby for change on their behalf. Such activity, when it occurs, has the benefit of transparency and the possibility of open debate surrounding it.[2]

As will be seen, however, when employed by the monarch and the royal family, transparency and debate is seldom evident in such activities. Changes to s.37 of the Freedom of Information Act 2000 (FOIA)—making absolute in 2010 what had previously been a qualified exemption in respect of information requests about the royal family—and the introduction of the Sovereign Grant Act 2011 which changed the mechanism for funding the royal family are two notable examples. The mechanisms and methods used either to maintain the desired status quo or to achieve such changes often involve the use of

[1] Four members of Hacked Off—Dr Evan Harris, Professor Brian Cathcart, Martin Moore and Hugh Tomlinson QC—attended the final all-party drafting session held at the parliamentary offices of Labour Party leader Ed Miliband MP on 19 March 2013 to sign off on the Royal Charter for the Regulation of the Press which arose from the Leveson Report when press representatives were not present.

[2] Hannah Weller's *Protect: the Campaign for Children's Privacy* and questions asked by Baroness Alison Smith in the House of Lords on 6 January 2015 about whether the government had made an assessment "of the effects on children of the publication of photographs of them without agreement or permission". *http://www.parliament.uk/business/publications/hansard/lords/todays-lords-debates/read/unknown/12/*

special access, accommodations[3] or deferential processes which are opaque and can be hard to challenge or evaluate.

The reason for covering this subtle but vital constitutional, conventional and practical legal area in detail in this chapter is to provide a resource which is currently not easily available or accessible on such topics in any single book. Some of the relevant material is buried in old case reports and archives and some of the accepted textbook assumptions of the law are—as will be argued —not as straightforward as they might seem.

Sooner or later there will be a change of monarch and that is likely to create further constitutional challenges and a further examination of currently accepted conventions. The Supreme Court decision in *R (Evans) v Attorney General* to disallow the Attorney General's use of his s.53 FOIA veto powers in the Prince of Wales' letters case is but one example of complex interplay of legal forces that are now subject to rigorous judicial analysis and which are likely to continue on in the future.[4]

Pt–002 The structure of what follows is that Chapter 9 defines briefly who are the key members of the royal family, their rights and privileges together with the powers and duties of the relevant law officers. The issues relating to the royal prerogative and the personal constitutional conventions relating to the monarch are then outlined and the historical and contemporary position of the monarch in civil and criminal proceedings is then considered, particularly in terms of written and physical attacks and threats on the monarch and demands and involvement in litigation or prosecution, actual or potential.

In Chapter 10, the adjustment in 2010 to the Freedom of Information Act 2000, making information requests about the royal family under s.37 of

[3] An example is the papers relating to the *Simpson v S* divorce in 1936. Available for secure viewing in the National Archives in Kew, these carry the historical protective marking: *These papers are not under any circumstances to be opened except in the presence of the Treasury Solicitor's Department Records Officer:* National Archives (NA) Label TS 22/1/02. There is a manuscript side-note on the general file label: *Opened for inspection by Philip Ziegler 6/8/1988 in accordance with instruction given by the Secretary of the Cabinet* [Sir Robin Butler] *and communicated by the Treasury Solicitor*. Mr Ziegler had royal approval for research in writing his book *King Edward VIII* (Alfred Knopf, New York 1991).Yet a request for access to the same material to write a legal journal article made by Oxford University's Dr Stephen Cretney—an expert on the abdication period—12 years later (2/3/2000) was noted on that same label but was not granted. The inequitable nature of research with the Royal imprimatur (likely to have been sanctioned in this example at Privy Council level) and straightforward academic research in public records over 65 years after the events in question is manifest. It shows the lack of neutrality, transparency and even-handedness in respect of historical public information about the royal family.

[4] *R (Evans) v Attorney General* [2015] UKSC 21. In particular, per Lord Neuberger, President. At [115]. It is, I think, worth mentioning that the same fundamental composite principle lies behind the reason for dismissing this appeal on each of the two grounds which are raised. That principle is that a decision of a judicial body should be final and binding and should not be capable of being overturned by a member of the executive. On the second ground, which involves EU law, the position is relatively straightforward at least as I see it: the relevant legislative instrument, the 2003 Directive, expressly gives effect to that fundamental principle through the closing words of article 6.2 and the opening sentence of article 6.3. On the first ground, which involves domestic law, the position is more nuanced: the relative legislative instrument, the FOIA 2000, through section 53, expressly enables the executive to overrule a judicial decision, but only "on reasonable grounds", and the common law ensures that those grounds are limited so as not to undermine the fundamental principle, or at least to minimise any encroachment onto it.

the Act an absolute exemption when previously it had been a qualified exemption, together with the Supreme Court case of *R (Evans) v Attorney General*[5] are explored. Also examined is the issue of whether the correspondence being sought in the *Evans* case should have been considered, as a matter of fact and law, to be the Prince of Wales' sensitive personal data under the provisions of s.2 and Schedule 3 of the Data Protection Act 1998 because of the "lobbying" and "political" nature of it and—as such—*not* the subject of any disclosure.

Chapter 11 considers the way in which the mechanism for financing the monarch was altered for the future—and for all future monarchs—by the introduction of the Sovereign Grant Act 2011. This significant constitutional and legislative change took place without any overt campaign for it to occur or any significant public debate or scrutiny outside the confines of Parliament.

Chapter 12, the final one in this part, considers the convention surrounding the sealing of the wills of members of the royal family, secured in 1910 as an agreement in less-than-clear circumstances by Queen Mary, Queen Consort of King George V, as a concession from a newly-appointed President of the Probate, Divorce and Admiralty Division. The effect of this convention has been the subject of litigation by an individual who believes he is the illegitimate son of the late Princess Margaret. That aside, this convention has arrogated to members of the royal family for over 100 years something which cannot be claimed by the estates of ordinary members of the public, however wealthy or powerful.

[5] *R (Evans) v Attorney General* [2015].

CHAPTER 9

THE MONARCH AND MEMBERS OF THE ROYAL FAMILY

Definition of the Monarch and Members of the Royal Family

9–001 The expression "the royal family" carries no strict legal definition[1] but certain relatives of the monarch possess special privileges and are subject to special common law or statutory provisions.[2] Traditionally members of the royal family perform a public social or ceremonial function by virtue of the legal institution of monarchy, and this is reflected in the styles and forms of precedence[3] which are in existence.

Here, unless otherwise stated, the "royal family" is used to describe those people carrying the style of Her or His Majesty (HM) or Her or His Royal Highness (HRH) and includes the monarch, the consort of the monarch, the widowed consorts of previous monarchs, the children of the monarch and previous monarchs, the male-line grandchildren of the monarch and previous monarchs and the spouses and widows of a monarch's and a previous monarch's sons and male-line grandsons.

The official website of the British Monarchy lists the current members of the royal family (after the Queen).[4] The order of succession is the sequence by which members of the royal family stand in line to the throne. That sequence is regulated not only through descent but by Parliamentary statute.[5] Precedence

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[1] *Halsbury's Laws of England* (Volume 12 (1) (Reissue)): 3. The Royal Family (1) In General [27].

[2] *Halsbury's Laws of England*: these include the Civil List Acts, the Regency Acts and the Royal Marriages Act 1772.

[3] *Halsbury's Laws of England* [34]: the children of the sons of the monarch are entitled to the style of Royal Highness, this privilege having been conferred upon them by letters patent. Other members of the Royal family may hold this style at the discretion of the monarch. Annuities payable out of the public revenues have been provided for certain members of the Royal family, statutory restrictions are imposed on royal marriages but in other respects they are all ordinary citizens.

[4] They are the Duke of Edinburgh, the Prince of Wales and the Duchess of Cornwall, the Duke and Duchess of Cambridge, Prince Harry, the Duke of York, the Earl and Countess of Wessex, the Princess Royal, the Duke and Duchess of Gloucester, the Duke and Duchess of Kent, Princess Alexandra and—finally—Prince and Princess Michael of Kent.

[5] The arrangements for succession are altered by the Succession to the Crown Act 2013 so as to allow descendants to succeed irrespective of gender (s.1) and to allow the children of Roman Catholic marriages to succeed (s.2). The Act (a) ends the system of male preference primogeniture under which a younger son displaces an elder daughter in the line of succession, (b) removes the statutory provisions under which anyone who marries a Roman Catholic loses their place in the line of succession and (c) repeals the Royal Marriages Act 1772 which voids certain marriages of

determines the seniority of members of the royal family at official events and is influenced by a variety of laws, and by custom and tradition.[6]

There are some specialist definitions such as the "royal household".[7] The "royal family" is—and has become throughout its history—the collective mind not only of its visible members but also of a significantly large array of advisors and individuals. Insofar as it includes the "royal household", the current scale of this undertaking is a significant iceberg element which is rarely observed or considered by the public yet—on issues relating to the Royal Prerogative and constitutional norms and conventions—can be highly influential and formative.

The royal household[8] employs approximately 1,200 staff, of whom approximately 450 are funded by the taxpayer.[9] It has five departments: the Lord Chamberlain's Office,[10] the Private Secretary's Office,[11] the Master of the Household's Department[12] and the Privy Purse and Treasurer's

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persons in line to the throne, replacing it with a provision requiring the consent of the monarch to the marriage of any of the six people nearest in line to the Crown. As a result of the Act Princess Charlotee displaced Prince Harry when she was born on 2 May 2015 becoming fourth in line after her brother Prince George.

[6] Thus, though the Duke of Edinburgh does not appear in the immediate line of succession, he appears directly after the Queen in the order of precedence as he is considered the second most senior member of the Royal family.

[7] Freedom of Information Act 2000 s.37 and Sovereign Grant Act 2011 generally.

[8] Costing £35.7m in the year to 31 March 2015 according to the royal accounts: *http://www.royal.gov.uk/latestnewsanddiary/annualfinancialreports/annualfinancialreports.aspx*. The pressure group Republic presents a different annual cost estimate of £299.4m: *https://republic.org.uk/what-we-want/royal-finances*. Issues about the changes in the way the funding of the monarch and the royal family occurs is covered in greater detail in the section that examines the Sovereign Grant Act 2011.

[9] The information in footnotes 9–11 derives from the official website of the British monarchy: *http://www.royal.gov.uk*

[10] This is the senior official of the Royal Household with a role to oversee the conduct and general business of the Royal Household and to be a source and focal point for important matters which have implications for the Household as a whole. The role is non-executive and the post is part time. The position of Lord Chamberlain dates from the Middle Ages, when the King's Chamberlain often acted as the King's spokesman in Council and Parliament. Until 1924, the appointment was a political one; today, the Lord Chamberlain does not participate in political activities.

[11] This office is responsible for supporting the monarch in the duties of Head of State. The Private Secretary is the channel of communication between the Head of State and the Government, not only in the United Kingdom but also in the 15 other realms of which the monarch is Sovereign. The Private Secretary informs and advises the monarch on constitutional, governmental and political matters in the United Kingdom and the Commonwealth. He or she liaises with the Armed Forces, the Church and the many organisations of which the monarch is patron. Other responsibilities include organising the monarch's official programme at home and overseas; liaising with the Households of other members of the Royal Family; and dealing with The Queen's official correspondence and correspondence with members of the public. The Private Secretary prepares the monarch's speeches and messages, and arranges photographs and official presents, portraits and messages of congratulation. The position of Private Secretary originated in the late nineteenth century: there is a Deputy Private Secretary and an Assistant Private Secretary.

[12] This is the largest department in the Royal Household, with over 250 employees. It is responsible for all hospitality, catering and housekeeping arrangements for official and private entertaining at all the Royal residences.

Office[13] and the Royal Collections Department. In addition to the royal household at Buckingham Palace there is the Prince of Wales' (and Prince Harry's) official London residence at Clarence House,[14] and the Duke and Duchess of Cambridge at Kensington Palace, with attendant specialist staff that are also reflected to a lesser degree by the households of other members of the royal family.

9.2 THE LAW OFFICERS OF THE CROWN

9–002 The principal Law Officers of the Crown are now appointed by the Government of the day but have an important traditional function in relation to the monarch. The office of Attorney General originated in 1315, when the Crown needed an individual to prosecute its business in the Court of Common Pleas, and the individual initially designated "King's Attorney" in 1327 became known in 1452 as "Attorney General" with the power to appoint deputies. By the 16th century he had become the most important person in the legal department of the State and with the chief representative of the Crown in the Courts. The office of Solicitor General originated in 1461.[15]

The offices of the Attorney General and Solicitor General attained their modern form in the 17th century when they became legal advisers of the Crown. They appeared, either by themselves or their deputies, on behalf of the Crown in the courts. As the legal advisers and deputies of the Crown they gave legal advice to all the departments of state, and appeared for them if they wished to take action in the courts. Like judges, they received writs of attendance requiring them to come to Parliament to give their advice to the House of Lords. Unlike the judges, however, one or other was the member of the House of Commons. They were also regarded as leaders and representatives of the Bar. The Attorney General and Solicitor General, together with the Advocate General for Scotland and the Advocate General for Northern Ireland (a statutory Office held by the Attorney General), are collectively known as the Law Officers of the Crown. There is also the office of HM Procurator-General and Treasury Solicitor (whose office has since 1991 been an Executive Agency branded as *TSo* but

[13] The Keeper of the Privy Purse is Head of the Privy Purse and Treasurer's Office and has overall responsibility for the management of the sovereign's financial affairs as well as looking after the management of revenues which come to the Sovereign from the Duchy of Lancaster. The Privy Purse, mainly financed by the net income from the Duchy, is used to meet both official expenditure incurred by The Queen as Sovereign and private expenditure. As Treasurer to The Queen, the Keeper also oversees the management of the Civil List. This is the money paid from public funds to meet official expenditure relating to The Queen's duties as Head of State. He/she oversees the Grants-in-Aid from Government Departments for the maintenance of the occupied Royal Palaces and for Royal travel. Annual accounts are published for the Grants-in-Aid and Civil List.

[14] It is also a metonym for the Prince of Wales' private office which, in 2011–2012, cost £9.831m and employed 135 support staff according to information contained the *Annual Review 2012* on *http://www.princeofwales.gov.uk/content/documents/Annual%20Review%202012.pdf*

[15] This information is condensed from *http://www.attorneygeneral.gov.uk/AboutUs/Pages/History.aspx*. For greater detail, see J Ll J Edwards *The Law Officers of the Crown* (Sweet & Maxwell 1964) Chapters 5 and 6.

since April 2015, called the Government Legal Department GLD).[16] A modern example of the exercise of GLD's powers is *RP and others v UK*.[17]

The monarch also has an additional Attorney General—in the Duchy of Lancaster[18]—to conduct the business of the Crown in the courts belonging to that jurisdiction.[19]

9.3 Other Law Officers

9–003 A Queen Consort has an Attorney and Solicitor-General of her own[20] and actions involving her or on her behalf become the province of her Law Officers.[21] In 1820 Caroline, the Queen Consort of George IV, was the target for a much-publicised and scandalous divorce action—brought in Parliament on the basis of her adultery—and which was effectively frustrated by Lord Brougham and Lord Denman on her behalf.[22]

The Consort of the Queen regnant—in modern times, Prince Philip, and at an earlier stage Prince Albert—is not accorded such privileged assistance although no historical explanation has been offered for this lacuna.[23] In *Prince*

[16] This post was first defined in 1661 and, by 1842, the office handled the legal affairs of 13 out of 23 Departments of State. Its role was widened by the Treasury Solicitor Act 1876 and from 1885, the Treasury Solicitor also held the office of Director of Public Prosecutions, until that office was formally separated under the Prosecution of Offences Act 1908. It deals with *bona vacantia* issues (ownerless goods). As Procurator-General, appointed by the Royal Warrant, the holder has power under the direction of the Attorney General to act as solicitor for the Crown in matrimonial issues. This chapter later considers the part played by Sir Thomas Barnes, the King's Proctor (as Procurator-General), in the *Simpson v Simpson* divorce case of 1936 that led to the abdication of King Edward VIII.

[17] *RP and others v UK* [2012] ECHR 1795.

[18] The Duchy of Lancaster had its beginnings in a grant of land made by King Henry III in 1265 and soon became one of the wealthiest bodies in the kingdom. Its status was confirmed in 1399 with the accession to the throne of Henry Bolingbroke, Duke of Lancaster. From that time onwards, the inheritance has been enjoyed by all reigning sovereigns, while being separately administered from other royal possessions: *http://www.duchyoflancaster.co.uk/about-the-duchy/history/*

[19] See generally James William Norton-Kyshe *Law and Privileges relating to the Attorney General and Solicitor General of England* (Stevens & Haynes 1897) 61–66.

[20] Queen Elizabeth, the Queen Mother, had an Attorney General. The significance of this may re-emerge when the Prince of Wales succeeds the Queen depending on whether Camilla, Duchess of Cornwall, uses the style HRH the Princess Consort (as stated on 10 February 2005 at the announcement of their marriage) or, in fact, becomes Queen Consort, a style to which she would be entitled.

[21] Ibid and Lord Redesdale 24, 99; 36 & 37 Vict. c. 66, s.23; 38 & 39 Vict. c. 77, s.21; Stephen's Comm. iii, 274. The Queen Dowager does not have Law Officers*: AG v Tarrington*, Hardres 219.

[22] The *Pains and Penalties Bill* was introduced into the House of Lords with the aim of stripping Queen Caroline (the former Princess of Wales) of her royal title and privileges—on the basis of her adultery with one Bartolomeo Pergami—after she had refused a government offer to increase her annuity from £35,000 pa to £50,000 pa on condition she stayed abroad when the Prince Regent ascended to the throne on the death of George III. Lords (Henry) Brougham and (Thomas) Denman conducted her defence so effectively that, although the Bill passed by nine votes in the House of Lords, it was never submitted for ratification to the House of Commons. The government subsequently raised her annuity to £50,000 with no preconditions.

[23] It probably reaches back to the fact that the Queen Consort might sue or be sued as a *feme sole*

Albert v Strange[24] the original Bill filed by the Prince Consort in his own name was against "William Strange and Her Majesty's Attorney General".[25]

The Prince of Wales appoints his own Attorney General[26] in his role as Duke of Cornwall. The relevant powers and duties are explored extensively in *Attorney General to the Prince of Wales v Sir James St Aubyn*.[27] The Prince's Attorney General appears again, most recently, in issues relating to the Environmental Information Regulations 2004 and the Duchy of Cornwall.[28] The right of the Prince of Wales to be consulted on (and potentially veto) proposed legislation in relation to the Duchy was considered in *Kirkhope v IC and National Archives*.[29] Attempts recently have been made, without effect, to curtail the powers of the Duchy.[30] Outside the context of the Duchy of Cornwall, the Prince of Wales can sue and be sued by writ in the ordinary way[31].

9.4 THE ROYAL PREROGATIVE AND PERSONAL CONSTITUTIONAL CONVENTIONS RELATING TO THE MONARCH

9–004 It is necessary to consider briefly the royal prerogative and personal constitutional conventions relating to the monarch. These are topics of some complexity and the focus here has been limited to issues arising in this chapter. Blackstone—in the vivid language of another age—describes the law of the constitution clothing the person of the monarch with supreme sovereignty and pre-eminence.[32] In modern terms that description needs to be read subject to an understanding that the monarch can lawfully and constitutionally only

by virtue of her marriage to the monarch at common law, as happened in 1410 (YBP II Hen IV pl 26): George Stuart Robertson *Law and Practice of Civil Proceedings by or against the Crown* (Stevens & Son 1908) 6. Although not explored by Robertson, the explanation suggested here is that the equivalent "male" status mirroring *feme sole* could never apply to a male consort of the Queen regnant because—as a male—there could be no potential loss of contractual capacity by virtue of marriage to the monarch. Because Queen Elizabeth I never married, it could never have been tested against such residual Norman French law principles.

[24] 2 De G & Sm 652 (on appeal, 1 Mac & G 25; 18 LJ Ch 120).

[25] To this Bill was added an information laid by the Attorney General on behalf of the Crown against the same persons and the Prince Consort for the infringement of copyright in certain drawings and etchings belonging to the Prince Consort and the Queen respectively, thus interposing and creating the locus for the Attorney General to protect Queen Victoria's individual rights as monarch: *National Archives* C 14/778/A70 and C 14/778/A71, containing the original, bulky Chancery Rolls (written on hide) detailing this information. See also the original Affidavit sworn by Prince Albert on 20 October 1848 in the Royal Archives at Windsor Castle.

[26] *Solicitor of Duchy of Cornwall v Canning* LR 5 PD 114.

[27] (1811) 145 ER 1215: William Garrow was the Attorney General for HRH George, Prince of Wales, Duke of Cornwall and Earl of Chester. This case decided that the Prince had a right to file an English information by his Attorney General for lands in the Duchy itself.

[28] *Bruton v IC & Duchy of Cornwall* EA/2010/0182. The Prince's Attorney General in this matter is Jonathan Crow QC (appointed 2006).

[29] *Kirkhope v IC and National Archives* (EA/2011/0185).

[30] Duchy of Cornwall (Private Estates) Bill (HL) 2014.

[31] *Prince de Gales v Basset* (1348) YBM 21 Edw III pl, 46 and—more recently—*HRH Prince of Wales v Associated Newspapers* [2006] EWHC 11 (Ch).

[32] 1 Bl Com (14th edn) 241.

act in certain ways. The rights, privileges, immunities and other legal attributes that make up the royal prerogative come from ancient custom and the common law.[33] The 1688 settlement and the Bill of Rights in 1689 established the supremacy of parliamentary statutes over the prerogatives of the monarch and the contemporary exercise of the monarch's executive prerogative powers is regulated by conventions and the principles of ministerial responsibility.

The constitutional conventions relating to the monarch are rarely explored or defined in the context of proceedings in court. There has, however, been a recent and illuminating exception in the case of *Evans v Information Commissioner*[34] an approach which was subsequently endorsed by the Supreme Court.[35] The Upper Tribunal of the Information Rights Tribunal approved the test for identifying whether a constitutional convention existed at all. This particular test was first proposed by Sir Ivor Jennings.[36] In essence, a constitutional convention exists if (i) there are precedents underpinning it, (ii) the parties to the relevant practice consider themselves to be bound by it and (iii) there is a reason for the existence of the convention. It has also been described as a "non-legal rule of constitutional behaviour which has been consistently accepted by those affected by it as binding on them, which is not enforceable in the courts".[37]

The two key contemporary constitutional conventions relating to the monarch are characterised[38] as the cardinal convention and the tripartite convention. In the first, the monarch is required to act on—and use prerogative powers consistently with—ministerial advice which is usually given by the Prime Minister on behalf of the government. In the second,[39] the convention is characterised by conferring on the monarch three elements: the right to be consulted, the right to encourage and the right to warn.[40]

The Tribunal summed up the contemporary operation of these two conventions as follows:[41]

> "Our constitution reconciles monarchy and democracy through fundamental constitutional mechanisms under which (1) state power is exercised by and in the name of the monarch in accordance with the advice of ministers, and (2) the monarch is entitled to be consulted, to encourage, and to warn, but so long as ministers are in office their advice must be followed. In order to ensure that these fundamental mechanisms are not put in doubt, it is not until a long time has passed that details of how they operated in any particular instance can be revealed. . .. Both the cardinal convention and the tripartite convention must be exercised 'in complete confidence',[42] but we do not by any means regard these possible advantages as fundamental."

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[33] Sir William R. Anson, *The Law and Custom of the Constitution*, Vol. II, 4th edn 1935.

[34] *Evans v Information Commissioner and 7 Departments of State* [2012] UKUT 313 (AAC).

[35] *R (on the application of Evans) and another v Attorney General* [2015] UKSC 21 [34–39].

[36] Sir William R. Anson *The Law and the Constitution*, 5th edn 1959 131.

[37] G. Marshall and G. Moodie *Some Problems of the Constitution* 5th edn 1971 22–26.

[38] In the *Evans* case, above, by one of the expert witnesses, Prof R. Brazier of the University of Manchester.

[39] Described by Walter Bagehot.

[40] The Upper Tribunal rejected the operation of the third "education" convention—extending in the appeal itself to charitable or personal matters relating to the Prince of Wales—in the context of the expert evidence it heard. See also *R (on the application of Evans) and another v Attorney General* [2015] UKSC 21 [35].

[41] *Evans* [87].

[42] A slip in relation to this occurred when the BBC's Security Editor, Frank Gardner, revealed

9–005 As Head of State, the monarch's person is regarded as inviolable, immune from all suits and actions at law (civil or criminal) and only bound in legislation when expressly mentioned or by clear implication. Traditionally, the monarch can do no wrong[43] and no remedy lies against the monarch in person—in civil or criminal matters—because the prerogative is created for the benefit of the people and cannot be used to their prejudice.[44] The monarch is regarded in law as being incapable of thinking wrong or meaning to do an improper act[45] and, if the monarch appears to have acted incorrectly then it is because there has been a "deception" in the grant. Advisors—normally the relevant Government ministers exercising other aspects of the Royal Prerogative on the monarch's behalf—take responsibility for such incorrect advice.

The monarch cannot be arrested.[46] This is a privilege that extends in civil matters to those in the monarch's household who are liable to be "bona fide, substantially and continually employed in waiting or attending on the royal person"[47] unless the Lord Chamberlain gives leave for the arrest.[48] No arrest can be made in the monarch's presence or within boundaries of a royal palace and no judicial process can be executed within a royal palace which is used or kept ready for use as a royal residence even though the monarch is not residing there.[49]

The issue of whether the monarch's evidence under the sign manual[50] or Great Seal is admissible as to the facts within the monarch's knowledge has been doubted.[51] It has been said[52] that the monarch may not give evidence in his or her own cause.[53] This is a matter that was at the heart of the *Mylius*' trial, which is examined later in this chapter.

However it is at this point that a detailed examination of Chitty's 1820 *Treatise on the Law of the Prerogatives of the Crown* reveals that things are not quite as clear and straightforward as has been assumed by most commentators. What Chitty *actually* states is more limited:

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in a BBC Radio 4 Today broadcast that the Queen had told him she had privately expressed surprise to the Home Secretary of the day—in a private conversation some years before—that Abu Hamza had not been already been arrested and deported: *Daily Telegraph* 25 September 2012.

[43] 1 Bl Com (14thedn) 245. *Halsbury's Law of England* Vol. 12 (1) (Reissue) 5/48 on this topic suggests: '*This statement can be reconciled with the realities on the modern constitution only if it is understood that the monarch can lawfully and constitutionally act only in certain ways.*'

[44] *Nichols v Nichols* (1576) 2 Plowd 477 at 478.

[45] 1 Bl Com (14th edn) 246.

[46] 2 Co Inst 50.

[47] 2 Co Inst 631; 4 Co Inst 24; *Bartlett v Hebbes* (1794) 5 Term Rep 686.

[48] Chitty *Treatise on the Law of the Prerogatives of the Crown* (J Butterworth & Son 1820) 377.

[49] This restriction was removed in 2007 by Section 128 of the Serious Organised Crime and Police Act 2005. Buckingham Palace was made a "designated site" for the purposes of prosecution. The original purpose seems to have been to avoid the monarch having to appear in court to give evidence about any incident he or she witnessed.

[50] Sir Rufus Isaacs KC flourished a letter, written and signed by King George V, denying all the accusations as his closing *coup de theatre* in court after Mylius had been convicted.

[51] Chitty, op cit p 378 and, for practical purposes, is probably redundant.

[52] 2 Hale PC 282; Chitty, op cit p 377.

[53] The tentative "it is said" is reflected in the first (1909) edition of *Halsbury's Laws of England* Vol. VI, p. 410 [623], the edition contemporary with *Mylius*' trial.

> ". . .the King cannot personally execute any office, judicial or ministerial, or arrest in person [2 Inst 187: 'The King cannot arrest any one person on suspicion of felony or treason though the subject may; for if the King do wrong there is no remedy against him,' per Markham J, 1 H 7.4]. For the same reason, and also on the ground that the King shall not give evidence in his own cause, it is clear that his Majesty's testimony is not admissible in cases of treason or felony [2 Hale PC 282]."

The core premise is that, if the monarch incorrectly arrests a felon, *then* there is no remedy available to the wronged person. That rationale has been elided over time to include a presumed bar on the monarch giving evidence in his own cause. However the specific context of the observations detailed above relates to crimes of treason and felonies. In the context of *Mylius*' trial,[54] criminal and seditious libels were *misdemeanours* (limited to fines and imprisonment), not felonies.[55] There is nothing in the rationale, if it is supportable at all, that related to the monarch not giving evidence in respect of misdemeanours. There is no personal benefit that might accrue to the Crown in trials for misdemeanours—such as confiscation of land or the death of a felon causing titles and honours to revert to the Crown—in the event of such evidence being given by the monarch. Further, this restriction on the limitations on the monarch of the role *only* in terms of treason and felonies is confirmed by reference to Sir Matthew Hale's[56] original text:[57]

> "If a man be indicted of high treason, the king cannot by his great seal or *ore tenus* [orally] give evidence, that he is guilty, for then he should give evidence in his own cause.[58] Nay, altho he may in person sit on the King's Bench, yet he cannot pronounce judgement in case of treason, but it is performed by a senior judge, for as he cannot be a witness, so he cannot be a judge in *propria causa* [his own cause]. And the same law is for felony for the same reason, yet in some cases the king's testimony under his great seal is allowable, as in an *essoin de servitor regis*,[59] the warrant under the great seal is a good testimonial of it."[60]

9–006 There is no historical record of any monarch ever appearing as a witness. Early 20th century writers on the topic—in the days before the Human Rights Act 1998—could not see by what principle any court could compel the monarch to be sworn as a condition for giving evidence any more than a court could compel the monarch to come and give evidence.[61] Great significance was clearly given to whether or not temporal sanctions existed in respect of any oath that the monarch might take for the obvious reason that—both are under the doctrine of the Divine Right of Kings and, later, as Head of the Church of England—the monarch represented a higher institution with potentially divine sanctions. The matter was discussed in the Earl of Bristol's

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[54] And everything else that follows in this chapter as contemporary criminal law.

[55] The distinction between felonies and misdemeanours was abolished by s.1 of the Criminal Law Act 1967. Felonies were extinguished and all crimes became subject to the process and procedure that had been used for misdemeanours.

[56] Hale was Lord Chief Justice from 1671–1676.

[57] 2 Hale PC p. 282.

[58] *"Vide supra,* [Part 2] *Ch 28, p 211 & Part 1 Ch 26 p 314, the case of the Earl of Lancaster."*

[59] An excuse for being unable to attend court because of being engaged on the King's service (confirmed by the King's warrant under the Great Seal).

[60] *'F.N.B. 17. Stat. Glou. Cap. 8.'*

[61] George Stuart Robertson *Law and Practice of Civil Proceedings by or against the Crown* (Stevens & Son 1908) 592

case (1626)[62] where the Earl—who had been impeached—(unsuccessfully) wished to call the King as a witness to communications which had passed between them before the King's accession. Charles I headed this matter off, via his Attorney General, by warning the judges not to try to answer the conundrum.[63] For the purposes of this book the trial of Charles I, leading to his execution, is not considered a relevant example of the monarch as a witness because of the nature and validity of the court before which he appeared.[64]

If it *is* a still a rule of Common Law that the monarch is not compellable as a party in court then the foundations for that rule appear to be flawed. If it is still a convention that the monarch does not appear in court then the relevance of that convention needs now to be reappraised in a contemporary setting so that issues of proportionality and fairness can be articulated and reflected and so that there can be a clear understanding of why such a person should be permitted to stand outside the normal requirements of open justice.[65] The issues explored in the 1911 *Mylius* criminal libel are summarised in this chapter because a more detailed examination of the case is available elsewhere.[66]

9.5 Forms of Action: Criminal and Civil Proceedings

9–007 As will become apparent the monarch has not, so far, appeared in person in court in criminal or civil proceedings. Whether that can continue to be the case[67]—if the monarch wishes to pursue a personal criminal or contested civil complaint—is a moot point. Other members of the royal family can appear in court but, when this happens,[68] it is the exception rather than the rule. Ordinary members of the royal family avoid such appearances wherever possible.

[62] Lord Campbell's *Lives of the Chancellors* II 510. The Lord Keeper, Lord Coventry, stated that the monarch could not be examined in any judicial proceedings under an oath or without an oath as "he was the Fountain of Justice. Since no wrong could be imputed to him the evidence would be without temporal sanction". The logic of the Lord Keeper's conclusion is strained.

[63] Ibid: "Not being able to discern the consequence which might happen to the prejudice of his Crown from these general questions, his pleasure was that they should forbear to give an answer thereto."

[64] Charles I was brought to trial in Westminster Hall on 9 January 1649. He appeared before his judges four times, charged with tyranny and treason. He repeatedly challenged the court's authority and its right to try him but the death sentence was proclaimed on 27 January 1649.

[65] See, in particular, *Turning Queen's evidence* David Pannick QC, Public Law 2003, 201–204.

[66] "The Missing Witness? George V, Competence, Compellability and the Criminal Libel Trial of Edward Frederick Mylius" R. Callender Smith, *Journal of Legal History* Vol. 33 (2) August 2012, 209–239.

[67] In the light of the Human Rights Act 1998 and the fair trial principles contained in Article 6 of the European Convention on Human Rights (ECHR).

[68] As in the Prince of Wales' compelled appearances in the *Mordaunt v Mordaunt, Cole and Johnson* divorce trial of 1870 and the *Gordon-Cumming v Wilson* libel trial of 1891: see later.

9.5.1 Criminal proceedings

9–008 The monarch is immune from action in the criminal jurisdiction.[69] The position of the monarch as a witness in criminal proceedings is examined separately immediately below in the 1911 criminal libel case of *R v Mylius*.

Members of the royal family may be prosecuted as ordinary defendants.[70] As witnesses in criminal proceedings there are three aspects. First, does the prosecutor need the royal witness to prove the case? Secondly, does the defendant require the royal witness to attend either so that there can be cross-examination on any particular point about which the witness has given a witness statement or where assistance can be given to the court in terms of evidence given by the defendant or a defence witness. Thirdly, does the court —in exercising its discretion—require the witness to attend. The first two situations arose in *R v Strachan and McGuigan*.[71] An example of the potential for all three was *R v Taylor*, the mugging of Prince Harry's friend Thomas Van Staubenzee, where the defendant was sentenced to two years after being convicted of robbery.[72]

9.5.1.1 R v Mylius (1911)

9–009 On 1 February 1911 a 32-year-old Belgian born British subject, Edward Frederick Mylius, was convicted of criminal libel in a trial at the High Court before the Lord Chief Justice, Lord Alverstone, and a special jury and sentenced to 12 months' imprisonment. He had asserted in a newspaper article[73] that King George V was a bigamist who had gone through a marriage ceremony with Queen Mary when he was already married. *The Liberator*, a newspaper promoting republicanism, was printed and published in Paris and distributed there, in the UK and in the US. The article was direct and uncompromising. It stated that, in 1890, the future king had contracted a lawful marriage in Malta with the daughter of a British Admiral, that the marriage had produced three children and that—three years later when Prince

[69] *Archbold* 2012 1.54: this immunity does not extend to deposed or exiled sovereigns who happen to be within the jurisdiction: *R v Mary, Queen of Scots* (1586) 1 St Tr 1161.

[70] Princess Anne was fined £500 and ordered to pay £500 compensation and £148 costs on 21 November 2002 when she attended and pleaded guilty before Slough Magistrates Court to an offence under the Dangerous Dogs Act 1997 after her 3-year-old English Bull Terrier "Dottie" bit two young boys riding bicycles in Windsor Great Park. A similar charge against her husband, Timothy Laurence, was dropped and Dottie was not destroyed.

[71] A blackmail case in 2008 involving a royal victim who was given anonymity—as would normally be the case with such allegations—in a trial involving a demand for £50,000 to suppress a homosexual sex video showing cocaine use. The anonymity order, made by Cooke J, was under s.11 of the Contempt of Court Act 1981.

[72] *The Times* 21 August 2012: the robbery—which took place while the victim and the Prince were talking together on a mobile phone—sparked a security scare because the phone contained telephone numbers of several members of the royal family. See generally *Coroners and Justice Act 2009* sections 74–86 and *Criminal Evidence (Witnesses Anonymity) Act 2008* sections 10 (8), 11 and 12. The defence had not required the Prince's attendance but the jury was not told about the full extent of the victim's relationship with the royal family as Judge Southwell at Kingston Crown Court deemed it irrelevant to the case.

[73] Published in *The Liberator* on 19 November 1910.

George came into the direct line of succession to the throne following the death of his older brother—"he finally abandoned his true wife and entered into a sham and shameful marriage with a daughter of the Duke of Teck."

Rumours[74] about this morganatic marriage had been around for over 17 years and increased in volume when King George V acceded to the throne in May 1910. The King was advised by Winston Churchill, as Home Secretary, backed up by a joint opinion dated 23 November 2010 from the Law Officers—Attorney General Sir Rufus Isaacs KC and Solicitor General Sir John Simon KC—that Mylius should be arrested and charged with criminal libel and that the King could not be required to give evidence. Mylius was subsequently arrested[75] and held in custody until his trial, conviction and sentencing which took place during a single day on 1 February 1911.

A feature of the process which followed his arrest was Mylius' argument that, if the monarch—in his personal capacity—was accusing him of the crime of criminal libel then the monarch should attend in person at the trial in the High Court so that Mylius could have the chance to cross-examine his accuser. Without the King's presence to stand behind the prosecution and face questioning, Mylius argued, he could not have a fair trial. He did not prevail. For completeness it appears—as the relevant marriage records were bought from Malta to London for the trial—that there was no record of Prince George marrying anyone on the Island during that period. The woman he was alleged to have married and her family gave evidence at the trial that no such event had ever taken place. It is also clear that Mylius wanted to be prosecuted and to have his day in court.[76]

9–010 The Law Officers' joint opinion of 23 November 1910 is an obvious starting point. It formed the basis for the prosecution itself and covered—incidentally—the constitutional position of the monarch as a potential witness at the trial.[77] What this six-paragraph opinion signed by both Law Officers

[74] The day before Prince George and Princess Mary became engaged, a Guernsey newspaper, *The Star*, on 2 May 1893 stated: ". . . The rumour is persistently going round naval circles that the Duke of York has lately married secretly the daughter of an English Naval Officer in Malta." Sir Frederick Ponsonby, Assistant Private Secretary to Queen Victoria, annotated that newspaper cutting "The power of imagination among newspapers is extraordinary": Royal Archives VIC/Z476/28, 29. The newspaper editor W. T. Stead later wrote to Ponsonby telling him of an anonymous correspondent alleging that George had two children by this marriage: Royal Archives VIC/Add A12/2106a. See also Jane Ridley *Bertie: A Life of Edward VII* (Chatto & Windus London) 2012 p. 306: "Bertie was at first inclined to issue a contradiction. He consulted Gladstone, who advised taking no notice of the rumours, 'which are equally scandalous and ridiculous'. So no denial was published, although the Queen thought this was a mistake, arguing as follows: 'No one cares about it today. But in fifty years' time when some young prince ascends the throne there will be a cry that he is illegitimate or his father committed bigamy. . . . .Now – a simple denial will clear the clouds away': Royal Archives VIC/Add C07/1."

[75] On 26 December 1910, Boxing Day.

[76] See *The Missing Witness?* 214–215.

[77] King George V apparently wanted to give evidence at the trial: see *The Times* 2 February 1911 p. 7 col 6 final paragraph—Sir Rufus Isaacs QC: "I am authorised by His Majesty to state publicly that he was never married except to the Queen and that he never went through any ceremony of marriage except with the Queen. . ..and that His Majesty would have attended to give evidence to this effect had he not received advice from the Law Officers of the Crown that it would be unconstitutional for him to do so."

on 23 November 1910 reveals is an almost exclusive focus on the advisability of the criminal libel prosecution having King George V as the complainant rather than the Culme-Seymour family. Paragraph 5 of that opinion mentions, almost in passing, that:

> "It is not necessary, in a prosecution for publishing a libel on the King, that His Majesty should give evidence. There is no precedent for the Sovereign appearing as a witness in his own court, and, upon the authorities, there is some doubt whether he can do so. Apart altogether from this last consideration, we are distinctly of the opinion that His Majesty should not take so novel a course."

The prosecution strategy[78] was to play the longest possible game at Mylius' trial. The prosecutors knew that the monarch wanted to give evidence so that he could clear his name and be directly vindicated rather than hiding behind the Attorney General's prosecution in his name. The monarch was not, initially, to be tendered as a witness for the prosecution. The Attorney General would open the case and submit at the same time the authorities and reasoning for the monarch either being or not being a competent witness. The Attorney General played the "not competent" card and he was supported in this by Lord Alverstone as the trial judge. With that avenue closed off—and because he appeared not to be compellable—there was then no further risk of the monarch's competence as a witness being tested.

The purpose of the prosecution appears to have been less to punish Mylius than to vindicate the King's honour. Within the existing framework of the law it had not been easy to achieve and, procedurally, may have been incorrect for all the reasons raised by Mylius about the difference between criminal libel and seditious libel.

Sir John Simon, the Solicitor-General, later wrote in his diary:

> "We were very lucky to bring the Mylius case to so satisfactory an end. If Mylius, instead of justifying, had pleaded guilty and explained that he was only repeating what thousands of reputable people have said for years without being prosecuted for it, we could never have established the falsity of the lie so effectually."[79]

Given the speed of the timeline from Mylius' arrest to trial there is the inescapable question about whether his eventual conviction resulted from a trial process that was so flawed and lacking in fairness that it cannot stand objective judicial scrutiny. One test is how the case featured in the law reports of the time. It was almost ignored. Conclusions that have been drawn from this case—as fixing a precedent rather than just citing the case as an example that the monarch cannot be compelled to give evidence—are questionable.[80] The convention itself rested on William Blackstone's historical—and arguably out-dated—enunciation some 130 years earlier in his *Commentaries*[81] that no

[78] The monitoring of Mylius' mail in and out of Brixton Prison, detailed in the material in the National Archives, meant that the defendant's plan of defence was well-known to the prosecution.

[79] Oxford, Bodleian Library, MS Simon 2, 3 Feb 1911.

[80] See Lord Bingham's reference to *R v Mylius* in the Privy Council case of *HRH Prince Jefri Bolkiah v the State of Brunei Darussalam & the Brunei Investment Agency* [2007] UKPC 63.

[81] *Commentaries on the Laws of England* (Oxford, 1778), Vol. 1, Ch VI.

court had authority over the monarch because the jurisdiction "implies superiority of power" and all legal power was derived from the Sovereign.

If the matter was put now before the Supreme Court, to test the strength of the precedent or the underlying conventions, it is unlikely that the original conclusions would stand the kind of judicial scrutiny to which the case would now be subjected. However, senior judicial scrutiny in respect of this issue may have to occur in the future, particularly since the collapse of the trial of Paul Burrell in October 2002 for theft of items that had belonged to the late Princess Diana. There have been annual warnings issued by the Queen since 2009 about media intrusion during the royal family's holidays at the private royal estates at Sandringham and Balmoral.[82] These warnings included threats of proceedings[83] under the Protection from Harassment Act 1997. It is unlikely that courts considering Article 6 European Convention on Human Rights principles of fair trial[84] would entertain such complaints from the Sovereign simply by the reading of a witness statement or affidavit signed by her, denying the defendant the opportunity of testing the evidence in court in cross-examination.[85]

At an historical level the case provides a clear example of the effectiveness of checks and balances that existed at that period on the Law Officers' power to prosecute such constitutionally and politically-sensitive matters. The separation between the Law Officers' function as advocates, presenting the evidential formulation of the case for the Crown (and, here, the monarch) and the "public interest" policy issues that remained under the constant review of Winston Churchill as Home Secretary, the Cabinet and the Prime Minister, is striking.

Equally evident was Mylius' determination to be prosecuted and to become a martyr for the anti-monarchist, republican cause. None of the archive documents or letters—either from him or relating to him—suggests that what he undertook was anything other than a means to create an issue that had to be tried. . ..and tried in a way that would secure maximum publicity.

9.5.1.2 Attacks and Intruders: the Michael Fagan syndrome

Outside the domestic and jurisprudential crises and intrigues which may affect the royal family it is clear—from historical[86] and Royal Protection Squad data[87] published in the US by researchers using information provided by the Home Office—that the monarch as well as other members of the royal family **9–011**

[82] *http://www.telegraph.co.uk/news/uknews/theroyalfamily/6736477/The-Queen-gets-tough-on-paparazzi-in-royal-privacy-row.html*

[83] Which can be both criminal and civil and be run in parallel: *Lomas v Parle* (Practice Note) [2004] 1 WLR 1642 CA.

[84] As they now must under the Human Rights Act 1998.

[85] Although considerations of proportionality, particularly in relation to security, might allow such evidence to be delivered to the court externally by live video link from a safe location.

[86] "Attacks on the British Royal Family: The Role of Psychotic Illness": James, Mullen, Pathé, Meloy, Farnham, Preston and Darnley 2008 *J Am Acad Psychiatry Law*, 36: 59–67.

[87] "Abnormal Attentions Towards the British Royal Family: Factors Associated with Approach

are regular and specific targets (outside the terrorist spectrum) in respect of incidents which are likely to bring them into civil or criminal proceedings as potential victims, witnesses or complainants.

In *Attacks on the British Royal Family* it was noted that—between 1778 and 1994—there were 23 attacks on the life or safety of the monarch or members of their immediate families.[88] Of the 23 attacks, 83 per cent were on the monarch. George III was attacked six times, Queen Victoria eight times, Edward VIII once[89] and Elizabeth II on three occasions.[90] Of the remainder, four involved the monarch's children and one spouse of the heir to the throne. Only two attacks resulted in serious physical injury. In 1864, Queen Victoria's son, Prince Alfred, was shot and seriously injured at a Grand Charity Picnic in Sydney. The attempted kidnapping of Princess Anne in the Mall in 1974 left the Princess unharmed but led to four people being shot and seriously injured. Minor injuries were sustained by King William IV when he was hit by a stone and Queen Victoria received a black eye and a bruise to the head when she was attacked while riding in her carriage. The remaining 19 attacks did not lead to any form of physical injury. No attacks occurred in royal residences. Thirteen occurred while the victims were in transit, riding in or getting out of carriages or cars and two—involving Edward VIII and Elizabeth II—concerned the monarch riding on horseback in a royal procession on the Trooping of the Colour. Of the attackers, 21 were male, seven of those were adolescents and 13 of the attacks involved firearms. One of the attacks in 1986 by 57-year-old man with a long history of psychiatric disorders involved an indecent assault on Princess Diana at a public function. Two of the attackers were known to have demonstrated warning behaviours before the attacks in the form of threatening letters or communications with demands linked to warnings. Eleven of the attackers were reported as having delusions or hallucinations at the time of the incidents and 10 of the 23 attackers were committed to psychiatric hospitals. The researchers concluded that the primary aim for most of the attackers was to bring public attention to their personal grievances, their political views or simply themselves. From that perspective, few of the attackers actually intended the death of the royal target but wanted to demonstrate their discontent or publicise their beliefs.

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and Escalation": James, Meloy, Mullen, Pathé, Farnham, Preston and Darnley 2010 *J Am Acad Psychiatry Law* 38: 329–340.

[88] "Attacks" were defined by the researchers as "any hostile act involving either a weapon or the making of physical contact by an individual". Alarming intrusions that had no hostile intent—such as Michael Fagan's appearance in the Queen's bedroom in 1982—were not classified. Neither were group events, such as the stoning of George III's coach in London in 1795 and the attempted storming of the Prince of Wales' convoy by anti-nuclear protesters in Barrow-in-Furness in 1992. Events such as the unwelcome but non-hostile physical contact by model Jane Priest in her encounter with Prince Charles in the Australian surf in 1979 were also excluded.

[89] 34-year-old Jerome Bannigam (aka Patrick McMahon) raised a loaded revolver at the King when he was riding in the Royal procession after the Trooping of the Colour. He was sentenced to two years' hard labour.

[90] In 1981 17-year-old Marcus Sergeant fired blanks at the Queen during the Trooping of the Colour. In 1986 17-year-old Christopher John Lewis fired a rifle at the Queen on a visit to Dunedin, New Zealand and 1990 27-year-old Henearouchuca Tepou (a Maori rights' activist) threw a wet T-shirt at the Queen during a visit to New Zealand.

When Michael Fagan broke into Buckingham Palace and entered the Queen's bedroom on 9 July 1982 he was treated as a trespasser (in the civil sense) rather than a burglar and it was only his earlier conduct which led to him appearing in court.[91] It was not until 2007 that the type of intrusion he managed to engineer became a criminal offence.[92] For that reason the incident did not raise issues of the Queen having to give evidence in court about what happened.

Given the persistence and prevalence of such attacks throughout history, in 2010 the author made Freedom of Information Act 2000 requests[93] to the Crown Prosecution Service (CPS), the Attorney General's office and to the police forces in Norfolk, Aberdeen and the Grampians, the Metropolitan Police and the Royal Special Protection Squad.

The information requested was to find out whether there were—in place—any policies or procedures in any of these public authorities for dealing with complaints by the Sovereign or member of the royal family as victims, witnesses, complainants or defendants. Without exception the response was "no". Those negative responses—particularly from the Law Officers' Office and the CPS—create a procedural vacuum for how, in the event of a witness statement being required rapidly from the monarch or a member of the royal family, that is to be achieved both practically and effectively. Criticism of the police and CPS procedures by Edmund Lawson QC in his review of the collapse of the Paul Burrell trial[94] suggest that if appropriate procedures to cover this area are not currently in place then rapid consideration should be given to addressing this area.[95]

[91] It was 32-year-old Fagan's second successful entry into Buckingham Palace. In his first entry he had scaled a drainpipe, startled a housemaid who called Security (who decided to do nothing) and walked around—resting on the throne for a while—before drinking half a bottle of white wine, becoming tired and leaving. On the second occasion he set off an alarm—which was then switched off because it was thought to be faulty—before he broke a glass ashtray, cutting his hand. After entering the Queen's bedroom he sat on the edge of her bed for about 10 minutes. She phoned twice for the police but no-one came. He was charged with theft of the half bottle of wine and acquitted at the Central Criminal Court only then to be found guilty of a completely unrelated, domestic assault for which—after psychiatric evaluation—he spent six months in a mental hospital.

[92] Section 128 of the Serious Organised Crime and Police Act 2005 came into force making Buckingham Palace a "designated site" for the purposes of prosecution.

[93] On 30 December 2010.

[94] Edmund Lawson QC's 2003 *The Report to His Royal Highness the Prince of Wales* 51–78 provides a review of these issues: *https://www.princeofwales.gov.uk/sites/default/files/documents/peat_report.pdf*

[95] The mobbing of the car containing Prince Charles and Camilla, Duchess of Cornwall, in London on its way to a Royal Variety performance during the student demonstrations on Wednesday 8 December 2010 would also have required careful consideration about how the witness statements were taken from members of the Royal family when criminal proceedings were likely. The procedure used to deliver such evidence in a criminal court could have involved an application by the Crown to use Special Measures—particularly by way of video link—under the provisions of section 17 of the Youth Justice and Criminal Evidence Act 1999. See also *Polanski v Condé Nast Publications Limited* [2005] *UKHL 10*. In the event Scotland Yard announced in May 2012 that no criminal proceedings would be taken in respect of that incident, avoiding the Prince of Wales and his wife being required to give any kind of evidence.

9.5.1.2 R v Burrell (2002): the effect of the monarch's silence

9–012 The criminal proceedings brought against Paul Burrell arose out of police investigations into the activities of another Kensington Palace employee, Harold Brown. Police had visited Mr Burrell's home address in January 2001 and seized property which had apparently belonged to Princess Diana. He was charged with theft of a very substantial quantity of property belonging to the Princess and some property alleged to have belonged to the Prince of Wales and also Prince William.

The trial at the Central Criminal Court began on 14 October 2002 and came to an abrupt end on 1 November 2002 when the Prosecution offered no further evidence and invited Mr Burrell's acquittal. One of the reasons given[96] was that the prosecution case had been opened on the basis—and proceeded on the "false premise"—that Mr Burrell "had never told anyone that he was holding anything for safe-keeping". However the police were aware that Mr Burrell had told Prince William of his "safekeeping items" in a letter written on 19 April 2001.[97]

On Friday 25 October 2002—before the memorial service at St Paul's for the victims of the Bali bombings—the Duke of Edinburgh mentioned to the Prince of Wales that the Queen had had a private conversation after the death of the Princess of Wales with Mr Burrell in which Mr Burrell had referred to his safekeeping of documents. Her mentioning this to the Duke was, apparently, prompted by the publicity relating to the on-going trial, of which she was aware.

> "She had not previously considered the conversation of any relevance, since the correspondence belonging to the Princess Wales was but a small part of a large quantity of property alleged to have been stolen by Mr Burrell. Previously, as the Prince of Wales has explained to me, he had been unaware of their having been a meeting between the Queen and Mr Burrell, let alone application where the topic of safe-keeping had been raised."[98]

In Edward Lawson QC's review he felt that the issue of whether there should have been consultation by the police with the Queen in the light of Mr Burrell having referred to a meeting with her was not within the remit of his enquiry.[99]

He noted that the Queen was "*not briefed on the way in which the case against Mr Burrell was being prepared*". He did note that the sole reason advanced in the public statement made by William Boyce QC on 1 November 2002 for the decision to offer no further evidence was the revelation of the conversation with the Queen and its implications.

Dealing with the question of whether the revelation was made in order to derail the trial he dismissed that conclusion on the basis that there was no evidence for it.

> "If it was done with such a motive, it was done subtly and deviously, since there could be no assurance that the snippets of conversation relating only to documents would result in the Prosecution offering no evidence in relation to the whole raft of goods alleged to have been stolen. . .. There was no overt pressure applied either on the CPS or coming to the notice of the

[96] By William Boyce QC for the Crown.
[97] *The Report to His Royal Highness the Prince of Wales* 74 2.103.
[98] *The Report to His Royal Highness the Prince of Wales* 74 2.104.
[99] *The Report to His Royal Highness the Prince of Wales* 74 76 2.114.

> trial judge. . . . . I am told that those involved in the revelation on behalf of the Prince of Wales did not have that expectation and were surprised at the outcome," he stated.

He pointed out that others were not expecting the trial to end so suddenly. On 29 October 2002, for instance, the Prince of Wales had been asked by Mr Burrell's defence team for a "testimonial" to be used on his behalf. "Strong" advice was given to the Prince of Wales not to provide this and that "*any 'reference' provided for Mr Burrell should be limited to use in mitigation in the event of conviction."*

9–013 What Edward Lawson QC emphasised in his conclusions was that the Prince of Wales had—throughout the trial—serious concerns about the implications of Mr Burrell being tried. He seems to have been concerned at the prospect of himself, Prince William and Prince Harry being called as witnesses and he was "worried that information personal to himself and his family would be revealed during the trial and be the subject of intense media interest". He attributed the Prince of Wales' main concern to the distress which could be caused to his sons by "revelations", true or not, relating to their mother. He concluded that the Prince of Wales would have preferred it if the trial could have been avoided. The Prince was advised, however, that he could not properly intervene and should not be seen to be interfering with or seeking to influence the prosecution process. The Prince of Wales followed that advice.

When Sir David Calvert-Smith was interviewed on the topic of this prosecution at the end of his five-year period as Director of Public Prosecutions (DPP)[100]—as he was about to take up appointment as a High Court judge in the Queen's Bench Division—he agreed that the Burrell case had led to considerable criticism of the CPS. From his perspective it took until the middle of the trial for the information to become known and there was no reference to it in Paul Burrell's defence statement when it was sent to the CPS. By the time Mr Burrell decided to make the disclosure, the trial had reached a critical point. At CPS headquarters at Ludgate Hill the revelation was met with astonishment and, as lawyers worked through the implications, there was a realisation that there was a real possibility that Mr Burrell might want to call the Queen as a defence witness.

At that stage the CPS had to put the matter out for an opinion from a senior barrister, an expert in constitutional law, to establish whether the Queen could be called as a witness in her own court. The DPP said

> "I am reasonably clear Her Majesty would be competent to give evidence should she wish to. The question is, if she did not wish to, could she be compelled to do so? That is an issue to which I cannot give an authoritative answer,"

He added that it was a matter that would have to have been decided by a court ruling from the House of Lords. In terms of the two-day delay between the information becoming known and then becoming public knowledge he said:

[100] *The Independent*, 3 November 2003.

> "It seemed to Counsel then, and I believe he was absolutely right, that it was necessary to explain to the judge, initially behind-the-scenes, what might be happening. They wanted to know exactly what Her Majesty was saying because it was fourth or fifth-hand when we first heard it. Check out exactly what it was, then have a careful look at the case and then decide whether the case should proceed. I think that was the only way it could have been handled properly."

It is clear that the uncertainty about the compellability of the Queen as a witness in this trial exposed what has been characterised as the "lack of critical comment and the deference of politicians and of lawyers about the Queen's lack of legal clothes".[101]

The aborted trial cost £2 million, according to media estimates, and this was born by the taxpayer. The issue of the Queen's compellability in that trial became an expensive and incongruous prosecutorial and judicial fiasco. Deference and uncertainty meant that it was not until the Queen was asked directly about what had happened[102] that she confirmed that Paul Burrell had told her that he was going to look after some of the papers of the Princess of Wales for safekeeping. That scenario of uncertainty should not—but still could—transpose itself into similar dilemmas in the future.

9.5.2 Civil proceedings

9–014 In terms of the monarch and civil proceedings against the Crown, the Crown Proceedings Act 1947 provides a barrier to such personal actions.[103] There is, however, no bar to the monarch herself taking civil action and, when she has done so, she was represented by the Attorney General.[104]

Members of the royal family, as has been explained earlier, are treated as ordinary people in terms of suing or being sued and may be required to attend court by witness summons.[105] As a result, when they seek to enforce their rights in the civil courts they invariably seek interlocutory injunctions or preliminary procedures that go to the heart of issues[106] and which allow the use of affidavits (often filed by senior members of the relevant households) rather

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[101] *Turning Queen's evidence* David Pannick QC, Public Law 2003, 201–204.

[102] On 27 October 2002 by Sir Michael Peat on behalf of the Prince of Wales.

[103] Crown Proceedings Act 1947, s.40 (1) states: "Nothing in this Act shall apply to proceedings by or against, or authorise proceedings in tort to be brought against, His Majesty in His private capacity". See *Halsbury's Laws of England* (4th ed., reissue, London, Butterworths, 1998), Vol.12 (1), paras 55–56; H.W.R. Wade and C.F. Forsyth, *Administrative Law* (8th edn., Oxford University Press, 2000), 812; and O. Hood Phillips and Jackson, *Constitutional and Administrative Law* (8th edn., London, Sweet & Maxwell, 2000), 746 and 749–750. The historical argument that the monarch cannot be sued for breach of contract comes from Blackstone's eighteenth century *Commentaries* with the outdated concept that no court has authority over the monarch because jurisdiction "implies superiority of power" and all legal power is derived from the sovereign.

[104] *Attorney General v Barker (Worldwide injunction)* [1990] 3 All ER 257 CA. There was also a letter before action drafted by the Queen's solicitors on 13 February 1993 in a breach of copyright claim against *The Sun* in relation to the Queen's 1992 Christmas speech.

[105] The witness summons is the modern form for what used to be known as "subpoena" and requires the court's permission before it is issued: Rule 34.2 *White Book* 2012.

[106] By way of the Civil Procedure Rules, made under the Civil Procedure Act 1997, and aimed at obtaining interim injunctions, striking out of actions or summary judgement. This approach—if successful—avoids full trial of proposed suits and keeps members of the royal family away from

than by using witness statements made and signed by the royal family member in question on which they could be called to court and upon which they could be examined.[107] It may also introduce varying, occasionally favourable, burdens of proof for the protagonist.[108]

Historically, however, the problem area exists when it is the monarch who may be required to give evidence in civil proceedings as *S v S* below demonstrated in 1936. While the procedure for divorce has been radically overhauled and reformed since the case elements of the dilemma at the heart of it—whether the monarch could be called on to testify in civil proceedings — are still unresolved.

9.5.2.1 Simpson v S *(1936), King Edward VIII's abdication and the shadow of* R v Mylius

9–015 The events that led to the Abdication Crisis of 1936–37 are well-known and extensively documented elsewhere.[109] There are, however, legal and constitutional conclusions arising from the Mylius' trial—re-inforced by the Law Officers' Joint Opinion of 23 November 1910—that significantly influenced the thinking of the Attorney General Sir Donald Somervell during and after the Abdication. Many of the issues surrounding the Attorney's dilemma during this crisis are described elsewhere.[110] Dr Cretney's article begins with a remark from a successor to the King's Proctor (from 1953–63).

> "When I was Treasury Solicitor and Queen's Proctor, I came across a locked deed-box with the superscription *Simpson v. Simpson* . . . Tommy Barnes [King's Proctor at the time of the abdication crisis] advised me not to open the box. I never did."[111]

9–016 The content of that locked deed box was held, sealed, in the National Archives until recently. It can now be inspected by special request in a closed, monitored and secure portion of the National Archives' facility at Kew.[112]

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the court proceedings themselves, preserving their privacy in terms of external scrutiny and preventing pictures of them in a court setting.

[107] Two examples—from different centuries—are Prince Albert's affidavit of 20 October 1848 in the injunctive proceedings against William Strange and—in the Prince of Wales' action against Associated Newspapers about his Hong Kong diaries reported in 2006—a witness statement from Sir Michael Peat (as the Prince's Private Secretary).

[108] There can be a complex interplay of case-law in this area if Article 10 ECHR freedom of speech issues are brought into play: contrast *American Cyanamid v Ethicon* [1975] AC 396 and *Cream Holdings Ltd v Banerjee* [2004] UKHL 44; [2005] 1 A.C. 253.

[109] The key work is Philip Ziegler's *King Edward VIII* (Alfred Knopf, New York 1991). Two recent works, viewing events from the perspective of the Duchess of Windsor are Hugo Vickers' *Behind Closed Doors: the Tragic, Untold Story of the Duchess of Windsor*) (Hutchinson, London 2011 and Anne Sebba's *That Woman: The Life of Wallis Simpson, Duchess of Windsor* (Weidenfeld & Nicholson, London 2011). There is also a 2006 DVD history, presented and produced by Prince Edward, incorporating private material from the Royal Archives at Windsor Castle: *What Ever Happened to the Windsors? The incredible story of the abdication and subsequent life of King Edward VIII and the reign that never was – http://www.dukevideo.com*

[110] *The King and the King's Proctor: the abdication crisis and the divorce laws 1936-1937* Stephen M. Cretney L.Q.R. 2000, 116 (Oct), 583–620.

[111] Sir Harold S. Kent *In on the Act: Memoirs of a Lawmaker*: Macmillan (London1979) p. 70.

[112] In the NA series TS 22/1/1/ to 22/1/8.

King Edward VIII's position as a potential witness mattered in the context of enquiries about collusion before he abdicated on 10–11 December 1936[113] and, thereafter, *if* the divorce itself might be declared void (or the Petition examined further) as a result of the King's Proctor's enquiries when Sir Donald Somervell presented his review to Merriman P.[114] The Decree Absolute in respect of the Petition was granted on 3 May 1937.

In the *Simpson* divorce proceedings before Hawke J,[115] the Judge clearly could not understand what this highly sensitive case was doing on his list and why he had the doyen of the defence Bar—Norman Birkett KC[116]—with his junior counsel[117] appearing for the Petitioner, Mrs Wallis Simpson.[118] The core elements that caught his attention—residence (to create a valid locus for consideration of the Petition) and collusion—set the tone for subsequent public and political scepticism[119] about the divorce and what it represented as events moved forward. Because all the UK press magnates had decided to impose a news blackout on the divorce, it was not until 3 December 1936 that news about it became more publicly available.[120]

Despite being granted the Decree Nisi, Wallis Simpson was not yet free to marry the King, nor he her. There could be no certainty that she would ever be free to do so. Although the court found that Ernest Simpson, her second husband, on two successive nights in July 1936 had committed adultery at the Hotel de Paris, Bray-on-Thames, the decree could not be made absolute for six months. Any person had a statutory right to "show cause" why the decree should not be made absolute.[121] All that any intervener had to do was to enter an appearance, pay the prescribed half-crown[122] fee, and then—within four days—file affidavits (for the same price) setting out the facts relied on in the challenge. Such an intervention would delay the King's marriage; at worst,

[113] He signed the Instrument of Abdication on 10 December 1936 and the Prime Minister, Stanley Baldwin, announced that fact to Parliament. It was not until 11 December 1936 that Parliament endorsed the Instrument of Abdication and Edward was allowed to broadcast to the nation.

[114] Sir (Frank) Boyd Merriman, who served as President of the Probate, Divorce and Admiralty Division for 30 years.

[115] Sir (John) Anthony Hawke 1869–1941: the divorce hearing was at Suffolk Assizes at the Shire Hall, Ipswich on 27 October 1936.

[116] 1883–1962: Birkett was a notably successful defence advocate—in the same era as Edward Marshall Hall—and alternate British Judge at the Nuremburg War Crime Trials.

[117] Walter Frampton.

[118] Theatrical, perhaps, unless he failed to notice the significant police presence in court and the fact that the doors had to be locked and the public was restricted to "ticketholders".

[119] One was Ramsay MacDonald, Lord President of the Council and formerly Prime Minister in the 1924 and 1929–1931 Labour Governments and (1931–35) in the National Government. He believed that Mrs Simpson had obtained her decree nisi by "a stretch of law and justice" or at any rate "much too easily" and thought it would be a "scandal" if the King's Proctor did not intervene: Helen Hardinge, *Loyal to Three Kings* (1967) 70.

[120] Brian Inglis, *Abdication* (1966) contains a detailed analysis of press coverage. Lord Beaverbrook left an account of his own important role in influencing the press to keep silent for so long: *The Abdication of King Edward VIII*, ed. A.J.P. Taylor (1966). The role of *The Times* and its editorial staff is set out in detail in Appendix I to *The History of The Times, The Fiftieth Anniversary and Beyond 1912-1948* (1952).

[121] Supreme Court of Judicature (Consolidation) Act 1925, s.183 (2).

[122] About £45 on 2015 values.

the decree might be rescinded, and the King would have precipitately abandoned the throne while still being debarred from marrying as he wished.[123]

The King's Proctor had a specific role during the *Nisi* period. Working on the instructions of the Attorney General he could, on receipt of relevant information, take such steps as were "necessary or expedient". If he suspected collusion then, under the direction of the Attorney General and after obtaining the leave of the court, he could intervene, retain counsel and subpoena witnesses to prove the alleged collusion. It will become apparent that these powers—in this case—were more of form than substance.

The Attorney General's statutory responsibilities[124] in relation to divorce cases, with the King's Proctor in his armoury for enquiries, meant that he became the fulcrum between two powerful forces. There were those who saw a successful intervention as a way of saving the King from himself, preventing the marriage and allowing Edward VIII to retain the throne, so keeping the monarchy pure and intact. Equally powerful was the body of opinion that believed the King (and his perceived mistress) should not be permitted to benefit from advantages denied to his subjects. The divorce, after all, had proceeded through the King's Courts and the justice—or otherwise—of the result was a reflection of much more than the Petition itself. Within both forces were also scattered an array of potentially self-publicising busybodies.[125]

9–017

Somervell knew that questions could be asked in Parliament about whether investigations were taking place.[126] He had been summoned by the Prime Minister, Stanley Baldwin "one morning"[127] to advise on three matters. Thoughts about *R v Mylius* were at the forefront of his considerations.

> "Marriage, Abdication [and the] King's Proctor. He [Baldwin] had written them out on a slip of paper. I wrote out a memorandum in my own hand of which I did not keep a copy. I said that the King's marriage was outside the Royal Marriages Act but that it would be unconstitutional for him to marry contrary to the advice of his Ministers. . .. If he did marry contrary to or without advice he would be acting unconstitutionally as if he did any other public act without or contrary to advice. Abdication I said could be done with the King's assent by Act of Parliament. The King's Proctor – at that time the only suggestion was of possible adultery between the King and Mrs Simpson. On this I took the view that it would be contrary to the constitutional position of the King for the King's officer to invite the King's Courts to investigate allegations against the King. This is a debatable point. I base my views on (1) the King's general immunity to legal process – he cannot be indicted for a crime or sued for a civil wrong or cited as a Co-respondent. This is based I imagine partly on the fact that they are his Courts and partly on the necessity of preserving his unique and supreme position. (2) He cannot give evidence. This is in accordance with an opinion supported by much a learning given by Simon at the time of the Mylius trial and is I have no doubt right. It seemed to me quite wrong that I should, assuming I had the evidence, bring allegations which, in an ordinary case, could be met and denied, against the King who could not by the law go into the box and deal with them. I had no doubt a feeling that whatever else was to be the solution of the problem the King's

[123] Cretney 585.

[124] Supreme Court of Judicature (Consolidation) Act 1925, s.181 (2) and (3) re-enacting provisions formerly in Matrimonial Causes Act 1860, s.7.

[125] Evidenced by the mass of letters in NA TS 22/1/1 to the King's Proctor asking, many in vitriolic terms, why he did not intervene.

[126] He had prepared a carefully-phrased answer: "If the KP receives any information which is relevant to his duties he will proceed in the ordinary course": Somervell, *Politics* (typescript), 80 (f 257).

[127] Somervell, *Journal*, ff 63–66.

> Proctor appearing with a bevy of valets and chambermaids before Merriman to prove that the reigning Monarch had been seen going down the passage etc was not the right one – assuming that the chambermaids were available."

Evidence of collusion between Wallis and Ernest Simpson, however, would have been in a different category—on which he *would* have authorised an intervention—but none was forthcoming.[128]

As a result Sir John Simon, as Home Secretary, advised Baldwin on 3 December 1936[129] that

> "intervention by the King's Proctor. . . on the present materials may be ruled out. The King's Proctor never acts except upon the express instructions of the Attorney-General, and though the Attorney-General in exercising this duty acts on his own responsibility and quite apart from Government advice, I as an old Attorney-General am quite satisfied that intervention by the Attorney-General in the present circumstances would not take place, at any rate unless some new and glaring evidence of collusion was forthcoming hereafter."[130]

It was inevitable, perhaps, that there would be a formal intervention. It occurred on 9 December 1937, on the cusp on the King's Abdication. Mr Francis Stephenson[131] filed the intervention and then—post-Abdication—prepared a draft three-page affidavit on 16 December 1936 which was annexed to his withdrawal of the intervention on the same date.

By the date of that affidavit the former King was the Duke of Windsor: he was no longer the King. Somervell, who had his *Mylius*-based position well-rehearsed before the Abdication, did offer an explanation about why he did not direct his investigating official, the King's Proctor, at the now ducal (rather than sovereign) subject of King George VI.[132]

> "After the abdication the position changed. Should we make all enquiries or not? I took a little time to make up my mind which I finally did with Barnes' help quite definitely. I took the time to think over this aspect. Assume there was some evidence of adultery. If brought to the notice of the Court Mrs S and the D of Windsor might well return to the country to give evidence and deny it. Even if proved, would not the Court on ordinary principles grant a discretion, particularly as Mrs S could plead the difficulty of informing the Court of her misconduct with the then ruling Sovereign. Result: a first-rate and squalid sensation and the divorce allowed as if I had never intervened."

9–018 Against this, Somervell balanced what he described as "three external factors". He felt there was a considerable belief that he, the King's Proctor and the judge had been "got at corruptly to abstain from administering justice". He

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[128] Somervell, *Journal*, f 81.

[129] Baldwin Papers, 176 f. 97 as quoted in H Montgomery Hyde *Baldwin, The Unexpected Prime Minister* (1973).

[130] Somervell's only comment about Sir John Simon—in his private papers—is revealing: "When the crisis started Simon rather took over the major constitutional issue. At times I rather felt he might have called me in to cooperate (sic) on me on one or two occasions when he didn't. However the main legal lines were pretty clear. I've no doubt that he felt as I should have in his position that he knew as much or more about it than I did and things had to be done fairly quickly." *Journal* ff 66–67.

[131] Managing Clerk at Thorp, Saunders and Thorp, Solicitors, of 79 Salisbury House, London EC, who lived in Ilford. He gave his address for service as c/o Liddiards, 26 Lawrence Lane, Cheapside, EC2.

[132] Somervell, *Journal*, ff 81–82.

acknowledged that there were those who felt that it was essential in the public interest that the divorce should be stopped. Finally there were those who felt it would be "outrageous if the King having abdicated to marry was prevented from doing so".[133]

> "Barnes who was bombarded with abusive letters wrote to me about Xmas suggesting he should follow up enquiries on adultery as well as collusion. He had already with my approval seen some of the apparently more responsible of his correspondents who admitted they had no evidence and that they were repeating the gossip of the Club or the Temple. I wrote back agreeing. I decided we'd go ahead as if this was an AB case. We'd make all the usual enquiries on information or suggestions as is our own practice. Barnes as a result interviewed countless people, members of the crew of the Yacht, servants, hall porters etc. It was more than in most cases because people wrote suggesting suspicious events which, on examination, turned out never to have happened."[134]

In the end he concluded that whether or not the King and Mrs Simpson committed adultery was a question on which "those who know him may well differ". Somervell believed that it was obvious that, if they had committed adultery, they had not done so openly and had not publicly indulged in "the familiarities which normally indicate cohabitation".[135] He stated, at the same time, that the statement he made in the High Court on 19 March 1937 was "the whole truth" but doubted if it would be accepted as such. He does not seem to have reflected—and no-one close to him seems to have pointed out—that he was now King George VI's Attorney General and that it was his new monarch's law that needed to be upheld.[136]

The King's Proctor's task[137] was burdensome. Inspection of the files in the National Archives[138] makes it abundantly clear that he handled his extensive, difficult and onerous assignment with considerable sensitivity, endeavour and aplomb. Apart from bearing the brunt of the torrent of angry correspondence he and his assiduous assistant[139] interviewed a total of 42 individuals over the period and then presented a six-page summary[140] of their work.

One of the people he interviewed was Ernest Simpson on 23 February 1937. He explained that he had no power to force Simpson to answer any question. He

> "was quite ready to give me any information he could, with one exception, namely that he was not prepared to give me any information about the lady named in the case, as she was a great friend of his and he wanted to protect her name as far as possible."

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133 Somervell, *Journal*, f 82.

134 Somervell, *Journal*, f 83.

135 Somervell, *Journal*, f 84.

136 However neither the King's Proctor nor the High Court had any power to *compel* testimony. The proviso to section 3 of the Evidence (Further Amendment) Act 1869 protected parties and other witnesses to proceedings instituted in consequence of adultery from answering questions tending to show that he or she had been guilty of adultery unless he or she had already given evidence in the same proceedings in disproof of the alleged adultery.

137 To give a measure of his work and its results, in 1935 he intervened in 23 divorces, 21 of which were rescinded and in 1936 the comparative figures were 26 interventions and 25 rescissions: Anne Sebba 151. It is also clear, from these figures, that the King's Proctor picked the cases for investigation on the basis of likely and provable collusion.

138 TS 22/1/1–TS 22/1/8.

139 Walter G. Chapman, the Assistant King's Proctor.

140 An important part of the brief to Clifford Mortimer for the hearing on 15 March 1937 before Merriman P.

Simpson went on to say that he and his wife had married in 1928 and lived happily together for some years until 1935 "when they became somewhat estranged". The couple had met the Prince of Wales in 1931 and become friends of his. At the end of 1935 Simpson noticed that his wife was associating "very frequently" with the Prince of Wales and he had talked to her about it.

> "Early in 1936 he and his wife were entertained by the King, and he mentioned the matter to the King. The King told him that he was in love with his wife, and that he wanted to marry her. He told the King that he must be mad to entertain such an idea; that he must realise that she was already married and, even if she were divorced, it would be impossible for him to marry a woman who had been twice divorced. He had a long talk with the King on this aspect of the matter, pointing out the position he held in the State and the traditions of the Royal Family with regard to family life, etc. the King became very emotional, and eventually broke down. There was never any request by the King to him to divorce his wife, and apart from that one occasion the question of divorce was never discussed. At no time did he discuss any question of divorce with his wife."[141]

9–019 Simpson had strongly disapproved of his wife going on holiday with the King, to no effect. In respect of the divorce proceedings brought against him by her "he was somewhat estranged from his wife and he followed his own inclinations and did what he liked". When he went to Bray and stayed with the lady, he was surprised when it was found out. He did not know he was being followed and did not know how his stay there had been discovered. He refused to tell the King's Proctor the real identity or location of the "Mrs Kennedy" mentioned in the divorce petition. He had received no payment from the King.

On 19 March 1937 the divorce proceedings came for review before Merriman P in the High Court.[142] The King's Proctor's instructions to Clifford Mortimer as the Attorney's Junior Counsel set out a summary—over 13 foolscap pages—of the elements to be considered. The conclusions were that there had been no collusion and that the "jurisdictional" point about the petition being heard in Ipswich had no great weight to it.

At the hearing itself Norman Birkett explained to Merriman P that the house at Felixstowe had been taken by Mrs Simpson "on advice" because of her "ill-health" and the fact that the Petition could not be listed speedily in London. Ipswich was the nearest convenient Assize venue and the "only reason for the removal to Ipswich was the matter of expedition".[143] The President concluded his review on the basis that the *Nisi* period would continue to run for the remainder of its course until the Decree was made Absolute.

It is difficult now to see how enquiries that specifically excluded individuals who could give accurate and direct evidence—members of Mrs Simpson's staff and those of the King himself—could ever present evidence that there

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[141] Page 2 of Exhibit H.

[142] A full report exists in *The Times* Law Report 19 March 1937, published on 20 March 1937.

[143] Merriman P then remarked: "You have put it quite frankly that residence was only taken in order to qualify for trial. . .. That is very frank. I understand." After confirming with Mr Stevenson that he had withdrawn his intervention he stressed Somerville's assurances that no pressure had been put on anyone.

had been adultery between Mrs Simpson and the King. That was always private information and, even at the time, that was information that could not be sought or compelled because, to do so, would put a witness who actually knew anything in breach of contract and also in breach of the implied confidentiality that such contracts of employment carry with them.[144] That applies as much to the servants of the Simpsons while they were a married couple as to the servants of any of the individuals involved.

What it did emphasise, however, was a mind-set—certainly on the part of the Attorney General—that the King *qua* King could never be brought before his own court and held to account even if this inability created the injustice of a petitioner in a divorce case gaining, with the Decree Absolute, a clear advantage that would not be available to anyone else. That mind-set did not adjust to any appreciable degree after Edward VIII's abdication, when he was serving George VI.

Somervell then seems to have been more worried—with an eye to history—that if adultery between the former King and Mrs Simpson was explored post-Abdication and pre-Decree Absolute, then the couple would return to deny any adultery and give evidence or—remarkably—that Mrs Simpson could get the benefit of the court's discretion in respect of her Petition because of a kind of royal *impasse* (rather than duress) that explained her difficulty in detailing her adultery with the then-ruling monarch. The only other way out of that *cul de sac* would have been for Parliament to pass emergency legislation to allow this particular Decree Absolute, a prospect that none of the senior politicians or George VI could have relished.

What is clear, too, is that the Duke of Windsor was not going to have his reputation traduced with allegations of adultery. Twice he resorted to libel actions which—in the nature of things—were impossible to defend because only he and the Duchess could have provided the evidence to defend the claims. Somervell's caution together with the King's Proctor's investigations and Merriman P's review in the High Court on 19 March 1937 had, ironically, given the sexual propriety aspect of their reputations a clean bill of health.

9.5.2.1 The monarch, other infringements and inquest evidence

9–020 Generally, when the Queen makes complaints about such matters as breach of copyright or breach of confidence the courts seem content to accept affidavit evidence offered on her behalf. The most notable copyright infringement was when her solicitors wrote to *The Sun* newspaper[145] seeking damages and costs for breach of copyright. *The Sun* had published the full text of the Queen's annual Christmas broadcast to the nation two days before transmission.[146] Immediate punishment was the withdrawal of *The Sun's* press accreditation to

[144] Public interest arguments as a counterweight to implied silence and confidence had not yet been developed or matured.

[145] 13 February 1993.

[146] *The Sun*—having originally claimed that it came by the transcript legitimately—subsequently printed an apology on 16 February 1993, paid all costs and made a £200,000 donation to a charity nominated by the Queen.

photograph the royal family attending church at Sandringham on Christmas Day. In 1990 the Attorney General (acting for the Queen in her personal capacity) obtained an injunction to prevent a former royal servant from publishing a book about his experiences in breach of a contractual agreement.[147]

A different—and more sensitive—situation arose during the inquests into the deaths of Princess Diana, Princess of Wales, and Dodi Al Fayed in 2008. Scott Baker LJ (sitting as a Deputy Coroner) touched on part of the issue about the Queen's compellability as a witness during these inquests.[148] His decision on 12 March 2008—refusing to call Prince Philip, Duke of Edinburgh, as a witness and to ask questions of the Queen—was upheld in a subsequent judicial review that went before the President of the Queen's Bench Division sitting with Gross and Walker JJ.[149]

Setting out his reasons in a five-page judgment Scott Baker LJ began by noting that there had been on-going requests to call Prince Philip and—before the inquest began—there was a suggestion that the Queen should also be called but this was modified to a request that she be invited to answer certain questions. In relation to Prince Philip, Scott Baker LJ noted:

> "It should be borne in mind that the central belief of Mr Al Fayed is that the Duke of Edinburgh organised the assassination of Diana, Princess of Wales and Dodi Al Fayed through the Secret Intelligence Service because of hostility towards the Princess of Wales and the Al Fayed family and the perceived damage to the Royal "brand". Her engagement to Dodi Al Fayed and her pregnancy by him were the last straw."

He concluded that nothing had emerged to persuade him that it would be expedient to call the Duke of Edinburgh. In relation to the Queen, the questions were directed at three areas. The first was a conversation alleged to have taken place with Paul Burrell in which Mr Burrell recollected she made reference to "*dark forces or something similar*". The second related to "Squidgygate".[150] The third related to her knowledge of the "St Tropez" trip.[151]

On the issue of whether the Queen should have to answer such questions he said:

> "Her Majesty is not, I think, a compellable witness (although I emphasise that this has not been explored in argument). It is submitted that nevertheless these questions should be put to Her Majesty and she can answer them if she wishes. What should be done thereafter would depend on the answers. I do not think I should go down this route if I do not think it would be expedient to have evidence on these matters. . .. I have concluded that enquiries of Her Majesty the Queen should not be made as suggested by Mr Al Fayed on the basis that they will not assist the jury to answer the statutory questions."

In the judicial review proceedings, the President of the Queen's Bench Division (May J) noted that Scott Baker LJ had called a vast body of evidence before

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147 *Attorney General v Barker (Worldwide Injunction)* [1990] 3 All E.R. 257 CA in respect of Malcolm J Barker's *Courting Disaster* published in Canada in 1990 by Fleetwood Publications.

148 *http://webarchive.nationalarchives.gov.uk/20080521144222/http://www.scottbaker-inquests.gov.uk*

149 *Mohamed Al Fayed v Assistant Coroner for West London* [2008] EWHC 713 (Admin).

150 Telephone calls in the 1980s between Princess Diana and a close friend, James Gilbey.

151 Metropolitan Police concerns regarding the Princess of Wales going on holiday with the Al Fayed family in July 1997.

the jury and that the purpose of calling the Duke of Edinburgh as a witness and to address questions to Her Majesty the Queen, "*was to inquire into a new minted speculative theory*".

He decided that Michael Mansfield QC wanted the Duke of Edinburgh to be called in order to cross examine him whether he had expressed himself in such terms of hostility to Diana, Princess of Wales that members of the UK's Secret Intelligence Service (SIS), without his knowledge, or the knowledge of those responsible for the service, conjured up a plot of their own to arrange for her to be killed.

> "In our judgment the Coroner was entitled to conclude that the new theory, whether it went to rumour and speculation or indeed "how" the deceased met their deaths, when examined in the light of existing evidence, did not make it expedient to ask the questions intended to be raised with the Duke of Edinburgh, and the questions asked of Her Majesty The Queen."

It is perhaps understandable, in the context of the judicial review, that the President of the Queen's Bench Division avoided issues of compellability in respect of the sovereign. What is less easy to understand—given the inquisitorial role of Scott Baker LJ exercising his jurisdiction as Coroner—is why he did not raise the issue of whether the Queen could be compelled to do anything in relation to the proceedings and explore it in more detail at the outset. It is a further example of legal deference in respect of an issue that, sooner or later (probably sooner given the rapid development of communication and media issues against a fabric of competing privacy and freedom of speech claims) will have to be addressed.

9.6 Historical Cases of Note Involving Other Members of The Royal Family And Royal Household

9–021 For completeness, other key cases during the last 175 years involving members of the royal family—or members of the royal household—as witnesses will be outlined briefly. The examples which follow reinforce the observation, already made, that such individuals appear only rarely in court proceedings. When they do it is generally reluctantly, or—if it is a member of the royal household—it is sometimes as a foil to represent royal interests without exposing the individual member of the royal family to the full scrutiny of judicial proceedings.

9.6.1 The Prince Consort

9–022 The position of Prince Albert, the Prince Consort, has already been mentioned in connection with *Prince Albert v Strange*, a case examined in more detail separately in relation to the copyright, breach of confidence and privacy elements it discloses.[152] The most contemporary of Prince Consorts, Prince Phillip, has never been party to any litigation.[153]

[152] (1849) 2 De Gex & Smale 652; 64 E.R. 293.

[153] The singer and musical star Pat Kirkwood was rumoured to have had an affair with Prince

9.6.2 The Queen Consort

9–023 None of the Queen Consorts[154]—during the last 175 years—have been directly involved in judicial proceedings although Queen Mary created a legal convention in terms of the publication of the details of royal wills[155] which will be discussed later.[156]

9.6.3 The Prince of Wales: "Bertie" in court

9–024 All of the four Princes of Wales—"Bertie", George, "David" and Charles—have inevitably been the subject of intense public scrutiny as monarchs-in-waiting. The (inaccurate) rumours regarding the morganatic marriage of Prince George[157] led to criminal court action in 1911 in *R v Mylius* only when he became King. Only two of the Princes of Wales—Bertie and Charles—have been directly involved in court proceedings. Issues relating to Prince Charles are dealt with separately.[158] Bertie—to the dismay of his mother Queen Victoria—set about establishing the record (unbeaten by any of the others) for enforced court appearances before he became Edward VII[159] and a legacy of issues about the many letters he wrote to those with whom he was involved. There were two notorious matters in which he featured.

9.6.3.1 Mordaunt v Mordaunt, Cole and Johnson[160]

9–025 The first was this high-profile, high-society matter, heard before Lord Penzance and a special jury. On 27 April 1869 Sir Charles Mordaunt had petitioned for a divorce from his wife, Harriett, on the basis of her adultery with Lord Cole, Sir Frederick Johnstone and "some other person".[161] Bertie wrote to Queen Victoria on 10 February 1870 that "it was his painful duty" to tell her that he had been subpoenaed to appear at court in the action.[162] Although Bertie was not

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Phillip in October 1948 while the then Princess Elizabeth was eight months pregnant with Prince Charles. Kirkwood had later wanted him to sue on these allegations—to clear her reputation—but the Duke wrote to her: "Short of starting libel proceedings, there is absolutely nothing to be done. Invasion of privacy, invention and false quotations are the bane of our existence." Michael Thornton *Daily Telegraph* 24 September 2012.

[154] Princess Alexandra of Schleswig-Holstein-Sonderberg-Gluckstein (1844–1925), Princess Victoria Mary of Teck (1867–1953: Queen Mary) and Lady Elizabeth Bowes-Lyon (1900 – 2002: Queen Elizabeth, the Queen Mother).

[155] *Brown v Executors of Estates of HM Queen Elizabeth The Queen Mother and HRH The Princess Margaret, Countess of Snowdon* [2008] EWCA Civ 56; *Brown v IC & AG* (Royal Wills) EA/2011/0002.

[156] In Chapter 12.

[157] Published in *The Star* of 2 May 1893 and which eventually led to *R v Mylius* in 1911.

[158] In Chapter 10.

[159] Professor Jane Ridley's authorised biography *Bertie A Life of Edward VII* (Chatto & Windus 2012) is the product of five years of unrestricted access to the Royal Archives and covers most of the detail mentioned here but—where indicated—I have also drawn from contemporary reports in *The Times*.

[160] *The Times* 26 February 1870.

[161] Assumed to be Bertie.

[162] In fact he and his lawyers had done everything possible to prevent the case coming to court.

actually cited as a co-respondent, the evidence given by Sir Charles Mordaunt—about Bertie's acquaintanceship with Harriett—forced him into the witness box. Letters between Bertie and Harriett appeared in *The Times* on 21 February 1870, a leak that does not seem to have been inspired by those advising the Prince.[163] When he actually gave his evidence on Day 5 of the case (Wednesday 23 February 1870) he was asked by Dr Deane, Counsel for the Moncrieffe's:

- "Were you acquainted with Lady Mordaunt before her marriage?
- I was.
- We have heard in the course of this case that your Royal Highness used hansom cabs occasionally.[164] I do not know whether this is so.
- It is so.
- I have only one more question to trouble your Royal Highness with. Has there ever been any improper familiarity or criminal act between yourself and Lady Mordaunt?
- There has not."

That ordeal in the witness box lasted only seven minutes and he received an ovation as he left the court. Serjeant Ballantine, the formidable counsel for the petitioner Sir Charles Mordaunt, having got Bertie into the witness box, declined to question him.[165]

9.6.3.2 The royal baccarat case: Gordon-Cumming v Wilson (1891)

9–026 The second court appearance took place as a result of a game of baccarat played on the evening of 8 September 1890 at a country house called Tranby Croft, near Hull, owned by a wealthy ship-owner called Arthur Wilson. Bertie and his entourage, including a 42-year-old Lieutenant-Colonel in the Scots Guards, Sir William Gordon-Cumming, were guests and began to play the game[166] with Bertie as the "banker" sometime after 11 pm. Subsequently Sir William was accused of cheating and was forced to sign a piece of paper, with Bertie present, undertaking "never to play cards again as long as I live".[167]

"They were careful to operate in a clandestine way, which made it difficult for historians to learn the truth, but it seems that Harriet Mordaunt's father, Sir Thomas Moncrieffe, was in league with Marlborough House to ensure that Harriet was declared insane and not fit to appear in court. In November 1869 the royal doctor William Gull visited her and declared her mentally incapable." *Bertie* 129.

[163] The Lord Chancellor, Lord Hatherley, commented that people seem to have been surprised to find them so simple and free from impropriety: Royal Archives VIC/Z499/79, Hatherley to Queen Victoria 21 February 1870.

[164] That the prince should have used a hansom cab was especially shocking to the Victorians. "There was something unpleasantly sly and furtive about a prince hiring a public carriage to drive around anonymously through gas-lit streets: Roger Fulford 'The King' *Edwardian England*, ed. Simon Nowell-Smith (Oxford University Press, 1964) p.9.

[165] Prof Ridley suggests this was because Prime Minister Gladstone had intervened behind-the-scenes to prevent this: *Bertie* 132.

[166] That, a few months earlier, had been ruled to be illegal by the High Court in a declaration that it was a game of chance rather than skill.

[167] The paper was countersigned by Bertie and nine other individuals.

In January 1891 Sir William brought a slander action against the owner of Tranby Croft, Arthur Wilson, because of information that had appeared about the incident in the US press.[168] Attempts by courtiers and Bertie to stifle the trial were unsuccessful and the Prince's attempts to block the court case led to him being attacked in the press for plotting a royal cover-up. This also resulted in coverage that portrayed Sir William as a martyr.[169]

When the trial began on 1 June 1891 the spectacle was more like a society wedding than a trial.[170] Bertie gave evidence on the second day. In the witness box his answers were brief and given in a hoarse voice with great rapidity. When the lawyers had finished one of the jurors stood up and asked the two questions the lawyers had not dared to ask. As a banker, had the Prince seen any cheating on the part of Sir William? Bertie replied "no" and explained that it was not usual for the banker to look for cheating among friends. The second question—whether, at the time, he had believed the charges against William—received the reply that Bertie had no choice but to believe them.[171]

The *coup de grace* in the trial came on the following Monday (8 June 1891). With Bertie sitting in court in front of him, Sir Edward Clarke[172] demolished the Wilsons' case against Sir William by suggesting that no-one intending to cheat would have placed his playing counters on white paper. He also suggested that there was "a strong and subtle influence of royalty, a personal influence. . . to save the interests of the dynasty or to conceal the foibles of the prince". On 9 June the trial judge, Lord Coleridge, summed up for nearly four hours and effectively ordered the jury to decide against Sir William. After 13 minutes it returned a unanimous verdict which complied with this direction, finding for the defendants. In court, the result was greeted with booing and hissing. Bertie, who was at the races at Ascot when the verdict became public, was hooted by the crowd.

Queen Victoria felt it was a "fearful humiliation" to see the future King dragged "through the dirt just like anyone else, in a Court of Justice".[173] It demonstrated the important point, however, that the monarchy was not above the law. The verdict was considered to be unfair and Sir William became a hero. The day after the verdict he was dismissed from the Army.[174]

9.6.3.3 Memento Mori: Bertie's Legacy

9–027 In each of his royal *personae*—as Bertie, Prince of Wales, and as King Edward VII—he does not appear to have considered the implications of the

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[168] *Gordon-Cumming v Wilson* Times 1–9 June 1891.

[169] Michael Havers, Edward Grayson and Peter Shankland *The Royal Baccarat Scandal* (Souvenir Press 1988) pp.61–63.

[170] "Women in smart summer dresses and fashionable bonnets peered through their opera glasses as Bertie entered the courtroom and positioned himself in a red morocco chair placed at the front of the court, on the left of the judge's seat. Sitting where he was, and being who he was, he could hardly fail to influence proceedings". *Bertie* 288.

[171] *Bertie* 289.

[172] Counsel for Sir William.

[173] Royal Archives VIC/Add U32/, Queen Victoria to Vicky 8 June 1891.

[174] He then married a 22-year-old American heiress, Florence Garner. When he returned to Forres, his home in Scotland, he was feted as a hero: *Bertie* 290.

legacy he was creating as "Edward the Caresser".[175] Like his mother Queen Victoria he was an inveterate letter writer. As a result, both during his life and after his death, ladies of various ranks and degrees came forward directly or through intermediaries with their hands stretched out offering the return of private correspondence. . ..for money. There were numerous attempts at blackmail.[176] In addition, it is uncertain how many, if any, illegitimate children he fathered.[177] Although there were a prolific number of extra-marital relationships which could have produced children,[178] almost all of the claimed children—when researched—could (and often did) have other fathers.

The two examples which follow—of the methods by which such embarrassments were removed—are representative of the methods used by the royal household of protecting Bertie's privacy for posterity. One occurred during his lifetime and one emerged to haunt George V after his father's death.

After losing his virginity[179] and facing a dressing down by his father, Prince Albert—who (presciently) painted a lurid picture of future blackmails, illegitimate children and law cases—Bertie found himself in 1864 being blackmailed by a man called Green for events that had occurred, apparently with Green's wife, about three years earlier. Royal advisors arranged for Green and his wife to be paid an annuity of £60 for their silence provided they left the country to live in New Zealand.[180]

The case of *Probyn v Logan*[181] shows a similar, pragmatic resolve from George V when threatened by the ever-impecunious "Daisy" Warwick—a former mistress of Edward VII—when she sought around £80,000 to return Bertie's letters to Buckingham Palace. In March 1914 Daisy[182] hatched a plot with writer Frank Harris for a "kiss-and-tell" autobiography they believed would net around £100,000. In 1908 she had promised Bertie that she had destroyed all his letters but had "discovered" a bundle of 30 of them when the bailiffs turned up to distrain on her property at Easton Lodge.

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[175] Henry James to Ariana Curtis 3 February 1901: *Henry James Selected Letters*, ed. Leon Endell (Harvard University Press 1987) 329.

[176] *Bertie* 58, 101–102, 111, 146, 149–150, 188–193, 225–226, 265 and 488–490.

[177] *Bertie* 138n, 147–148, 167, 171n, 329, 332, 427n, 472 and 521n

[178] They included Lily Langtree, "Daisy" Countess of Warwick, Countess Edith Ayleford, Lady Randolf (Jennie) Churchill, Patricia Cornwallis-West, Alice Keppel and a string of others.

[179] An arrangement secured by fellow Grenadier Guard's officers while Bertie was attending a military camp at the Curragh in August and September of 1861. It involved Nellie Clifden, a "well-known London lady much run after by the household brigade".

[180] Royal Archives VIC/Add Co7/1/00313: Sir Charles Phipps to General Knollys 22 November 1864.

[181] Heard before Low J in the King's Bench Division 1914 P No 1594. The author has been unable to locate the file in the National Archives. The only fragment of the case that exists is the final order—dated 5 July 1915—recorded in Fritz Lang's *My Darling Daisy* Michael Joseph 1964 184–185: ". . .. It is ordered that all further proceedings in this action be stayed until further order and that there be no order on the summons dated 18 February 1915, except that the documents contained in a sealed envelope deposited with the Court in this action. . .. be handed out to Sir Henry Paget Cooke the said defendant's solicitor forthwith to be destroyed by him. All affidavits filed in this action by any of the parties to be taken off the File of the Court and be returned to the present solicitors of the parties who filed them respectively."

[182] Reputedly the inspiration for the popular music hall song composed by Harry Dacre in 1892 and made popular in 1899 by Katie Lawrence.

9–028 Sir Frederick Ponsonby,[183] when told of the letters, believed they would "blast" Bertie's reputation and "could have a far graver effect on the monarchy".[184] His reflex was to pay Daisy off but George V was not prepared to be blackmailed nor to allow Daisy to humiliate his mother. Daisy was served with an injunction forbidding her from publishing, circulating or divulging letters received from Edward VII. Her response was to tell Sir Charles Russell, George V's solicitor, that she would relate her story in court at the full trial of the action. What was then marshalled against her, in the legal action of which the injunction was part, was an intellectual property argument coupled with threats under the Defence of the Realm Act 1914 (DORA).[185]

During the period of the injunction she had allowed Frank Harris to take some additional letters she had discovered, from Bertie, with him to the US. Buckingham Palace claimed copyright in Bertie's letters to her. DORA, among its other provisions, prohibited the export of intellectual property which could damage the national interest. Sir John Simon, Attorney General during this period, had seen three of the letters before they left the UK and pronounced them to be "very bad" particularly in terms of references to Queen Alexandra. As a result Daisy was threatened with committal to Holloway Prison for breaching the injunction. She capitulated, retrieved the material from Frank Harris in the US together with the manuscripts of her memoirs, and delivered the entire package to Lord Stamfordham.[186]

One fragment of the legal action remains for posterity. In her final affidavit[187] she stated:

> "am handing back with splendid generosity the letters King Edward wrote me of his great love, and which belong to me absolutely. I. . .. have never dreamed of publishing such things. My memoirs are my own affair, and every incident of those 10 years of close friendship with King Edward are in my own brain and memory."

[183] Assistant Private Secretary to George V.
[184] Royal Archives GV/GG9/ 527 Ponsonby to Davidson 16 July 1914
[185] DORA came into force on 8 August 1914.
[186] Royal Archives PS/GV/O/479 B/55, Stamfordham's Note.
[187] Royal Archives PS/GV/O/479B/54: Affidavit by Lady Warwick [1915].

CHAPTER 10

FOIA 2000: POST-ENACTMENT CHANGES MADE IN 2010 IN RESPECT OF THE MONARCH AND THE ROYAL FAMILY

10.1 Introduction[1]

10–001 A significantly restrictive change in the law—extending to the Queen and defined members of her family an absolute (rather than a previously qualified) exemption from enquiries under FOIA highlights a lack of transparency, meaningful public debate and practical clarity in the process used to achieve such important alterations. Notably such changes are not possible in respect of information requests made under the provisions of the Environmental Information Regulations 2004 (EIR) for the very reason that such Regulations—once enacted by an EU member state—do not permit unilateral or partisan adjustment.[2]

The process used to effect such change may have a profound constitutional significance both for the present and the future. When the monarch and her family benefit from the extra restrictions flowing from such amending legislation—without full and proper debate both inside and outside Parliament—questions inevitably arise about the process used to effect such changes.

These changes were achieved in the Labour Government's Constitutional Reform and Governance Act 2010 by alterations to s.37 FOIA which were then activated by the Coalition Government in January 2011. Bringing them into force flew in the face of the concordat on FOIA issues arrived at by Conservative and Liberal Democratic party at the creation of the Coalition partnership.[3]

The changes sit in sharp contra-distinction to the overtly public debate and avowed consultation with Commonwealth governments about the potential for changing the laws of royal succession and the position of marriage to

[1] Clarification: I have been a First Tier Tribunal Judge dealing with FOIA appeals since 2007. Because of my academic and media law interests I have not and will not deal with any Information Rights Appeals relating to the royal family under FOIA, EIR or any other related legislation.

[2] See also *R (Evans) v Attorney General* [2015] UKSC 21 [98–113] per Lord Neuberger and [147–149] per Lord Mance.

[3] *http://www.cabinetoffice.gov.uk/sites/default/files/resources/coalition_programme_for_government.pdf*, 10 May 2010 p.11; bullet point 5—"We will extend the scope of the Freedom of Information Act to provide greater transparency". See also the Consultation on Enhanced Fees for Courts and Tribunals which closed in September 2015.

Roman Catholics. The inequalities and anomalies of these succession issues have continued without any great focus in the background for a number of years.[4] These were given a boost in terms of the discussion that coincided with the marriage of Prince William to Katherine Middleton. That debate, on reforming the law on the Royal succession to allow first-born female heirs to take the throne and to remove the ban on Catholics becoming king or queen or marrying the heir to the throne, was completely appropriate. Its existence, however, begs questions about how and why it was thought that the FOIA changes—and their implementation—were not considered to be worthy of similar debate, discussion and rigorous scrutiny.

When enacted in 2000, FOIA was the product of a lengthy, pre-legislative campaign and significant scrutiny, debate and informed external comment as the Freedom of Information Bill moved through its Parliamentary stages.[5] Within 10 years of it passing into law the same enacting Government (with the original sponsoring Minister[6] transformed by the passage of years from Home Secretary to Lord Chancellor and Minster of Justice) produced in its dying days in March 2010 the amendments that permitted the restrictive alterations to be finally effected in the "wash up" in circumstances ensuring minimal debate in either House before receiving the Royal Assent on 8 April 2010.

10–002 Attempts better to understand the process that led to such changes—by direct enquiries by the author to Buckingham Palace,[7] the Ministry of Justice (MoJ) and its Privy Council Office—have shed no further light on how these were achieved. All that the Ministry of Justice conceded in response to the FOIA request by Rob Evans of *The Guardian* is that "lobbying" did take place. The *persona* of the lobbyist(s) and details of the mechanisms and channels used to achieve this—while they might be guessed at—remain unclear.

The scrutiny here is whether the process used (rather than the legislation that it has produced) suggests that the monarch and members of the Royal family have been more active and less neutral in securing such changes than had previously been the constitutional norm.

There is a respectable argument that such activism—if it is open and

[4] The whole issue was the subject of Evan Harris MP's Private Members Bill in March 2009: *Royal Marriages and Succession to the Crown (Prevention of Discrimination) Bill*. See also House of Commons Library Research Paper 09/24 17 March 2009 and House of Commons Library Standard Note SN/PC/683 24 January 2011: *The Act of Settlement and the Protestant Succession.*

[5] For the history, see the Report of the Select Committee appointed to consider the draft Freedom of Information Bill, 27 July 1998 *http://www.publications.parliament.uk/pa/ld199899/ldselect/ldfoinfo/97/9702.htm*

[6] Jack Straw MP.

[7] Sir Christopher Geidt, Private Secretary to the Queen, in response to the author, 12 April 2011: "*As a constitutional Monarch, in matters of law Her Majesty acts solely on the advice of her Ministers; legislation that has an impact on Members of the Royal Family is no exception. Taking your example of the recent changes to the Freedom of Information Act 2000, as the then Justice Secretary made clear during the report stage debate of the Constitutional Reform and Governance Bill in March 2010, the changes to the Act were implemented in recognition of the well-established conventions of confidentiality that underpin the unique constitutional position of the Monarchy, which was not sufficiently recognised under the previous legislation. The Freedom of Information Act was and is, therefore, a matter for the Government.*"

transparent—may be appropriate in contemporary society[8], particularly where issues relating to the privacy of the monarch's communications and the confidentiality of briefings, discussions and responses are concerned.

Covert activism, however, curtails informed public debate about what may be proposed. In this case, it is suggested, it created a Parliamentary *fait accompli*. The secrecy engendered by this process erodes trust in the very institution—the monarchy and its constitutional neutrality—that the changes seek to protect.

10.2 The Freedom of Information Act 2000

10–003 When the Freedom of Information Bill 1999 was presented to Parliament it was the product of many years' discussion and deliberation. The first proposal came in 1972 from evidence given to the Franks Committee which was examining the effect of s.2 of the Official Secrets Act 1911. In 1979 a Private Members' Bill to reform s.2 of the Official Secrets Act and to introduce a public right of access to official documents was introduced by Clement Freud MP. This Bill had completed its Committee Stage in the House of Commons when it lapsed on the dissolution of Parliament. The Labour Party had included a commitment to introduce a FOIA in every election manifesto from 1974. It made a detailed promise to enact such legislation in the 1997 election. When it came to power it published a White Paper in December 1997 and on 24 May 1999 the draft Freedom of Information Bill was published.

As background, the pre-FOIA 2000 situation in relation to communications with the royal household was expressed in a document prepared on 11 December 1997 and revised in November 1998.[9] It set out the reasons for confidentiality:

> "The following categories of information are exempt from the commitments to provide information in this Code. In those categories which refer to harm or prejudice, the presumption remains that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.
>
> References to harm or prejudice include both actual harm or prejudice and risk or reasonable expectation of harm or prejudice. In such cases it should be considered whether any harm or prejudice arising from disclosure is outweighed by the public interest in making the information available. The exemptions will not be interpreted in a way which causes injustice to individuals.
>
> . . ..
>
> 3. Communications with the Royal Household
>
> Information relating to confidential communications between Ministers and Her Majesty the Queen or other Members of the Royal Household, or relating to confidential proceedings of the Privy Council."

[8] See in particular Sir Michael Peat's comments as Private Secretary to the Prince of Wales in a detailed press release from Clarence House running to 17 pages with attachments in response to a Channel 4 documentary on the Duchy of Cornwall in March 2004: *http://www.princeofwales.gov.uk/mediacentre/inthenews/channel_4_programme_dispatches_578639796.html*

[9] *Open Government Code of Practice on Access to Government Information* 2nd edn (1997) Pt II, Para 3

The Sponsoring Minister for the Freedom of Information Bill was the Home Secretary, Jack Straw MP, supported by his Minister of State, Lord Williams of Mostyn. As things moved forward, pressure within Whitehall departments created a climate for a tighter regime than originally envisaged.

10.3 PROCEDURE FOR BRINGING FOIA INTO LAW

10–004 The draft Bill was the subject of pre-legislative scrutiny by two Parliamentary committees in the summer of 1999. The Government held its line in the face of criticism and views that conflicted with the more narrow Home Office approach and the eventual Bill was introduced on 18 November 1999. The Bill suffered five backbench revolts during the Report Stage in the House of Commons—with Government concessions that increased the powers of the Information Commissioner and restricted the use of the veto—and eventually became law on 1 December 2000.

At no stage during the passage of the Bill through its Parliamentary stages in both Houses was the clause that eventually became s.37 in the Act subject to any adverse comment or specific debate and its wording remained unchanged throughout the legislative process. When originally passed by Parliament in 2000 s.37(1) of FOIA provided an exemption for communications with the Queen, other members of the royal family and with the royal household but the exemption was a qualified one, subject to the Act's public interest test.

Legislation that affects the Monarch and the royal family needs to be pre-cleared. As Professor Rodney Brazier has pointed out:[10]

> "Uniquely among anyone who might be affected by a public general Bill, the monarch's permission is essential before any Bill touching on the Crown may be passed by either House of Parliament."

The procedure is that if the main or an important part of the Bill touches on the royal interests then the monarch's assent is sought in time for it to be signified at the beginning of the Second Reading debate on 7 December 1999. The Queen must, therefore, have given her initial assent.

The idea that the Queen was not properly advised on the provisions that affected her and the royal household ahead of the enactment of all of the principal terms the Freedom of Information Bill 1999 before the Second Reading debate is a novel proposition. It is not one that was ever presented to or argued in either the House of Commons or the House of Lords.

10.4 CHANGING S.37 FOIA

10–005 If it was the lack of effective advice to the monarch on this issue—and the ways in which this legislation might work—that caused the problem that required correction 10 years later then a greater degree of candour

[10] *Legislating About The Monarchy*, Cambridge Law Journal 66 (1), March 2007, pp.86–105 at p.95

might have been expected when proposals for change were being suggested after whatever lobbying took place from the Palace and by the Government in bringing such changes forward. Those changes involved more than the "tidying up" of the Freedom of Information Act 2000 as suggested by Jack Straw when presenting them to the House of Common at the Report Stage debate. It was in fact "tightening up" an area of FOIA which had become inconvenient.

By convention, as already noted, the Queen can do no wrong. It can only be presumed—given such a fundamental amendment within 10 years of the life of the original legislation—that the advice given to her to secure her initial consent to FOIA was incomplete, incorrect or defective. Quite how that could occur, given the 25 years that had elapsed in the gestation of this legislation, is hard to understand. The situation also needs to be considered from the point of view of the Open Government Code of Practice already quoted which acted as a guide before the legislation was enacted, particularly in relation to *confidential* communications.

It is for that reason that much greater clarity, debate and explanation could have been expected when such a fundamental amendment was proposed so early in the life of this piece of legislation. When the Government Minister responsible for the original legislation is the same Government Minister who brought forward the eventual change it might be expected that the duty to explain what had happened—and to allow full and proper consideration of the amending proposal—became even greater.

The amended s. 37, which was brought into force on 19 January 2011, created a new absolute exemption in respect of communications with the monarch, the Heir to the Throne and the second in line. The effect of the change is to exempt information relating to communications with those individuals until five years after the individual's death or 20 years, whichever is later.

It takes away the FOIA's public interest test in respect of them so there is no possibility of disclosure on public interest grounds during those specified time periods. In respect of communications with other members of the royal family, the changes give them protection until five years after the individual's death or for 20 years but leaves information requests about those more peripheral members subject to the public interest test.

The Commencement Order[11] which bought the amendments into effect in

[11] HC Deb, 18 January 2011, c34 WS: The Lord Chancellor and Secretary of State for Justice, Kenneth Clarke MP, set out five paragraphs of potentially positive matters to be considered in a Freedom Bill to "increase transparency". He then added: "*However, we must also ensure that information which it is not in the public interest to release is properly protected, and that we have proper regard to this country's long-standing constitutional conventions. It is for this reason that on 16 January 2011 I made a commencement order to bring into effect changes made in the Constitutional Reform and Governance Act 2010 to enhance the protection for information relating to communications with the Royal family and Royal household. The change provides an absolute instead of a qualified exemption for information relating to communications with the sovereign, heir to the throne or second in line to the throne or those acting on their behalf. The exemption for other members of the Royal family and members of the Royal household remains qualified. . .. This amendment to the FOI Act is necessary to protect the long-standing conventions surrounding the monarchy and its record, for example the sovereign's right and duty to counsel, encourage and*

January 2011 was laid while the Upper Tribunal of the Information Rights Tribunal was still hearing the *Evans* case.

10.5 THE REVIEW OF THE 30-YEAR RULE

10–006 The Coalition Government had inherited the amendment from the legislative "wash up" that preceded the dissolution of the previous Parliament ahead of the General Election in May 2010. It received scant debate in either House and was presented as a "tidying up" operation. The FOIA proposals in respect of the monarch and Royal family first became apparent in February 2010 when the Lord Chancellor, Jack Straw MP, published a review of the 30-year Rule.[12]

The events leading up to this review merit scrutiny.[13] They demonstrate an approach which disclosed the minimum amount of information about the issue itself or the significance of the future intentions for change. On 25 October 2007 Prime Minister Gordon Brown asked Paul Dacre—working with Professor David Cannadine and Sir Joseph Pilling—to chair an independent review of the 30-year rule. Their report was published on 29 January 2009. At no stage did that report suggest changes to s.37 FOIA. On 10 June 2009 the Prime Minister made a statement on constitutional renewal. He pledged the Government to progressive reduction in the time taken to release official documents. He added that consideration had been given to the

> "need to strengthen protection for particularly sensitive material, and there will be protection of Royal family and Cabinet papers as part of strictly limited exemptions."[14]

On 25 June 2009 Dai Davis MP asked Jack Straw MP for the reasons why Cabinet papers and information in respect of the royal family were not included in his proposals to replace the 30-year rule with a 20-year rule for disclosure of official public documents.[15] Mr Straw did not reply with any specific information but the Ministry of Justice later issued a statement including the following:

> "To ensure the constitutional position and political impartiality of the Monarchy is not undermined, the relevant exemption in the Freedom of Information Act will be made absolute for information relating to communications with the Royal Household that is less than 20 years old. After that point – if the relevant Member of the Royal Family is still alive – then the exemption will continue to apply until five years after their death – on an absolute basis for the Sovereign and the Heir to the Throne, and on a qualified basis for other members of the Royal family."[16]

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warn her Government, as well as the heir to the throne's right to be instructed in the business of Government in preparation for their future role as monarch."

[12] Cm. 7822 (which followed the independent *Dacre Review* published in January 2009 there was no mention of altering the position of the Monarch and the Royal family in FOIA terms).

[13] See also House of Commons Library Standard Note SN/PC/05377 dated 9 March 2011: *Public Records, freedom of information and the Royal Family www.parliament.uk/briefingpapers/commons/lib/research/briefings/snpc-05377.pdf*

[14] HC Deb 10 June 2009 c797.

[15] HC Deb 25 June 2009 c 1130W.

[16] See the BBC's Martin Rosenbaum's "Open Secrets" blog at *http://www.bbc.co.uk/blogs/opensecrets/2009/06/government_plans_foi_restrictions.html*

That, it will be noted, is a more limited version of what was actually enacted because it does give absolute exemption to information requests in relation to Prince William and Prince Harry.

The rationale, when it eventually appeared, ran as follows:

> "In order to ensure that the constitutional position of the Monarchy is not undermined, information relating to communications with the Sovereign, the Heir to the Throne and the second in line to the Throne, and those acting on their behalf, will be covered by an absolute exemption for a period of 20 years. If the Member of the Royal Family to whom the information relates is not deceased after the end of this 20-year period the absolute exemption will continue to apply until five years after their death."[17]

The "tidying up" argument is a strange one to offer in respect of these changes and during the currency of a live appeal case.

The passage of the Constitutional Reform and Governance Bill during the dying days of the last Labour Government saw the s.37 amendment inserted in the House of Commons at the Report Stage on 2 March 2010.[18] The second reading in the House of Lords took place on 24 March 2010 with an "expedited" Committee report and Third Reading because of the imminence of the dissolution of Parliament. It returned to the House of Commons on 8 April 2010. It is significant that the Lords Constitution Committee report on the Bill—as a constitutional Bill—expressed considerable concern about inadequate scrutiny.

> "This makes it all the more disappointing that this House, too, is in all likelihood to be denied the opportunity to scrutinise the provisions in this Bill properly. Parliament is likely to be dissolved before the House of Lords can progress its consideration of this Bill beyond second reading. The fault lies with the Government. In the first place there was excessive delay between the publication of the Draft Bill in March 2008 and the publication of the present Bill in July 2009. This was compounded by the protracted nature of the Committee stage in the House of Commons, which was repeatedly extended as the Government tabled numerous rounds of late amendments. It is inexcusable that the Government should have taken so long to prepare this Bill that it has effectively denied both Houses of Parliament – and especially this House – the opportunity of subjecting this important measure of constitutional reform to the full scrutiny which it deserves."[19]

There are clear indications that a section of the royal family, if not the monarch herself, lobbied for the changes to s.37 FOIA.[20]

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[17] Cm 7822, para 51.

[18] See House of Commons Library Standard Note SN/PC/05379 dated 14 April 2010, *Remaining Stages of the Constitutional Reform and Governance Bill 2009–10 www.parliament.uk/briefingpapers/commons/lib/research/briefings/snpc-05379.pdf*

[19] Lords Constitution Committee Constitutional Reform and Governance Bill 11th Report HC 98 2009–10, para 40.

[20] The Guardian, 13 September 2010: "*A senior Ministry of Justice source said the 'Palace had been uncomfortable for some time' about the Freedom of Information Act after it came into force in 2005 and began 'expressing their concerns to civil servants'. . .. An opportunity for the Prince to do something about this came last year when Daily Mail editor Paul Dacre. . . recommended that old government records should be released after 15 years, instead of the traditional 30. This change would have required legislation in order to be implemented. The ministry source said: 'Paul Dacre had some sort of vague words that if it was bought down to 15 years, some other changes might need to be made in the act. The civil service spot these kind of sub-clauses in a massive report, one little sub-clause, and see the opportunity to pour through it.' After many arguments within Whitehall, a deal was struck: the secrecy surrounding old government records would be liberalised so that they*

10.6 INFORMATION COMMISSIONER'S DECISION NOTICE FS 50285971

10–007 Even before the amended s.37 FOIA came into force it could be argued that it was setting the climate for future decisions. The Information Commissioner upheld a Ministry of Justice refusal to release representations made by the Queen or royal household regarding how FOIA was changed.[21]

That request was originally made on 14 August 2009. The Information Commissioner's decision was not made until 2 November 2010, nearly a year and three months later. That delay meant that the Constitutional Reform and Governance Bill had moved through its Parliamentary stages and became an Act, receiving the royal Assent on 8 April 2010.

The Information Commissioner specifically noted, in terms of the background to that request for information, the changes and stated:

> "At the time of the request in this case, the Government was considering whether to amend the section 37 and other provisions of the Act, following publication of the report from the 30 Year Rule Review."[22]

The Ministry of Justice confirmed that it held information relevant to the request and, in doing so, went some way towards confirming the dynamic that may have resulted in this change with the trigger being lobbying on behalf of the Queen or the royal household.

That impression is further confirmed at Paragraph 17 of the Decision Notice:

> ". . ..The Commissioner has viewed the withheld information which consists of communications from the Deputy Private Secretary[23] to The Queen to the public authority. The Commissioner's established view is that such a communication should itself be treated as a communication from The Queen, although the Deputy Private Secretary is himself a member of the Royal Household in any event. The Commissioner is therefore satisfied that the withheld information clearly falls within the remit of this exemption."

The Information Commissioner went on to consider the balance of the public interest arguments and recognised that, under the law that existed at the time of the decision he was considering, the arguments in favour of disclosure included an assumption that disclosure would occur in most cases, that there was a general public interest favouring transparency and openness in

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could be made public earlier than before, but at the same time there would be a block on the disclosure of correspondence between the government and the monarch, the heir to the throne or the next in line, regardless of the public interest. Then Justice Minister Jack Straw told MPs there had been an error in drafting the original act. Then Labour MP Tony Wright called it the 'Prince Charles amendment'. A royal spokesman said: 'the Royal household was consulted by government on the changes to the Freedom of Information act, but, as with all official matters, the Royal household relied on the advice of Her Majesty's ministers with regards to the issue.'" http://www.guardian.co.uk/uk/2010/sep/13/charles-letters-freedom-information-act

[21] FS 50285971.

[22] *http://www.justice.gov.uk/about/docs/government-response-30-year-rule-review.pdf*

[23] Sir Christopher Geidt OBE succeeded Sir Robin Janverin (now Lord Javerin of Chalford Hill) to become the Queen's Private Secretary on 8 September 2007 and Edward Young became the Deputy Private Secretary at the same time. Depending on when the representations to the Ministry of Justice began—and there is no way of knowing—both Sir Christopher and Mr Young could have been involved.

government and that increased transparency would lead to greater accountability in relation to public officials and an increased level of public understanding and engagement with the process of government.

He continued:[24]

> "In the circumstances of this case the Commissioner recognises that there is significant interest in, and debate surrounding, the proposed changes to the Act, which are likely to have a direct bearing on the future release of communications with the Royal Family and the Royal Household. Therefore he accepts that there is a clear public interest in knowing any views which may have been expressed by members of the Royal Family or Royal Household on these matters."

He referred to previous Decision Notices where he had decided that four public interest factors were inherent in maintaining the exemption, adding that the first and third of these were applicable in this request. These were:[25]

- "protecting the ability of the Sovereign to exercise her right to consult, to encourage and to warn her Government and to preserve her position of political neutrality;
- protecting the ability of the Heir to the Throne to be instructed in the business of government in preparation for when he is King and in connection with existing constitutional duties, while preserving his own position of political neutrality and that of the Sovereign;
- preserving the political neutrality of the Royal Family and particularly the Sovereign and the Heir to the Throne to ensure the stability of the constitutional Monarchy; and
- protecting the privacy and dignity of the Royal Family."

The Commissioner accepted that the information in question consisted of communications which "fall within the heart of government"—being correspondence for or on behalf of the Queen to the public authority. He concluded it would not be in the public interest for the operation of the established convention of confidentiality to be undermined. He accepted that the disclosure of the information covered could undermine the Queen's political neutrality and accepted that it was inherent in the exemption contained at s.37(1) (a) that it was in the public interest for the political neutrality of all members of the royal family to be preserved.[26]

The Commissioner chose his words carefully in respect of this portion of the decision. He accepted that disclosure of the information requested could undermine the monarch's political neutrality but he then concluded that it was in the "public interest for the political neutrality of all members of the Royal family to be preserved".

[24] FSD50285971, para 28.
[25] FSD50285971, para 29.
[26] FSD5028597, para 32.

10.7 *R (Evans) v Attorney General*[27]

10–008 The Supreme Court's decision in this case[28] relates to the use by the then Attorney General[29] of his s.53 FOIA veto powers in an attempt to prevent the publication of letters written by the Prince of Wales to a number of Departments of State before s.37 had been adjusted, as described above, to prevent such information requests. As a result of this judgment, the Prince's correspondence which was the subject of the original information requests by Rob Evans of *The Guardian* in April 2005 has now been disclosed to the public. In the next section following this one an argument—which was not raised at any stage in the appeal process—will be developed about why this information should not have been released because of the operative provisions of the Data Protection Act 1998 (DPA).

With that caveat, Lord Neuberger's introductory paragraphs succinctly summarise the issues as they arrived before the Supreme Court:

> ". . ..Mr Evans requested disclosure of the letters from the Departments, pursuant to both the FOIA 2000 and the EIR 2004, in April 2005. After initially refusing to state whether or not they had any of the letters, the Departments in due course admitted that they did, but refused to disclose them on the ground that they considered the letters were exempt from disclosure under sections 37, 40 and/or 41 of the FOIA 2000 and the equivalent provisions of the EIR 2004. Mr Evans complained to the Information Commissioner ("the Commissioner"), who upheld the Departments' refusal in reasoned determinations promulgated in December 2009. Mr Evans then appealed to the Tribunal, and the matter was transferred to the Upper Tribunal (Walker J, UT Judge Angel and Ms Cosgrave) ("the UT"), who conducted a full hearing, with six days of evidence and argument. The UT issued their determination on 18 September 2012, and it was to the effect that many of the letters, which they referred to as "advocacy correspondence", should be disclosed – [2012] UKUT 313 (AAC).
>
> The Departments did not appeal against this determination. However, on 16 October 2012, the Attorney General issued the Certificate stating that he had, on reasonable grounds, formed the opinion that the Departments had been entitled to refuse disclosure of the letters, and set out his reasoning.
>
> Mr Evans then issued proceedings to quash the Certificate, on two grounds, namely (i) the reasons given by the Attorney General were not capable of constituting "reasonable grounds" within the meaning of section 53(2) of the FOIA 2000, and/or (ii) because the advocacy correspondence was concerned with environmental issues, the Certificate was incompatible with Council Directive 2003/4/EC ("the 2003 Directive") and/or article 47 of the EU Charter of Fundamental Rights ("the EU Charter"). The Divisional Court (Lord Judge CJ, Davis LJ and Globe J) dismissed his claim – [2013] EWHC 1960 (Admin), [2014] QB 855. However, the Court of Appeal (Lord Dyson MR and Richards and Pitchford LJJ) allowed his appeal on both grounds ([2014] EWCA Civ 254; [2014] QB 855), and, unusually but rightly, gave the Attorney General permission to appeal to this court.
>
> The position in practice is as follows. If the Attorney General's appeal to this court fails on the first ground, then all the advocacy correspondence would have to be disclosed, and the second ground would be moot. If the Attorney General's appeal on the first and second grounds both succeeds, then the Certificate would stand and none of the advocacy correspondence would have to be disclosed. If the Attorney General's appeal succeeds on the first ground but fails on the second ground, then to the extent that the advocacy correspondence contains environmental information, it would have to be disclosed, but there is a dispute as to whether

[27] *R (Evans) v Attorney General* [2015] UKSC 21.

[28] In a court composed of seven Justices but by a majority: 5–2 on the Veto point and 6–1 on the EIR point. Lord Neuberger, Baroness Hale, and Lords Mance, Kerr and Reed were in the majority throughout with Lord Hughes dissenting on the FOIA Veto and Lord Wilson dissenting on the Veto and EIR issues.

[29] Dominic Grieve MP.

that would also apply to the other information in the advocacy correspondence ("the non-environmental information"). There is also an argument as to the extent to which the advocacy correspondence contains environmental information, but that is not before us, and therefore the meaning of "environmental information" does not have to be considered on this appeal.

Before explaining the legislative and procedural background and then turning to the issues, it is, I think, right to mention that the points which this court has to decide involve determining issues of legal principle. Accordingly, like the Divisional Court and the Court of Appeal, we have not seen the letters, and our only knowledge of their contents is based on what the Commissioner and the UT considered it appropriate to reveal in their reasoned determinations (as I have called them in order to avoid any confusion with a "decision notice", which is a defined term in the FOIA 2000, as explained below). Unlike us, they had the function of deciding whether the letters should be disclosed on "the merits", ie in the light of all the relevant facts and competing public interests for and against disclosure, and that required them to consider the content of the letters."

10–009 He then set out the structure of the way in which FOIA operated in relation to the information requested by Mr Evans.[30] Part I of the FOIA 2000 was concerned with "Access to Information Held by Public Authorities". Section 1(1) stated that:

Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

Section 2 explained that this right was subject to the exemptions set out in Part II, and that some of the exemptions were "absolute" while others are "qualified". "Qualified" meant that they were subject to the test that

"in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information".

Sections 3–7 were concerned with identifying what was a "public authority", and sections 8–17 dealt with the procedures (including time limits and fees) for making and answering requests for information. Section 17(1) required any notice of refusal to "specify" both the exemption relied on, and "(if that would not otherwise be apparent) why the exemption applies". Section 18 created the post of Information Commissioner.

Part II of FOIA dealt with "Exempt Information". Sections 37, 40 and 41 were directly in point for present purposes. Section 37 provided for an exemption in relation to communications with the Sovereign, other members of the Royal family or the Royal household. Until January 2011, that had been a qualified exemption, but, as a result of an amendment to the FOIA 2000 by s.46 of, and Schedule 7 to, the Constitutional Reform and Governance Act 2010, the exemption in s.37 was now absolute in relation to communications with the Sovereign, the heir to the throne, and the next in line. It had been common ground that the original, qualified, version of s.37 applied in this case.

Importantly Lord Neuberger noted that s.40 of the FOIA 2000 contained an absolute exemption in relation to "personal information", subject to the data protection principles set out in the Data Protection Act 1998.[31] Section 41

[30] *Evans* [8–11].

[31] And at *Evans* [38] Lord Neuberger stated further: "The UT recorded that the parties differed

of the FOIA 2000 ("section 41") exempted information which, if disclosed, "would constitute an actionable breach of confidence". Although that was an absolute exemption, public interest in disclosure was normally a defence to a claim for breach of confidence, and it "appeared to be accepted" that it could, in principle, operate as an effective answer to reliance on s.41. It was also right to refer to s.35(1), which exempted "[i]nformation held by a government department if it relates to" certain issues, and they included "(a) the formulation or development of government policy" or "(b) Ministerial communications", which, by section 35(5) would extend to "any communications . . . between Ministers of the Crown".

The key point in the judgment was, in terms of the s.53 veto, that a statutory provision that allowed a member of the executive (the Attorney General)

> ". . ..to overrule a decision of the judiciary merely because he does not agree with it would not merely be unique in the laws of the United Kingdom. It would cut across two constitutional principles which are also fundamental components of the rule of law, i.e. (i) that a court's decisions are binding and cannot be ignored or set aside by anyone, and (ii) that the executive's actions are reviewable by the court on citizens' behalf. 'Section 53, as interpreted by the Attorney General's argument in this case, flouts the first principle and stands the second principle on its head'."[32]

The effect of this was that s.53 could not be used to stifle a judicial decision of a court of record such as the Upper Tribunal just because a government official reached a different view about what the court should have decided. The words "on reasonable grounds" in s.53 FOIA required restrictive construction given their context and in light of the serious constitutional implications: mere disagreement with the decision was not enough or—where it occurred—required properly explained and solid reasons against the background and law established by the judicial decision.[33]

Equally important, in terms of the EIRs and the ministerial veto, Article 6 of Directive 2003/4/EC required that refusals to disclose environmental information could only be challenged before courts whose decisions were final (subject to the appeal process). The veto provision did not square with that requirement and, as a result, environmental information could not be the subject of the ministerial veto.

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as to the weight to be accorded to these factors, and then went on to discuss them in some detail. They observed that the Commissioner had given insufficient weight to the public interest, and had "overestimated the extent to which disclosure would undermine the [education] convention". The UT expressed the view that the education convention would actually be assisted by "recognition that advocacy communications will generally be disclosable if requested". The UT then carefully assessed and weighed the various factors which they had identified in para 123, and reached the conclusion that the advocacy correspondence should be disclosed. *In very summary terms, the UT's conclusion was that, in relation to section 37 the public interest outweighed the argument for the exemption, in relation to section 40 this meant that para 6(1) of Schedule 2 to the Data Protection Act applied, and in relation to section 41 the public interest prevented the disclosure being a breach of confidence* [author's emphasis added]. Further details of the UT's reasoning are set out in Lord Mance's judgment." Nowhere was the UT's assessment of the applicability of Paragraph 6 (1) of the DPA challenged.

[32] *Evans* [51–52].

[33] *Evans* [130–131].

10.8 AN ALTERNATIVE VIEW: WHY WERE THE PRINCE OF WALES' LETTERS NOT CONSIDERED AS HIS "SENSITIVE PERSONAL DATA"?

10–010 Sensitive personal data, by virtue of s.2 of the Data Protection Act 1998 (DPA), is personal data containing information as to (a) the racial or ethnic origin of the data subject, (b) his political opinions, (c) his religious beliefs or other beliefs of a similar nature, (d) whether he is a member of a trade union, (e) his physical or mental health or condition, (f) his sexual life, (g) the commission or alleged commission by him of any offence, or (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

This means that personal data issues that fall for resolution under the DPA require consideration of the definition above. This is so even when the initial request for information occurs under FOIA because of the s.40 "gateway" provision in FOIA.

Considering the Upper Tribunal decision in *Evans v IC and others*,[34] the lack of consideration of and protection for Prince Charles' sensitive personal data is a curious omission.[35] It remained unaddressed in all the subsequent iterations of the case. It played no part in the Attorney General's s.53 FOIA veto in respect of the Upper Tribunal's decision when it was appealed to the Administrative Court which sat with Lord Judge LCJ and two colleagues.[36] This is strange given that *Evans* was the culminating event in what started in 2005 as the now successful attempt by the *Guardian* to ensure transparency as regards Prince Charles' communications with the Government which either sought to promote a charity or to promote a particular view on policy ("advocacy correspondence"). In seeking to the block disclosure, the Government largely relied on the exemptions in FOIA for information provided in confidence (s.41) and communications with the royal family (s.37). In relation to any environmental information present, the Government cited the exception in the EIR for disclosures having an adverse effect on the person who supplied the information (regulation 12 (5) (f)). In respect of all these exemptions and exceptions the Government argued vigorously that the correspondence was part of the constitutional convention that the right of the heir to the throne had, in preparation for kingship, a right to be educated in the ways and means of government and that the correspondence was therefore especially confidential. The Commissioner broadly accepted the Government's analysis. The Tribunal rejected that.

At no stage does any thought appear to have been given to the "sensitive" personal data provisions of the DPA. Much of the relevant correspondence related to the Prince's advocacy of his opinions on matters of public policy. The Tribunal clearly and correctly held that at least these interchanges must be considered "political".[37] Indeed, it was largely as a result of this political

[34] *Evans v IC and others* [2012] UKUT 313 (AAC).

[35] Dr David Erdos highlighted this lacuna in the decision-making process in *Privacy and the Prince – a Government of Laws not Men?* L.Q.R. 2013, 129 (Apr), 172–176.

[36] *R (on the Application of Rob Evans) v AG and IC* [2013] EWHC 1960 (Admin).

[37] There was a limited reference to the DPA but only insofar as this involved treating the information as "ordinary" as opposed to "sensitive" personal data: Annex 3 [275-281].

aspect that the Tribunal found the public interest for disclosure to be so strong. As it stated:

> "Those who seek to influence government policy must understand that the public has a legitimate interest in knowing what they have been doing and what government has been doing in response, and thus being in a position to hold government to account."[38]

10–011 At the same time both the Information Commissioner and the Departments stated that disclosure of such information could result in the Prince appearing politically biased and that, therefore, there was a public interest against disclosure.[39] Nevertheless, despite the common agreement that information in the correspondence was both by its nature "political" and that it derived from Prince Charles, none of the parties drew the conclusion that it included information as to the "political opinion" of a living individual. In line with the Data Protection Directive 95/46/EC, such information is classed as "sensitive" under s.2 of the DPA 1998. As a result, irrespective of the public interest arguments, it may only be disclosed if a special condition included within or under Schedule 3 of the DPA is met.[40]

Given the reluctance of the Government to see this information released, this oversight—and the Commissioner's apparent blind spot in respect of a data protection regime he is responsible for upholding—remains puzzling. The Commissioner had not only stated that such innocuous information as the political affiliation of an MP must be considered sensitive[41] but also held that, in light of the reference in s.40 of FOIA (and the EIR) to a "member of the public", only the non-purpose-specific legitimating conditions included within Schedule 3 may be used in such a context. As the Commissioner states, it followed that

> "Condition 1 (explicit consent) or condition 5 (information already made public by the individual) will be the only possible schedule 3 conditions. . .because the other conditions concern disclosure for a stated purpose, and so cannot be relevant to the applicant and purpose blind nature of disclosure under the FOIA."[42]

Although Prince Charles was not a party in the case, the Commissioner clearly stated that the Prince did not give consent.[43] It is clear on the evidence

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[38] *Evans v IC and others* [2012] UKUT 313 (AAC) [160].

[39] *Evans v IC and others* [2012] [34]. The latter part of this argument was not accepted by the Tribunal. The Attorney General, using his s.53 FOIA veto, stated that a special reason in favour of non-disclosure was that the letters "reflect The Prince of Wales' most deeply held personal views and beliefs", "are in many cases particularly frank" and "contain remarks about public affairs which. . .would potentially have undermined [his] position of political neutrality": [12] Attorney General *Exercise of Executive Override Under Section 53 of the Freedom of Information Act 2000 in respect of a judgment of the Upper Tribunal dated 18 September 2012 Statement of Reasons https://www.gov.uk/government/publications/evans-v-1-information-commissioner-2-seven-government-departments-2012-ukut-313-aac*

[40] The Tribunal and the parties may therefore have been fundamentally mistaken in finding "common ground that in the present case entitlement to disclosure broadly depends on the answer to a core question: will disclosure. . .be in the public interest?" *Evans* at [1].

[41] Information Commissioner's Office: *The Exemption for Personal Information* ICO 2008, 8.

[42] Information Commissioner's Office 8 – 9.

[43] *Evans* Annex 3 [17].

that "Prince Charles writes on subjects that he would not speak publicly about".[44] The Commissioner's strict approach has been challenged by certain Information Rights Tribunal judgments. These have applied (within the FOIA context) the conditions set out under Schedule 3 which provide for disclosure for the purposes of journalism (and also literature and art) and have also mooted applying the research purposes provision as well. However, even these decisions have emphasised that the hurdle to surpass in such cases is much more onerous than the legitimating condition, largely based on a simply "public interest" test, which must be generally satisfied when disclosing personal information.[45] This has been further explored by the Upper Tribunal in *Goldsmith International Business School v the Information Commissioner and The Home Office*.[46]

In *Evans* it seems almost certain that neither the journalism nor the research conditions would be met. Thus, the journalism condition not only requires that disclosure be not just in the "public interest" but in the "substantial public interest"[47] but also requires the disclosure to be in connection with (i) the commission by any person of any unlawful act, or (ii) dishonestly, malpractice, or other seriously improper conduct by, or the unfitness or incompetence of, any person, or (iii) mismanagement in the administration of, or failures in services provided by, any body or association.[48] There was no argument that the Prince's correspondence was "unconstitutional".[49]

As a result any claim made under (i), (ii) or (iii) would have been unlikely to succeed. In terms of the "research" condition it is also unlikely that the activities of the *Guardian* could be construed as being for "research purposes". Also that condition requires that the disclosure does not (i) "support measures or decisions with respect to any particular data subject otherwise than with the explicit consent of that data subject" nor that it (ii) "causes , nor is likely to cause, substantial damage or substantial distress to the data subject or any other person".[50] The context for the *Guardian's* fight for disclosure was linked to a campaign to curtail Prince Charles' role in the formulation of public policy. On this basis the operation of the clear provisions of the DPA 1998 through the FOIA s.40 gateway should have required that at least substantial parts of this correspondence be withheld from disclosure.

10–012 It would be harsh to criticise the Supreme Court for failing to spot this omission, particularly because it was not argued at any stage in the appeal process. The Supreme Court brushed up against the issue briefly, as noted earlier, when Lord Neuberger noted in *Evans* at Paragraph 38:

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[44] *Evans* [161].

[45] [6] Schedule 2, DPA 1998.

[46] *Goldsmith International Business School v the Information Commissioner and The Home Office* (Information rights: Freedom of information—absolute exemptions) [2014] UKUT 563 (AAC) (16 December 2014).

[47] Met in the "Nick Griffin" case of *Cobain v Information Commissioner (2011) (EA/2011/0112 and 0113)* but not met in *Smith v. Commissioner* (EA/2011/0006).

[48] [3] Data Protection (Processing of Sensitive Personal Data) Order 2000.

[49] *Evans* [91].

[50] [9] Data Protection (Processing of Sensitive Personal Data) Order 2000.

". . ..In very summary terms, the UT's conclusion was that, in relation to section 37 the public interest outweighed the argument for the exemption, in relation to section 40 this meant that para 6(1) of Schedule 2 to the Data Protection Act applied, and in relation to section 41 the public interest prevented the disclosure being a breach of confidence. . . . ."

Lord Mance spelled out, in FOIA terms, all the elements considered by the Upper Tribunal (and the Attorney General in the issuance of his s.53 veto). There is no mention of the s.40 FOIA "gateway" into the Data Protection Act principles, particularly those relating to the treatment of the Prince of Wales' sensitive personal data. The FOIA focus may have distracted everyone from consideration of the DPA issues. This is evident below:[51]

"[140]. The certificate continues:

> 'Also, The Prince of Wales is party-political neutral. Moreover, it is highly important that he is not considered by the public to favour one political party or another. This risk will arise if, through these letters, The Prince of Wales was viewed by others as disagreeing with government policy.'

This reasoning also fails to address or meet the Upper Tribunal's conclusions, based on the evidence before it. The Upper Tribunal pointed out that it was and is well known that Prince Charles advocates causes which may in a broad sense be described as political, but that, at the same time, he avoids party-political arguments, code words or personalities in a manner which The Times had as long ago as 25 October 1985 commended in an editorial. The Attorney General's certificate does not suggest the contrary. It appears, by inference, to be concerned about public misperception, or possibly misrepresentation. But both The Times then and the Upper Tribunal in its decision robustly dismissed the risk of public "misperception" as not being real or persuasive.

[141]. More specifically, the Upper Tribunal found, in relation to the suggestion that the Prince might, as a result of disclosure, be viewed as politically partisan, that:

> '176. . . . [T]he concern was a concern about perception, and "political" was used in a narrow sense of "party-political". The concern that was advanced by the Commissioner and the Departments was that disclosure of the disputed information might lead the public to think that Prince Charles favoured one political party over another. The Departments were at pains to stress that Prince Charles was not politically partisan, and the Commissioner made it clear that he did not suggest this. The concern is thus about misperception.
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> . . .
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> 182. . . . The word "political" can be used in a broad sense, connoting an activity relating to policy. It is apparent from Prince Charles's public advocacy, from the revelations in the biography about his private advocacy, from purported revelations elsewhere about his private advocacy, and from public criticism of his advocacy activities . . . that in this broad sense of "political" Prince Charles's activities are not neutral and in a number of respects have been controversial. It was common ground in the present case that despite all this, and despite views he has advocated often being later adopted to a greater or lesser extent by politicians or government, Prince Charles had succeeded in not being perceived as party-political. There is a risk that a view publicly advocated by him at a time when it did not divide political parties may do so in the future, but that is a risk that he has been prepared to run.
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> 183. . . . As we explain below, it does not follow that failure by members of the public to distinguish between views on party-political issues and views on wider matters of policy involves "unfair criticism" – or even if it were "unfair", that Prince Charles or the royal family generally needs to be protected from it.
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> 184. It follows from this reasoning that we do not accept the broad general proposition advanced by the Commissioner on this aspect. It is true that a decision to abstain from making certain kinds of statement in public may be rendered ineffective if private correspondence were disclosed. This has to be seen, however, in the context of advocacy correspondence. In that context the Commissioner's submission effectively becomes that

[51] *Evans* [140–144] per Lord Mance.

while Prince Charles desires to be known publicly as an advocate on some issues, nevertheless there is a public interest in not revealing his advocacy on issues where he does not wish his stance to be known publicly. There may be special cases – for example, particular circumstances where, in order to achieve some public good, there is an initial period where secrecy is necessary to avoid tipping off wrongdoers. In the absence of this, or some other special circumstance, we do not accept that a desire that the public should not know of his advocacy on a particular issue of itself gives rise to a public interest in non-disclosure.

187. . . . For reasons explained in our conditionally suspended annex, we can say that in the disputed information – consistently with what in 1985 he described as his own practice – Prince Charles avoids "party arguments", "party code-words" and "personalities". If it were possible to identify in the disputed information anything on a topic which attracted party-political controversy either at the time it was written or now, just as The Times in 1985 thought the public interest permitted public statements on such a topic, we consider that in the 21st century "our language is not so deformed and our politics are not so penetrating" as to make it in the public interest not to disclose advocacy communications on such topics.

188. There is, as it seems to us, a short answer to all the various ways in which the Departments have sought to rely on dangers of "misperception" on the part of the public. It is this: the essence of our democracy is that criticism within the law is the right of all, no matter how wrongheaded those on high may consider the criticism to be.'

[142]. The Attorney General's certificate does not engage with or give any real answer to this closely reasoned analysis and its clear rebuttal of any suggestion that a risk of misperception could justify withholding of disclosure. Sufficient is already known publicly about the Prince of Wales' actions and communications – some of it as a result of authorised disclosure – to make the suggested risk of misperception remote, and the Upper Tribunal evidently saw nothing to suggest any greater risk in any closed material. It also took the robust view, which again the certificate does not address, that public discourse is not so deformed that public figures cannot express important and potentially influential views without sounding politically partisan – or that secrecy should, in effect, outweigh transparency for fear of "misperception".

[143]. Another factor highlighted in connection with the Attorney General's evaluation of the public interest is that "much of the correspondence does indeed reflect The Prince of Wales' most deeply held personal views and beliefs" (paras 11 and 12(2) of the certificate). But it is unclear why this is an argument against disclosure of communications by a public figure intended to influence public action. Further, as the Upper Tribunal found

'Prince Charles's self-perceived role has been described on his behalf as representational, "drawing attention to issues on behalf of us all" and "representing views in danger of not being heard". We find this assertion to be established by the evidence.'

Where a public figure makes representations on behalf of the public or on behalf of those whose voice might not otherwise be heard, it is not unlikely that he or she will do this out of personal conviction. It would seem strange if that were a reason for withholding knowledge about the representations from those in whose interests they were made.

[144]. The Attorney General also identified as a reason why the public interest pointed towards disclosure that

'(4) There is nothing improper in the nature or content of the letters.'

That reinforces the point that misperception is an unreal fear. But it does not address the reason why disclosure is sought. The Upper Tribunal in paras 4 and 144-160 identified a very strong interest in disclosure in the interests of transparency, so that the influence which such communications has or may have on public decisions may be appreciated, and potentially also of course countered. I would myself also regard this as clear."

10–013 Prince Charles —as any high-profile celebrity or any ordinary person lobbying in similar circumstances—might have expected the issues relating to such correspondence with Departments of State (or any other public authorities) to have engaged the DPA regime and for that to have been identified at an early stage by the Information Commissioner. That, surely, is what the s.40 FOIA "gateway" into the DPA and its principles exists to achieve. There is

nothing in FOIA that suggests it should be disapplied or ignored in terms of members of the royal family.

Prince Charles was not represented during that appeal hearing. His attendance and participation could have been secured by the Tribunal, at the case management stage, by joining him as a party.[52] His private office was consulted and declined voluntary joinder. Clearly the Tribunal did not want to take that matter further, an accommodation which respected that response. Had he been represented, however, it would have been open to his own Attorney General to highlight issues relating to the letters—or at least some of them—being part of the Prince's sensitive personal data and, as such, shielded and protected from public inspection by the data protection regime.

The royal family—from the experience highlighted above—seem quite reasonably to have anticipated that the preservation of their privacy and their personal data might more effectively be achieved by the kind of legislative change secured on behalf of the monarch, Prince Charles and his two sons by the change to the original s.37 FOIA in the Constitutional Reform and Government Act 2010 to make information requests about them an absolute exemption rather than a qualified one.

[52] Under the provisions of Rule 9 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009: consent of the party to be joined is not required but the party can choose to take no part in the proceedings after joinder.

CHAPTER 11

THE SOVEREIGN GRANT ACT 2011

11.1 Introduction

11–001 The Sovereign Grant Act 2011 (SGA) provided new arrangements for the monarch in her official duties. The arrangements changed from the previous civil list arrangements which were "reign-specific"—and over which Parliament had particular oversight—to a permanent regime covering all future monarchs.[1] Until the SGA there had been four grants to the royal household to support the monarch in her official duties:

(1) The Civil List: an annual grant provided by Parliament direct from the Exchequer to meet the core official expenses of the monarch's household so that she could carry out her role as Head of State and Head of the Commonwealth;
(2) A grant-in-aid for royal travel – the Department for Transport provided annual funding to the royal household to meet the costs of official travel by air and rail;
(3) A grant-in-aid for the maintenance of the royal palaces: the Department for Culture, Media and Sport (DCMS) was responsible for maintaining the royal residences and contracts with the royal household to do so.
(4) A separate grant from the DCMS which covered expenditure on communication and information.

The Act developed "a new streamlined system of support for royal household expenditure" on the monarch's official duties as sovereign.[2] It put a new unified Sovereign Grant in place of the existing four grants described above. Like the previous arrangement the SGA does not meet the monarch's personal expenses.

The SGA is linked to the net income surplus (or profit) of the Crown Estate. The Crown Estate is the property of the monarch "in right of the Crown", though its revenue had always—since the accession of each monarch since George III in 1760—been surrendered to the Exchequer in return for government support. The SGA is paid each year through the Treasury Estimate and

[1] This is subject to each new monarch consenting to extend the Sovereign Grant provisions, and so to continue the payment of the hereditary revenues as directed in section 1 of the Civil List Act 1952, for the duration of his or her reign.
[2] Sovereign Grant Act 2011 Explanatory Note [5].

is treated like any other government grant.[3] The SGA is equal to 15 per cent of the net income surplus (profit) of the Crown Estate for the two years before.[4] However, the Crown Estate continues to pay its annual income surpluses in full into the Consolidated Fund.[5] Any Sovereign Grant unused in a given year goes into a Reserve Fund. Section 6 gives the Royal Trustees[6] a duty when setting the grant to seek to prevent the reserve rising beyond about half of the amount of the annual net relevant resources used by the royal household.[7] The Trustees have a duty to periodically review the formula for calculating Sovereign Grant and recommend change if they see fit.[8] The Sovereign Grant resembles other government grants in a number of ways: it is paid through estimates authorised by Parliament annually; its accounts are published; they are audited by the Comptroller and Auditor General and are subject to Parliamentary scrutiny, including by the Committee of Public Accounts.[9]

11.2 From Sovereign Grant Bill to Sovereign Grant Act 2011

11–002 There is an explanatory note about the procedure for Bills relating to royal finances is instructive. It is Research Note 11/57 and it notes:

> "Some elements of the procedure on bills relating to royal finance are unusual, although they follow in broad structure the approach taken for any Bill authorising new expenditure. In the past, the process has begun with a message from the Queen under her own signature, which is presented to the House in a formal manner. The message is accompanied by another to the House of Lords, asking it to concur in the provision which the Commons will make. Then a select committee has been convened to report on the matter, before a resolution has been introduced, upon which the relevant legislation can be founded. *The Chancellor made oblique reference*, when moving the founding resolution [on 30] June 2011, *to the reduction of this process in the present case; the select committee has been dropped* [author's italics]."[10]

Removing the provision of scrutiny by a select committee—it might be thought—required some explanation but there was none, despite the fact that the House of Lord Constitution Committee undertook an enquiry into the fast tracking of legislation in 2008–09 and made a series of recommendations.[11] The Labour Government's response to those recommendations had stated:

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[3] The Comptroller and Auditor General (who is the government's external "public auditor") audits the royal household's use of the grant.

[4] The Sovereign Grant is determined through a formula set out in section 6 of the Act.

[5] In other words, the Sovereign Grant does not directly hypothecate a share of Crown Estate revenue.

[6] A body corporate established by section 10 of the Civil List Act 1952, whose members are the Prime Minister, the Chancellor of the Exchequer and the Keeper of the Privy Purse.

[7] The Royal Trustees could do that by reducing the grant in that year.

[8] The Treasury would implement the Trustees' recommendations through Orders which would require the approval of the House of Commons.

[9] The National Audit Office (NOA report) for 2013–14 highlighted the value of the Sovereign Grant for 2012–13 at £31m (rising to £37.9m in 2014–15): *http://www.nao.org.uk/wp-content/uploads/2013/10/Sovereign-Grant-VFM_10-10-13.pdf* The first 5-year Review will take place in 2015–16.

[10] Research Note 11/57 9.

[11] Select Committee on the Constitution, *Fast-track Legislation: Constitutional Implications and Safeguards*, HL 116 2008–09, 7 July 2009.

> "The Government firmly believes that all members of both Houses are entitled to a full explanation of why a piece of legislation is being proposed for fast tracking; and we would expect to be held to account for its timetabling. Ministers remain prepared to justify the need for any expedition to the House, including covering those issues set out in the Committee's Report."[12]

In fact, in the case of the Police (Detention and Bail) Bill 2010–12, the Government did explain its reasons for fast-tracking the Bill both in an oral statement and in the explanatory notes to the Bill.[13]

Undeterred by the formalities of scrutiny, the Chancellor introduced the debate on the Sovereign Grant Bill on 30 June 2011 by saying:

> "the current civil list arrangements are no longer sustainable. They are inflexible, less than transparent and, critically, rely on a reserve of public funds that has steadily been run down and is about to become depleted."[14]

The solution, as he described it, was for a new Sovereign Grant that balanced the public interest in the Queen being properly funded to carry out her official duties with a legitimate interest of the taxpayer in proper accountability and value for money. He placed emphasis on the value of the monarchy both in terms of public engagements carried out by the Queen and other members of the royal family and also in terms of its appeal to tourists and the income generated from that interest.

The Chancellor gave an account of how the Civil List had operated in recent decades:

> "In 1990, the annual civil list amount was set at £7.9 million. Additional support was provided to the monarch in the form of two grants-in-aid, one for travel and one for maintenance of the Royal palaces, but inflation in the 1990s was falling faster than forecast and much of the funding was not spent. Instead, it went into a reserve, which by 2001 had grown to more than £37 million. At the beginning of the last decade, it was decided that rather than set a new civil list, the Royal household should run down that reserve to fund its official duties.
>
> That means that over the past three years, the Royal household has on average spent about £35 million a year. Let me set out how the spending breaks down for 2009 – 2010, the most recent year for which there is out-turn data. There was £7.9 million from the civil list, £6.5 million from the reserve – that was, of course, public money that had been provided earlier – £3.9 million for travel, £400,000 for communications, and £15.4 million for Royal Palace maintenance. It should be made clear that over recent decades the Royal household has done a huge amount to cut costs and improve the effectiveness of its spending. Indeed, total spending has come down from £45.8 million in 1991 to an expected £35 million in 2010–11. That is a real-terms cut of more than 50% in 20 years."[15]

The Chancellor's argument was that the current system was inflexible and grants-in-aid were effectively ring-fenced from one another. There was no proper audit. The reserve, on which the Civil List had relied since 2000, was running out.

The three features he wanted to put in place in the new system were:

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[12] Select Committee on the Constitution, *Government Response to Fast-track Legislation: Constitutional implications and safeguards*, HL 11 2009–10, 7 December 2009, p. 8. See also SN/PC/5256, *Fast-track Legislation*, 22 December 2009.

[13] HC Deb 30 June c1133, and *Explanatory Notes* to HL Bill 82 2010–12.

[14] HC Deb 30 June 2011 c1144.

[15] HC Deb 30 June 2011 c1145.

> "First, it provides the monarchy with sustainable long-term financing free from annual political interference, by which I mean the budget can be set for the long term and automatically updated without an annual political argument. Secondly, it provides flexibility, so that the Royal household can manage its funds efficiently to deliver best value for taxpayers. The third principle is that, alongside more sustainable finances with greater flexibility, we will ensure greater accountability and transparency and establish proper checks and balances to prevent the sums provided from becoming too excessive."[16]

11–003 The phrase "without an annual political argument" is a singular one to use in the context of scrutiny, transparency and such an important issue as the royal finances. It suggests that expediency was favoured to the detriment of a pre-existing system which ensured debate and accountability where differing political views in relation to the monarch and the royal family had been previously properly and lawfully expressed.

The Chancellor's aim, as stated, was to provide long-term financing without the need to return to Parliament each year. That would be achieved by linking the grant to the profits of the Crown Estate which in turn would ensure that the grant increased automatically through a reign. It would also help to bring the funding into line with the performance of the economy. He stated that the new legislation should be a permanent arrangement that outlived the sovereign although he acknowledged that it would have to be extended to cover each new monarch by means of an Order in Council.[17]

The Chancellor also lauded the benefits that the Sovereign Grant would bring in terms of accountability to Parliament for the spending of public money and the value for money for the taxpayer. The royal household had not in the past, itself, been subject to audit but that would change under the Bill:

> "From now on, the NAO will have full access and become the statutory auditor of all the Royal household's official business and of the sovereign reserve. It will also be able to audit the assets used by the Royal household in carrying out its official business. The National Audit Office will not become the financial auditor of the Queens private business, including the Duchies of Lancaster and Cornwall, which remain private funds.
>
> To ensure accountability to Parliament, the sovereign grant accounts will be laid before the House. The Public Accounts Committee will also be able to conduct hearings on the royal finances, with the Royal household itself providing evidence at such hearings. That is a big and historic extension of Parliamentary scrutiny, and I should like to thank Her Majesty for opening up the books."[18]

The Shadow Chancellor, Ed Balls, agreed with most of what George Osborne had presented. However he raised the question of the potential for an increase in the amount of money generated by the grant formula. The formula in the Bill was 15 per cent of the profits from the Crown Estate. The actual sum of the grant could vary particularly as it was anticipated that the profits of the Crown Estate could rise substantially as a result of the growth in offshore wind farms.

That point was met in reply by the Chancellor. Crown Estate profits from offshore wind activity produced revenues of around £2.5 million per year

[16] HC Deb 30 June 2011 c1146.
[17] HC Deb 30 June 2011 cc1146-7.
[18] HC Deb 30 June 2011 c1148.

but forecasts suggested there could be a substantial increase in the 2020s. The 15 per cent formula would be reviewed before that and the Government would not allow revenues from offshore wind to lead to a disproportionate rise in revenues to the royal household.

The current and former Chairs of the Public Accounts Committee—Margaret Hodge MP and Edward Leigh MP—welcomed the new audit arrangements in uncritical fashion. The latter commended the Chancellor for being:

> "the first Chancellor of the Exchequer to have the guts to take this issue on and deal with it. For the first time since this modern settlement was made in 1760, Parliament will, through the Public Accounts Committee, be able to scrutinise all aspects of royal finances".[19]

Paul Flynn MP argued that a simpler approach would be to cap the Civil List and link it to a mechanism such as an increase in the basic state pension, the retail price index or the consumer price index.[20] Dennis MacShane MP raised concerns over the total level of funding and also the extent of the Crown Estate.[21]

The Bill then moved to its Second Reading debate[22] in the House of Lords on Monday 3 October 2011[23] and on 18 October 2011 became law when it received the Royal Assent.[24] All the House of Commons stages of the Bill had already been concluded—on the same day—on 14 July 2011.[25]

11–004 The Act is an example of a degree of deference—and careful Parliamentary choreography in the timing of the relevant readings of the Bill vis-à-vis extra-Parliamentary news events—demonstrated to issues relating to the finances of the monarch and the royal family which is not evidenced in other areas of statutory legislation. The long title of the Bill set the tone. It was "a Bill to make provision for the honour and dignity of the Crown and the Royal Family; to make provision about allowances and pensions under the Civil List Acts of 1837 and 1952; and for connected purposes". The procedural aspects that accompanied its passage revealed—in what was said and what was not said—a peculiarly archaic and almost deferential approach to a piece of legislation which arrived before Parliament almost fully formed and without any obvious public debate about the necessity for it and a truncated approach to debating the issues contained within it.

Given that the legislation set in place a once-and-for-all formula for dealing with the royal finances stretching into the future—complete with

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[19] HC Deb 30 June 2011 c1158.

[20] HC Deb 30 June 2011 c1163.

[21] HC Deb 30 June 2011 cc1166 – 8.

[22] On which, of the seven speakers, three (Lords Fellowes, Janverin and Luce) were honorary members of the royal household and the fourth—Lord Turnbull—a former Cabinet Secretary from 2002–05.

[23] The final day of the Conservative Party Conference in 2011 in Manchester which meant that attendance in the House of Lords was limited

[24] The Bill as it went to the House of Lords is at: *http://www.publications.parliament.uk/pa/bills/lbill/2010-2012/0087/en/12087en.htm* (Explanatory Notes) and *http://www.publications.parliament.uk/pa/bills/cbill/2010-2012/0213/cbill_2010-20120213_en_1.htm* (for the Bill itself).

[25] Prince William and the Duchess of Cambridge were arriving back in the UK on this day following a highly-publicised tour of Canada and the US.

performance-related benefits—arguments about the transparency it would bring to the royal financial accounts were not reflected by the opaqueness of its origins and the genesis of its provisions.

The SGA was not the product of a royal or Parliamentary Commission into the structure and future provision of the royal finances. There had been no public campaign or debate on the issue. It appeared to be no more than the product of a lobbying exercise conducted by the royal household on the topic that had been subject to no contemporary public scrutiny before reaching Parliament as an almost unalterable and un-debatable Bill. In an attempt better to understand the background and genesis of the Bill, FOIA requests were made by the author on 15 August 2011 to HM Treasury, the Cabinet Office and the Ministry of Justice (responsible for the Privy Council Office) in the following terms:

> "(1) How many meetings occurred between civil servants and Ministers in [relevant Ministry] – and members of the royal household – during 2008/09, 2009/10 and 2010/11 in respect of the Sovereign Grant Bill?
> (2) On what dates, in each year, did those meetings occur?
> (3) Did [relevant Ministry] commission any external reports or independent consultants to provide an objective view in respect of the effect of any representations that were being made or being considered?"

The response from HM Treasury in September 2011 was:

> "The Treasury maintains regular contact with the Royal Household on a number of issues relating to Royal finances. The information below relates to face-to-face meetings between civil servants or ministers in the Treasury and officials in the Royal Household, where the purpose, in full or in part, was to discuss the Sovereign Grant Bill.
> In general, there was a greater focus on the Sovereign Grant Bill in the later meetings, when the Bill was closer to introduction.
> In addition to the meetings below, as you may be aware, the Chancellor of the Exchequer regularly has an audience with HM The Queen before presenting a budget or significant spending review report. These meetings are private; no officials attend and no note is taken. The Sovereign Grant Bill, or related issues, may have been discussed at such meetings.
> Your request infers you would like the information broken down by financial year. As three of the meetings below would have fallen outside the scope of that request, we thought it would be helpful to provide the information from 2008 to date:
>
> 2008 no meetings.
> 2009 no meetings.
> 2010 three meetings (September, November and December).
> 2011 five meetings (February, March, May and two in June).
>
> In response to your third question, HM Treasury did not commission any external reports or independent consultants in the development of the Sovereign Grant Bill."

11.3 COMMENT

11–005 The Grant started at £31 million in 2012–13. For each successive year it has been based either on the previous year's Grant or 15 per cent of the profits of the Crown Estate in that previous year, whichever is greater. The Grant can go up but it cannot go down.[26] A Reserve Fund was created to hold any

[26] Prompting the comment in the *Financial Times*, 1 July 2011: "When the Crown Estate does well, Royals win; when it does not, taxpayers lose".

surpluses of the Grant over expenditure. If the Reserve reaches more than 50 per cent of the official expenditure of the royal household it will be brought back down to 50 per cent with a transfer to meet expenditure and matching reduction in the Grant.

The Royal Trustees—the Prime Minister, the Chancellor of the Exchequer and the Keeper of the Privy Purse[27]—review the value of the Grant every five years and assess whether 15 per cent is the right proportion of the profits of the Crown Estate to be used in calculating the Grant. If an increase is recommended then HM Treasury is obliged to introduce an Order to do this but that Order is subject to a vote of approval in the House of Commons.

The Crown Estate is a countrywide set of properties and interests ranging from business parks and shopping centres to parts of Regent Street and offices in other central London locations.[28] It includes a great deal of agricultural and forested land, the Windsor Estate, all naturally occurring gold and silver, half the foreshore around the UK and virtually all of the territorial sea bed (out to 12 nautical miles from the shore).

Before 1760 the expenses incurred by the Sovereign and the royal household in fulfilling official duties were met from the income of the Crown Estate and from other hereditary revenues, supplemented by customs and excise duties and general taxation voted by Parliament. In 1760, on the accession of George III, everything changed. Under the new arrangement the King surrendered the income from the Crown Estate and other hereditary revenues to Parliament for the duration of his reign in return for the payment of a fixed annual Civil List. This separated the private income and private expenditure of the monarch from the public funds available to the monarch to fulfil official duties. That arrangement had been renewed at the start of each new reign since the Civil List Act 1952.

Quite why the expenditure of the head of state has now been linked to the Crown Estate is not clear. The monarch severed all claims to the Crown Estate in the 18th century. Critics point out that the royal household continually gives the impression that it retains some moral or legal right to its revenue.[29] *Republic* points out that annual financial reports from Buckingham Palace state that

[27] Sir Alan Reid KCVO, who has held the post since 2002, is Treasurer to the Queen and Receiver General to the Duchy of Lancaster. He is responsible for the expenditure of public funds voted by Parliament to the Sovereign under the current Civil List system. He is a former senior partner of accountancy firm KPMG.

[28] In 2013/14 it returned £267.1m to the Treasury achieving a Capital value of £9.9 billion and a Property value of £9.4 billion. The revenue by portfolio—excluding service charges—was Urban (£248.9m), Rural and Coastal (£48.5m), Windsor (£7.9m) and Energy and Infrastructure (45.5m). The property valuation (including indirect investments but excluding services charges) was Urban (£6.867 billion), Rural and Coastal (1.559 billion), Marine (£444m), Windsor (£225m) and Energy and Infrastructure (£759m). The land and property is let through 12,000 tenancies across the UK and almost all the property in London's Regent Street and Regent's Park belongs to the Crown Estate: *http://www.thecrownestate.co.uk/our-business/financial-information/*

[29] Republic, Parliamentary Briefing on the *Sovereign Grant Bill*.

> "Head of State expenditure is met from public funds in exchange for the surrender by the Queen of the revenue from the Crown estate and suggests that this is an utterly disingenuous statement that has nevertheless gained traction among politicians, journalists and the general public."

Because of the explicit link to the Crown Estate, the criticism is that the new funding proposals only reinforce a misunderstanding, create a misperception and undermine transparency and accountability.[30]

No detailed argument has been advanced to explain why the usual standards of scrutiny should not be applied to the monarchy and its finances. The idea that spending can be controlled effectively on a cycle of five year reviews—given current domestic and worldwide financial volatility—seems to fly in the face of practicality and reality. It might be thought that Parliamentary scrutiny and financial diligence were essential functions of an effective democracy and not simply "political argument". It is hard to see why there should not be an annual review with adequate time given to Members of Parliament to debate any proposed change to the rate of the grant.

The Chancellor claimed that "over recent decades the royal household had done a huge amount to cut costs and improve the effectiveness of its spending" but, because there had never been a full audit of the royal accounts, it is impossible to substantiate that assertion.

[30] "There is a major constitutional issue with appearing to say that [the Queen] owns all this stuff when she doesn't." *Financial Times*, 20 December 2010.

CHAPTER 12

THE CONVENTION OF SEALING THE ROYAL WILLS

12.1 Introduction

12–001 The will of the monarch is not subject to probate.[1] The granting of probate is the precondition of public access to a will. Because there is nothing in the operative provisions of s.124 and s.125 of the Supreme Court Act 1981—to bind the Crown—it follows that the monarch is exempt from their scope. On the death of any other member of the royal family an application is now made by summons to the President of the Family Division for the will to be sealed up. The application is served on the Treasury Solicitor. The will and the HMRC account are examined by a Capital Taxes Office official before the papers leading to the grant are lodged.[2]

1.1 The origins of the convention: Queen Mary and the "Cambridge" emeralds

12–002 The convention of sealing other royal wills of members of the royal family who are not the monarch appears to have had its origins when Queen Mary's brother "Frank" (Prince Francis of Teck) left the "Cambridge emeralds"—which had been in the family since 1818—to his mistress Ellen Constance, the Countess of Kilmorey.[3] She was a married woman and also a former mistress of Edward VII. On Frank's death in 1910 Queen Mary successfully applied for the sealing of his will to Sir Samuel Evans, newly-appointed President of the Probate, Divorce and Admiralty division.[4] The purpose in "sealing up" her brother's will was to "hush up this royal scandal in her coronation year".[5]

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[1] *King George III* (1822) 1 Add 255, 262: 162 E.R. 89, 92: "Now the history of the wills of Sovereigns from Saxon times—from Alfred the Great down to the present day — has been diligently searched and examined; but no instance has been produced of probate having been taken off the will of any deceased Sovereign in these Courts; much less of its having been contested here against the reigning Sovereign."

[2] Tristram & Coote *Probate Practice* 30th ed 2006 [4.247–4.249].

[3] He died of pneumonia aged 39 in 1910.

[4] Since then four cases (albeit unreported) have occurred involving applications to seal the wills of the wider royal family The Princess Royal (1931), Prince Arthur of Connaught (1939), Duke of Kent (1943), and Princess Beatrice (1945).

[5] *Telegraph* 8 February 2008 and—for greater detail, history and context—Joseph Jaconelli *Wills as public documents – privacy and property rights* CLJ 2012 71 (1) 147–171 esp. 164–170.

She brought the jewels back for £10,000 and wore them at the coronation ceremony in 1911.[6]

The prosaic origin of the convention is relatively clear.[7] The same cannot be said about the legal process by which it was achieved. This lack of clarity about the substance of the process continues to have effect. Subsequent courts examining the foundations of the convention have found the legal trail less than straightforward to follow. The convention itself—and the issues associated with it—only became public in 2006. Robert Brown—someone who believed he was the illegitimate son of the late Princess Margaret—issued a summons on 3 May 2006 seeking a direction that the wills of the late Queen Elizabeth, the Queen Mother, and that of his putative mother, the Countess of Snowdon, be unsealed.

12.2 WILLS: THE POSITION FOR MEMBERS OF THE PUBLIC

12–003 For all other members of the public—alive or dead—the position in respect of wills is clearly set out in s.124 of the Supreme Court Act 1981 (as amended):

> "All original wills and other documents which are under the control of the High Court in the Principal Registry or in any District Probate Registry shall be deposited and preserved in such places as may be provided for. . ..and any wills or other documents so deposited shall, subject to the control of the High Court and to probate rules, be open to inspection."

The right of inspection includes the right of publication of the details in the wills by the press. The Younger Committee on Privacy briefly considered the issue of mass-publication of such potentially sensitive personal details. It concluded the subject was outside its terms of reference.[8] Generally it saw no stronger case for restricting such detail than it did for restricting any other information that was publicly available.[9]

The origin of preserving and publicising wills comes from the Probates and Letters of Administration Act 1857. This broke the hold of the Ecclesiastical Courts over this area. Previously they had the power to grant probate of wills and became depositories of the wills of those who had died within their jurisdiction.[10] In the post-1857 law the critical step for access by members

[6] Equivalent to £600,000 now. They have since been worn by the Queen, Diana Princess of Wales and most recently by Katherine, Duchess of Cambridge.

[7] A list filed in the National Archives identifies 27 royal wills in Somerset House that have been sealed by order, from the will of Francis of Teck to that of Prince Henry, Duke of Gloucester, in 1974. Against each person there is attached a valuation of the estate, with the sole exception of Queen Mary in 1953. Finally, and unusually, "all records as normal" is the entry recorded in the case of Princess Helena Victoria (in 1948).

[8] *Report of the Committee on Privacy* Chairman: Sir Kenneth Younger (Cmnd. 5012, 1972) [177–180].

[9] Despite the fact that the survey it had commissioned showed that 77% said this was an invasion of privacy and 71% that it should be prohibited.

[10] The main provisions of the 1857 Act were section 66 (stipulating that there was to be a place of deposit for wills that had been proved under the control of the Court of Probate, where the same could be inspected) and section 69 (providing that official copies of these wills could be obtained upon payment of a fee).

of the public was the proving of a will.[11] The objective of the new system of probate was to provide clear provenance of title for property, creditor protection and protection for the testator's donative intent. The deceased testator is taken to have no expectation of privacy.[12] In terms of the privacy interests of beneficiaries the Younger Report noted the "widespread knowledge of a large inheritance often leads to begging letters".[13] Enforcement of Article 8 ECHR privacy rights in this area is untested but there are considerable obstacles to any attempt to use this in preventive litigation. Proceedings may not be brought to challenge actions that are required to be performed by statute and s.124 and s.125 of the Supreme Court Act 1981 clearly protect the Probate Registry.[14] Whether it protects the press is untested[15] although, in principle, protection should be afforded to dissemination of information which is a matter of public record (as with birth certificates).[16]

12.3 LITIGATION ON THE CONVENTION AND MR ROBERT BROWN

12–004 As one commentator has observed about the convention of sealing royal wills since the beginning of the 20th century:

> ". . ..it has been the standard, if (until of late) little noticed, practice in regard to royal wills. In this context some light has been cast on the device by the recent application of Robert Brown, an accountant based in Jersey, to gain access to the wills of Princess Margaret and the Queen Mother which were both sealed shortly after their deaths in 2002."[17]

When the summons to seal the will is served on the Treasury Solicitor, the Attorney General is instructed to represent the public interest and the matter is then heard before the President of the Family Division in Chambers. The result of this *ex parte* hearing is revealed in a press release.[18] If more is now

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[11] Prior to that it was a private document with confidentiality enshrined in the lawyer-client relationship.

[12] H. Steiner *An Essay on Rights* (Oxford 1994) pp.249–258 and C. Wellman *Real Rights* (New York 1995) pp.146–157.

[13] *Report of the Committee on Privacy* [178].

[14] A more potent route for challenge might be via a combination of Articles 7 (Privacy) and 8 (Protection of Personal Data) of the EU Charter of Fundamental Rights and Freedoms or whether the principles in the pre-Charter CJEU case of C-73/07 *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy* (in relation to publicity permitted in terms of "journalistic activity" to annual public tax filing records in Finland) still prevailed under provisions of Charter Article 11.

[15] On 20 April 2013 the *Sun on Sunday* ran a story about HMRC assessments on the estate of the late Jade Goody, an original *Big Brother* contestant, eliminating funds held in trust for her two sons' education. The Trustees of her estate—and the sons' father—specifically waived the boys' privacy rights in respect of the amounts bequeathed to them to avoid any latent problems in this area.

[16] As in the 1956 South Carolina case of *Meetze v Associated Press* 95 S. E. 2d 606 the invasion of privacy action was founded in the defendant newspaper's report of the birth of the Plaintiffs' child. The newsworthy aspect was that the mother was only 12 years old. In dismissing the case, the court emphasised that the birth was obliged by law to be recorded as a matter of public record, and moreover that the birth certificate was required to state the ages of the mother and father.

[17] Jaconelli *Wills as public documents – privacy and property rights* 164.

[18] As for applications to seal the wills of non-royals, the procedure is unclear about whether

known of the procedure, the same cannot be said of the substance of the grounds upon which such applications are decided as will be seen below. Also, while members of the royal family can apply to have their wills sealed, the process for sealing of the wills of non-royals is shrouded in mystery.[19]

Mr Robert Brown, a 59-year-old accountant from Jersey, believes he may be the illegitimate son of the late Princess Margaret on the basis that she hid a pregnancy in 1955, had him adopted and that he is her secret child. He believes that there may be evidence to support this contention in her will, drawn up around the time of her death in 2002, and sealed to keep its contents secret.

In the first iteration of his litigation[20] the Executors' solicitors challenged his locus to make the application at all.

> ". . ..In order for Mr Brown to apply to unseal those Wills, he must. . ..establish some form of private interest in having the wills unsealed. [He]. . .. has been provided with an opportunity to establish such a private interest in the evidence he has been ordered to produce. Unless and until evidence of such an interest is produced (and none has so far been produced. . ..). . .. Mr Brown does not have the standing to pursue the application, and hence is not entitled to the disclosure of the documents and information that he seeks. The appropriate course, therefore is for [him] to produce his evidence first, at which point our clients will consider his request for the information and the documents sought."[21]

The Executors then issued a summons to strike out Mr Brown's claim. Sir Mark Potter, President of the Family Division, at first instance noted that:

> "despite my expression of concern at the outset that I did not have available to me any note or record of the judgement or reasons of the former President when making the orders for sealing of the wills and despite my suggestion that, for that purpose, I should have sight of the affidavit evidence upon the basis of which the former President's orders were made. . . neither the executors nor the Attorney General were willing to disclose the evidence to the Plaintiff in the absence of an order of the court. Nor was any of the parties disposed to my suggestion that I should myself look at the affidavits presented to the former President in support of the sealing application. . .. on a preliminary and restricted basis in order to inform myself of the reasons advanced for the original application, whilst preserving the position of the executors vis-à-vis the Plaintiff that this application is an abuse of the court process."

12–005 The President eventually decided the matter on the basis that Rule 58 of the Non-Contentious Probate Rules (NCPR) 1987 governed his decision[22] and that the power to seal a will was "concerned with considerations of privacy".[23] He explained that the Wills were under the control of the High Court in the Principal Registry having been sealed up following orders made by the former President on 10 April and 19 June 2002 respectively on applications made by the executors. No copy had been made for the records or was kept in the court files.

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they, too, would be heard by the President or would involve the Attorney-General, whose position in the application is to represent the public interest.

[19] A parliamentary question to the Department for Constitutional Affairs revealed that no statistics on the subject were available "nor would any be compiled": HC Deb. vol. 435 col. 182W (13 June 2005) question no. 3106.

[20] *Brown v Executors of the Estate of HM Elizabeth the Queen Mother and others* [2007] EWHC 1607 (Fam).

[21] *Brown v Executors of the Estate of HM Elizabeth the Queen Mother and others* [2007] [14].

[22] The Rule refers to the opinion of a district judge or registrar and not that of the President.

[23] *Brown* [41].

Mr Brown had argued that it was in the public interest that the two Wills be accessible to public inspection, as were all other wills. Considerations of privacy were an insufficient reason for any form of exemption "when measured against the public interest". In addition, his particular interest as the claimed illegitimate child of the late Princess meant that he had a personal interest in unsealing and inspecting the Wills in order to advance or establish his claim. The President pointed out that the NCPR provide no guidance on the facts or circumstances which might be "apt" to justify a decision to close or seal a will from public inspection. He added that it was to be presumed that the power to do so

> "is concerned with considerations of privacy and a perceived necessity in particular cases to protect from harm, harassment, intrusion or publicity of those who are beneficiaries, potential beneficiaries or otherwise interested under the will or who, for other reasons, may be adversely affected if the provisions of the will are open to public inspection".

He went on to add that, equally, it was presumed that—in relation to such a decision—those considerations of privacy fell to be weighed against the general statutory presumption in favour of openness in respect of all wills subject to probate. He admitted, however, that he "lacked knowledge" of the matters which had been placed before the former President on the basis of which the sealing applications were made and decided.[24] He concluded that

> "given the presence of the executors on one side putting the case for privacy and the Attorney-General on the other as representative of the public interest, I have no reason to doubt that, in coming to a decision, the former President would have had placed before her [the relevant material]."

A detail taken from the transcript of the hearing on 27 March 2007 is revealing.[25] In exchanges between Mr F Hinks QC for the Executors and the court, the President indicated that he felt "very under-informed about the whole basis on which this jurisdiction has been exercised in the past". The Executors said they did not wish to bring into the public domain certain documents, such documents being referred to in argument as consisting of a summons, an affidavit and "the practice direction".[26] He said he had never heard of a practice direction that was not in the public domain.

However he went on to determine that once a Rule 58 order had been made, there was no provision allowing a specific remedy

> "to a member of the public whose private rights or interests are adversely affected by the making of such an order, but who has had no opportunity to bring such rights or interests to the attention of the court at the time of its order so as to enable the court to make special provision or reservation in that respect if it appears appropriate to do so. Nor is the remedy of appeal of judicial review available in respect of such an order."[27]

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[24] *Brown* [43].

[25] This detail comes from [21] of *Brown v IC and AG* [EA/2011/0002], a further—and unsuccessful—attempt to get the "practice direction" disclosed to him under the provisions of the original, qualified exemption in s.37 FOIA (before the exemption was made absolute).

[26] An expression on page 12 of the relevant transcript at paragraph (f). Leading Counsel for the executors then said that "direction" "may be the wrong word, but in practice agreed with the then President of the Family Division (Dame Elizabeth Butler-Sloss).

[27] *Brown* [53].

12–006 He characterised Mr Brown's private interest as "illusory".[28] That took away Mr Brown's reliance on ECHR Articles 8 and 10 and resulted in his claim being struck out as vexatious and as an abuse of process.

Mr Brown appealed, beginning the second iteration of the litigation.[29] There was a hearing before a two-judge Panel of the Court of Appeal.[30] Exchanges there[31]—in answer to a question posed by the court as to who the parties were to the process described as the "the procedural review during the reign of the former President"—produced the following answer from Counsel for the Executors:

> "It was essentially, my Lord, between the Palace and my instructing solicitors, on the one hand, and the Treasury Solicitor, the Attorney General's Secretariat and the Attorney General on the other. So they were the basic parties to the review looking at the entire practice, because it is the Attorney General who protects the public, and so you've got a question of a proper balance to ensure that it is only in proper cases that applications are made, and to agree what is a proper procedure."

The court then characterised that process as a "sort of consensus". In further answer Mr Hinks QC stated:

> "That is my understanding. The actual correspondence, until the final correspondence, was with probably a Senior District Residential Judge, but the correspondence indicates him seeking the views of the President. So it was done informally through a lower officer of the court but in formal consultation with the President, then getting to a position which was thought did provide a proper balance, proper checks and proper procedure and then that is recorded properly in writing and is put to the President to either approve or not approve as she saw fit. She approved the procedure. I should make it quite clear, my Lord, that what she approved – and it is quite clear, if we have to disclose it we have to disclose it, a letter – was the procedure. She did not pre-commit herself to the sealing of any will. But what it did mean, that when she came to consider the actual applications, of course, she had a lot more background and understanding of the background of the procedure and the history than the court would otherwise have had."[32]

In a later exchange, following one further attempt to get some idea of what form the "practice direction" actually took, the opaqueness of the answers on behalf of the Executors remained stubbornly unhelpful. The "consensus and/or procedural review" did "find expression in a quite lengthy document which was put to the former President for review". So, the court asked, did the term "Practice Direction" have any meaning and, if so, what? The response was:[33]

> "Mr Hinks QC: That is the expression which, perhaps rather unfortunately, is given to this practice. But is a practice which embraces the whole question of the checks and balances for this process of sealing Royal wills. Within it there is something which does indicate –
> The Court: So when you refer to "the Practice Direction" you were actually referring to the consensus that had emerged from the review –

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[28] *Brown* [55].

[29] *Brown v Executors of the Estate of HM Queen Elizabeth the Queen Mother and others* [2008] EWCA Civ 56.

[30] 17 December 2007 to set aside an earlier direction made in relation to the appeal that Counsel agree upon the admission of further evidence.

[31] Page 6 of the transcript at line 5: see *Brown v IC and AG* [EA/2011/0002] [22].

[32] *Brown v IC and AG* [EA/2011/0002] [22].

[33] *Brown v IC and AG* [EA/2011/0002] [24].

Mr Hinks QC: That occurred both before and after the death of the Queen Mother, yes, my Lord.
The Court: So that is what you are referring to?
Mr Hinks QC: That is what I was referring to.
The Court: It is a practice unknown to the whole world."

The Court ruled that the "cardinal and probably only issue" for the appeal was whether the President was right to conclude Mr Brown "had no locus". The appeal then proceeded to a substantive hearing which concluded that there was nothing on the face of s.124 to suggest that the court might only exercise its powers under the Act on an application by the Attorney General. There was no reason why a person asserting a genuine private interest could not simply apply for the will to be unsealed.

> "Had those orders been made by a transparent process according to identified criteria in which the Attorney General had been joined to represent the public interest, there might have been force in the argument that no challenge based simply on the public's right to inspect the wills should be permitted. The principle in *Gouriet* might have been applicable and the analogy with judicial review apt. The problem is, however, that the process under which the late President made the orders was not transparent, nor the criteria applied by the former President plain."[34]

The Court decided that if Mr Brown was not permitted to challenge the order made by the former President, it was difficult to envisage circumstances in which anyone else would be permitted to do so. The issues raised by him were of public importance and it was not for the court to prevent him making the application. It was therefore impossible to say that his application was doomed to failure. He was given permission to have a substantive hearing of his claim to re-open the Wills.

However the Court endorsed the President's reference from the original judgment[35] to the

> "'public interest properly so called and the interests of the public in the sense simply of its seemingly insatiable curiosity about the private lives, friendships and affections of members of the royal family and their circle".

12–007 The Court stated that might justify special treatment for royal wills. It did not expand on that crucial point any further and it remains unexplored because, despite having won the right to bring the matter back before the President of the Family Division, Mr Brown so far has taken no further action on the point in the High Court.

The third iteration of the litigation came when he tried to secure the elusively-defined "Practice Direction in respect of the handing of the Royal Wills" by way of an FOIA request.[36] The Information Commissioner and—on appeal—the Information Rights Tribunal held that the balancing exercise in respect of the (unamended) s.37(1)(a) qualified exemption[37] fell in favour of withholding rather than disclosing the requested information. The Tribunal had the advantage of seeing withheld information as Closed Material. Without

[34] *Brown* [2008] EWCA Civ 56 Lord Phillips CJ [37].
[35] *Brown* [2007] EWHC 1607 (Fam) [50].
[36] *Brown* [EA/2011/0002].
[37] In respect of communications with other members of the royal family or royal household.

having to resort to a Closed Annexe for its decision the Tribunal concluded that "the document at issue in the case is simply not a Practice Direction in any sense of that term" and was something that "merely provided guidance as to the way in which rules and practice directions should be interpreted".[38] It also found—in relation to s.41 FOIA[39]—that the withheld information was derived from communications with the monarch and reflected her private views. That information had been provided to the Attorney General in confidence and contained matters

> ". . ..within the scope of her right to privacy. There is no doubt that she could bring a personal claim were there to be a breach arising out of disclosure. . ..there is a strong public interest in protecting that privacy."[40]

There is a fourth iteration. Mr Brown was given leave to judicially review this decision by Phillips J on 18 December 2013.

> "Mr Justice Phillips, sitting at the High Court in London, said there were compelling constitutional reasons to allow Brown's legal challenge to go ahead and that was not altered by a previous Court of Appeal observation that Brown's claim was 'scandalous and irrational'."[41]

The judge said the case gave rise to important points of principle and practice for open justice and the public interest. They related to how the courts dealt with statutory provisions and rules "in relation to a particular class of litigant".

12.4 CONCLUSIONS

12–008 There appear to be a series of remarkable accommodations in respect of members of the royal family described above that would not be accorded to ordinary members of the public. The President highlighted the undefined factual area of "apt" to justify a decision to close or seal a will from public inspection, and admitted that he "lacked knowledge" of what had actually been put before the former President—which formed the basis of what had been decided—and yet was happy to rely on the Executors on the one hand and the Attorney General on the other to vouch for the fidelity of this untransparent process, the product of which he could not see. This is despite the fact that he felt "very under-informed about the whole basis on which this jurisdiction has been exercised in the past".

The Court of Appeal process produced additional information about the accommodation in respect of the privacy paradox suggesting—obiter—a

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[38] Ibid [48].

[39] "Information provided in confidence."

[40] Ibid [55].

[41] *http://www.theguardian.com/uk-news/2013/dec/19/princess-margaret-robert-brown-illegitimate-son-high-court-ruling*. This Administrative Court decision does not appear to have been reported formally and cannot, therefore, be referenced or explored further. There is no report yet of Mr Brown proceeding to the full judicial review hearing on this point or any reported result from such a hearing.

special privacy right for royal family as it relates to wills.[42] In relation to "openness" it accepted that it raised the question of

> "the extent to which there can be justification for sealing a will in order to give effect to the desire of beneficiaries for privacy. This question is of practical importance as we were told that there is an increasing number of applications for wills to be sealed. Both art 8 and art 10 of the European Convention on Human Rights may be engaged."

No other individual celebrity or celebrity grouping—attributed, ascribed or attained—appears to have been accorded this special status of "sealing". It accepted that the "Practice Direction" itself—rather like the interchange between the March Hare, Alice and the Mad Hatter at the Mad Hatter's Tea Party[43]—actually was not a Practice Direction but was "a practice unknown to the whole world" which covered "the whole question of the checks and balances for this process of sealing Royal wills."[44]

The Information Rights Tribunal, although not a court of record in its composition for this appeal, assessed that privacy and confidentiality concepts in relation to the monarch and royal family justified the withholding of the requested information about the mis-named Practice Direction.

On the other side of things, there are family law proceedings which Mr Brown could perhaps have used more effectively to search for answers to his questions and that would have raised the issue directly.[45] Getting access to the royal wills is of no obvious benefit to him because the traditional way of providing for illegitimate children is through a secret trust. In terms of establishing his place in the line of succession, illegitimate children are excluded.

[42] *Brown* [2008] EWCA Civ 56 [47]: "We would not dissent from the President's reference in para 50 of his judgment to the "seemingly insatiable curiosity about the private lives, friendships and affections of members of the royal family and their circle and this may justify special treatment for royal wills."

[43] Charles Dodgson *Alice In Wonderland.*

[44] The definition of "Practice Direction" used by Mr Hinks QC for the Executors.

[45] See Family Law Act 1986, s. 56, as amended by the Family Law Reform Act 1987, s. 22. Obstacles are that the applicant must be domiciled in England and Wales at the time of the application or have been habitually resident here throughout one year before the lodging of the application (Mr Brown is resident of Jersey). Also, the drafting of s. 56(1) means that a person may apply for a declaration "that he is the legitimate child of his parents". Mr Brown believes he is illegitimate.

APPENDICES

Bribery Act 2010
Data Protection Act 1998
Defamation Act 2013
Independent Press Standards Organisation Code
Electronic Commerce Directive 2000/31/EC

Bribery Act 2010 c. 23

An Act to make provision about offences relating to bribery; and for connected purposes.

[8th April 2010]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

General bribery offences

1 Offences of bribing another person

(1) A person ("P") is guilty of an offence if either of the following cases applies.

(2) Case 1 is where—

(a) P offers, promises or gives a financial or other advantage to another person, and

(b) P intends the advantage—

(i) to induce a person to perform improperly a relevant function or activity, or

(ii) to reward a person for the improper performance of such a function or activity.

(3) Case 2 is where—

(a) P offers, promises or gives a financial or other advantage to another person, and

(b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.

(4) In case 1 it does not matter whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned.

(5) In cases 1 and 2 it does not matter whether the advantage is offered, promised or given by P directly or through a third party.

General bribery offences

2 Offences relating to being bribed

(1) A person ("R") is guilty of an offence if any of the following cases applies.

(2) Case 3 is where R requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly (whether by R or another person).

(3) Case 4 is where—

(a) R requests, agrees to receive or accepts a financial or other advantage, and

(b) the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity.

(4) Case 5 is where R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (whether by R or another person) of a relevant function or activity.

(5) Case 6 is where, in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly—

(a) by R, or

(b) by another person at R's request or with R's assent or acquiescence.

(6) In cases 3 to 6 it does not matter—

(a) whether R requests, agrees to receive or accepts (or is to request, agree to receive or accept) the advantage directly or through a third party,

(b) whether the advantage is (or is to be) for the benefit of R or another person.

(7) In cases 4 to 6 it does not matter whether R knows or believes that the performance of the function or activity is improper.

(8) In case 6, where a person other than R is performing the function or activity, it also does not matter whether that person knows or believes that the performance of the function or activity is improper.

General bribery offences

3 Function or activity to which bribe relates

(1) For the purposes of this Act a function or activity is a relevant function or activity if—

(a) it falls within subsection (2), and

(b) meets one or more of conditions A to C.

(2) The following functions and activities fall within this subsection—

(a) any function of a public nature,

(b) any activity connected with a business,

(c) any activity performed in the course of a person's employment,

(d) any activity performed by or on behalf of a body of persons (whether corporate or unincorporate).

(3) Condition A is that a person performing the function or activity is expected to perform it in good faith.

(4) Condition B is that a person performing the function or activity is expected to perform it impartially.

(5) Condition C is that a person performing the function or activity is in a position of trust by virtue of performing it.

(6) A function or activity is a relevant function or activity even if it—

(a) has no connection with the United Kingdom, and

(b) is performed in a country or territory outside the United Kingdom.

(7) In this section *"business"* includes trade or profession.

General bribery offences

4 Improper performance to which bribe relates

(1) For the purposes of this Act a relevant function or activity—
  (a) is performed improperly if it is performed in breach of a relevant expectation, and
  (b) is to be treated as being performed improperly if there is a failure to perform the function or activity and that failure is itself a breach of a relevant expectation.

(2) In subsection (1) *"relevant expectation"*—
  (a) in relation to a function or activity which meets condition A or B, means the expectation mentioned in the condition concerned, and
  (b) in relation to a function or activity which meets condition C, means any expectation as to the manner in which, or the reasons for which, the function or activity will be performed that arises from the position of trust mentioned in that condition.

(3) Anything that a person does (or omits to do) arising from or in connection with that person's past performance of a relevant function or activity is to be treated for the purposes of this Act as being done (or omitted) by that person in the performance of that function or activity.

General bribery offences

5 Expectation test

(1) For the purposes of sections 3 and 4, the test of what is expected is a test of what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned.

(2) In deciding what such a person would expect in relation to the performance of a function or activity where the performance is not subject to the law of any part of the United Kingdom, any local custom or practice is to be disregarded unless it is permitted or required by the written law applicable to the country or territory concerned.

(3) In subsection (2) *"written law"* means law contained in—

(a) any written constitution, or provision made by or under legislation, applicable to the country or territory concerned, or

(b) any judicial decision which is so applicable and is evidenced in published written sources.

Bribery of foreign public officials

6 Bribery of foreign public officials

(1) A person ("P") who bribes a foreign public official ("F") is guilty of an offence if P's intention is to influence F in F's capacity as a foreign public official.

(2) P must also intend to obtain or retain—

(a) business, or

(b) an advantage in the conduct of business.

(3) P bribes F if, and only if—

(a) directly or through a third party, P offers, promises or gives any financial or other advantage—

(i) to F, or

(ii) to another person at F's request or with F's assent or acquiescence, and

(b) F is neither permitted nor required by the written law applicable to F to be influenced in F's capacity as a foreign public official by the offer, promise or gift.

(4) References in this section to influencing F in F's capacity as a foreign public official mean influencing F in the performance of F's functions as such an official, which includes—

(a) any omission to exercise those functions, and

(b) any use of F's position as such an official, even if not within F's authority.

(5) *"Foreign public official"* means an individual who—

(a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory),

(b) exercises a public function—

(i) for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or

(ii) for any public agency or public enterprise of that country or territory (or subdivision), or

(c) is an official or agent of a public international organisation.

(6) *"Public international organisation"* means an organisation whose members are any of the following—

(a) countries or territories,

(b) governments of countries or territories,

(c) other public international organisations,

(d) a mixture of any of the above.

(7) For the purposes of subsection (3)(b), the written law applicable to F is—

(a) where the performance of the functions of F which P intends to influence would be subject to the law of any part of the United Kingdom, the law of that part of the United Kingdom,

(b) where paragraph (a) does not apply and F is an official or agent of a public international organisation, the applicable written rules of that organisation,

(c) where paragraphs (a) and (b) do not apply, the law of the country or territory in relation to which F is a foreign public official so far as that law is contained in—

(i) any written constitution, or provision made by or under legislation, applicable to the country or territory concerned, or

(ii) any judicial decision which is so applicable and is evidenced in published written sources.

(8) For the purposes of this section, a trade or profession is a business.

Failure of commercial organisations to prevent bribery

7 Failure of commercial organisations to prevent bribery

(1) A relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending—

(a) to obtain or retain business for C, or

(b) to obtain or retain an advantage in the conduct of business for C.

(2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.

(3) For the purposes of this section, A bribes another person if, and only if, A—

(a) is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence), or

(b) would be guilty of such an offence if section 12(2)(c) and (4) were omitted.

(4) See section 8 for the meaning of a person associated with C and see section 9 for a duty on the Secretary of State to publish guidance.

(5) In this section—

"partnership" means—

(a) a partnership within the Partnership Act 1890, or

(b) a limited partnership registered under the Limited Partnerships Act 1907,

or a firm or entity of a similar character formed under the law of a country or territory outside the United Kingdom,

"relevant commercial organisation" means—

(a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),

(b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,

(c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or

(d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom,

and, for the purposes of this section, a trade or profession is a business.

Failure of commercial organisations to prevent bribery

8 Meaning of associated person

(1) For the purposes of section 7, a person ("A") is associated with C if (disregarding any bribe under consideration) A is a person who performs services for or on behalf of C.

(2) The capacity in which A performs services for or on behalf of C does not matter.

(3) Accordingly A may (for example) be C's employee, agent or subsidiary.

(4) Whether or not A is a person who performs services for or on behalf of C is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between A and C.

(5) But if A is an employee of C, it is to be presumed unless the contrary is shown that A is a person who performs services for or on behalf of C.

Failure of commercial organisations to prevent bribery

9 Guidance about commercial organisations preventing bribery

(1) The Secretary of State must publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing as mentioned in section 7(1).

(2) The Secretary of State may, from time to time, publish revisions to guidance under this section or revised guidance.

(3) The Secretary of State must consult the Scottish Ministers [and the Department of Justice in Northern Ireland] before publishing anything under this section.

(4) Publication under this section is to be in such manner as the Secretary of State considers appropriate.

(5) Expressions used in this section have the same meaning as in section 7.

Prosecution and penalties

10 Consent to prosecution

(1) No proceedings for an offence under this Act may be instituted in England and Wales except by or with the consent of—

(a) the Director of Public Prosecutions, [or]

(b) the Director of the Serious Fraud Office [.]

[. . .]

(2) No proceedings for an offence under this Act may be instituted in Northern Ireland except by or with the consent of—

(a) the Director of Public Prosecutions for Northern Ireland, or

(b) the Director of the Serious Fraud Office.

(3) No proceedings for an offence under this Act may be instituted in England and Wales or Northern Ireland by a person—

(a) who is acting—

(i) under the direction or instruction of the Director of Public Prosecutions [or the Director of the Serious Fraud Office], or

(ii) on behalf of such a Director, or

(b) to whom such a function has been assigned by such a Director, except with the consent of the Director concerned to the institution of the proceedings.

(4) The Director of Public Prosecutions [and the Director of the Serious Fraud Office] must exercise personally any function under subsection (1), (2) or (3) of giving consent.

(5) The only exception is if—

(a) the Director concerned is unavailable, and

(b) there is another person who is designated in writing by the Director acting personally as the person who is authorised to exercise any such function when the Director is unavailable.

(6) In that case, the other person may exercise the function but must do so personally.

(7) Subsections (4) to (6) apply instead of any other provisions which would otherwise have enabled any function of the Director of Public Prosecutions [or the Director of the Serious Fraud Office] under subsection (1), (2) or (3) of giving consent to be exercised by a person other than the Director concerned.

(8) No proceedings for an offence under this Act may be instituted in Northern Ireland by virtue of section 36 of the Justice (Northern Ireland) Act 2002 (delegation of the functions of the Director of Public Prosecutions for Northern Ireland to persons other than the Deputy Director) except with the consent of the Director of Public Prosecutions for Northern Ireland to the institution of the proceedings.

(9) The Director of Public Prosecutions for Northern Ireland must exercise personally any function under subsection (2) or (8) of giving consent unless the function is exercised personally by the Deputy Director of Public Prosecutions for Northern Ireland by virtue of section 30(4) or (7)

of the Act of 2002 (powers of Deputy Director to exercise functions of Director).

(10) Subsection (9) applies instead of section 36 of the Act of 2002 in relation to the functions of the Director of Public Prosecutions for Northern Ireland and the Deputy Director of Public Prosecutions for Northern Ireland under, or (as the case may be) by virtue of, subsections (2) and (8) above of giving consent.

Prosecution and penalties

11 Penalties

(1) An individual guilty of an offence under section 1, 2 or 6 is liable—
  (a) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both,
  (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years, or to a fine, or to both.

(2) Any other person guilty of an offence under section 1, 2 or 6 is liable—
  (a) on summary conviction, to a fine not exceeding the statutory maximum,
  (b) on conviction on indictment, to a fine.

(3) A person guilty of an offence under section 7 is liable on conviction on indictment to a fine.

(4) The reference in subsection (1)(a) to 12 months is to be read—
  (a) in its application to England and Wales in relation to an offence committed before the commencement of section 154(1) of the Criminal Justice Act 2003, and
  (b) in its application to Northern Ireland, as a reference to 6 months.

Other provisions about offences

12 Offences under this Act: territorial application

(1) An offence is committed under section 1, 2 or 6 in England and Wales, Scotland or Northern Ireland if any act or omission which forms part of the offence takes place in that part of the United Kingdom.

(2) Subsection (3) applies if—

(a) no act or omission which forms part of an offence under section 1, 2 or 6 takes place in the United Kingdom,

(b) a person's acts or omissions done or made outside the United Kingdom would form part of such an offence if done or made in the United Kingdom, and

(c) that person has a close connection with the United Kingdom.

(3) In such a case—

(a) the acts or omissions form part of the offence referred to in subsection (2)(a), and

(b) proceedings for the offence may be taken at any place in the United Kingdom.

(4) For the purposes of subsection (2)(c) a person has a close connection with the United Kingdom if, and only if, the person was one of the following at the time the acts or omissions concerned were done or made—

(a) a British citizen,

(b) a British overseas territories citizen,

(c) a British National (Overseas),

(d) a British Overseas citizen,

(e) a person who under the British Nationality Act 1981 was a British subject,

(f) a British protected person within the meaning of that Act,

(g) an individual ordinarily resident in the United Kingdom,

(h) a body incorporated under the law of any part of the United Kingdom,

(i) a Scottish partnership.

(5) An offence is committed under section 7 irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere.

(6) Where no act or omission which forms part of an offence under section 7 takes place in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom.

(7) Subsection (8) applies if, by virtue of this section, proceedings for an offence are to be taken in Scotland against a person.

(8) Such proceedings may be taken—

(a) in any sheriff court district in which the person is apprehended or in custody, or

(b) in such sheriff court district as the Lord Advocate may determine.

(9) In subsection (8) *"sheriff court district"* is to be read in accordance with section 307(1) of the Criminal Procedure (Scotland) Act 1995.

Other provisions about offences

13 Defence for certain bribery offences etc.

(1) It is a defence for a person charged with a relevant bribery offence to prove that the person's conduct was necessary for—

(a) the proper exercise of any function of an intelligence service, or

(b) the proper exercise of any function of the armed forces when engaged on active service.

(2) The head of each intelligence service must ensure that the service has in place arrangements designed to ensure that any conduct of a member of the service which would otherwise be a relevant bribery offence is necessary for a purpose falling within subsection (1)(a).

(3) The Defence Council must ensure that the armed forces have in place arrangements designed to ensure that any conduct of—

(a) a member of the armed forces who is engaged on active service, or

(b) a civilian subject to service discipline when working in support of any person falling within paragraph (a),

which would otherwise be a relevant bribery offence is necessary for a purpose falling within subsection (1)(b).

(4) The arrangements which are in place by virtue of subsection (2) or (3) must be arrangements which the Secretary of State considers to be satisfactory.

(5) For the purposes of this section, the circumstances in which a person's conduct is necessary for a purpose falling within subsection (1)(a) or (b) are to be treated as including any circumstances in which the person's conduct—

(a) would otherwise be an offence under section 2, and

(b) involves conduct by another person which, but for subsection (1)(a) or (b), would be an offence under section 1.

(6) In this section—

"active service" means service in—

(a) an action or operation against an enemy,

(b) an operation outside the British Islands for the protection of life or property, or

(c) the military occupation of a foreign country or territory,

"armed forces" means Her Majesty's forces (within the meaning of the Armed Forces Act 2006),

"civilian subject to service discipline" and *"enemy"* have the same meaning as in the Act of 2006,

"GCHQ" has the meaning given by section 3(3) of the Intelligence Services Act 1994,

"head" means—

(a) in relation to the Security Service, the Director General of the Security Service,

(b) in relation to the Secret Intelligence Service, the Chief of the Secret Intelligence Service, and

(c) in relation to GCHQ, the Director of GCHQ,

"intelligence service" means the Security Service, the Secret Intelligence Service or GCHQ,

"relevant bribery offence" means—

(a) an offence under section 1 which would not also be an offence under section 6,

(b) an offence under section 2,

(c) an offence committed by aiding, abetting, counselling or procuring the commission of an offence falling within paragraph (a) or (b),

(d) an offence of attempting or conspiring to commit, or of inciting the commission of, an offence falling within paragraph (a) or (b), or

(e) an offence under Part 2 of the Serious Crime Act 2007 (encouraging or assisting crime) in relation to an offence falling within paragraph (a) or (b).

Other provisions about offences

14 Offences under sections 1, 2 and 6 by bodies corporate etc.

(1) This section applies if an offence under section 1, 2 or 6 is committed by a body corporate or a Scottish partnership.

(2) If the offence is proved to have been committed with the consent or connivance of—

(a) a senior officer of the body corporate or Scottish partnership, or

(b) a person purporting to act in such a capacity, the senior officer or person (as well as the body corporate or partnership) is guilty of the offence and liable to be proceeded against and punished accordingly.

(3) But subsection (2) does not apply, in the case of an offence which is committed under section 1, 2 or 6 by virtue of section 12(2) to (4), to a senior officer or person purporting to act in such a capacity unless the senior officer or person has a close connection with the United Kingdom (within the meaning given by section 12(4)).

(4) In this section—

"director", in relation to a body corporate whose affairs are managed by its members, means a member of the body corporate,

"senior officer" means—

(a) in relation to a body corporate, a director, manager, secretary or other similar officer of the body corporate, and

(b) in relation to a Scottish partnership, a partner in the partnership.

Other provisions about offences

15 Offences under section 7 by partnerships

(1) Proceedings for an offence under section 7 alleged to have been committed by a partnership must be brought in the name of the partnership (and not in that of any of the partners).

(2) For the purposes of such proceedings—

(a) rules of court relating to the service of documents have effect as if the partnership were a body corporate, and

(b) the following provisions apply as they apply in relation to a body corporate—

(i) section 33 of the Criminal Justice Act 1925 and Schedule 3 to the Magistrates' Courts Act 1980,

(ii) section 18 of the Criminal Justice Act (Northern Ireland) 1945 (c. 15 (N.I.)) and Schedule 4 to the Magistrates' Courts (Northern Ireland) Order 1981 (S.I. 1981/1675 (N.I.26)),

(iii) section 70 of the Criminal Procedure (Scotland) Act 1995.

(3) A fine imposed on the partnership on its conviction for an offence under section 7 is to be paid out of the partnership assets.

(4) In this section *"partnership"* has the same meaning as in section 7.

Supplementary and final provisions

16 Application to Crown

This Act applies to individuals in the public service of the Crown as it applies to other individuals.

Supplementary and final provisions

17 Consequential provision

(1) The following common law offences are abolished—
  (a) the offences under the law of England and Wales and Northern Ireland of bribery and embracery,
  (b) the offences under the law of Scotland of bribery and accepting a bribe.

(2) Schedule 1 (which contains consequential amendments) has effect.

(3) Schedule 2 (which contains repeals and revocations) has effect.

(4) The relevant national authority may by order make such supplementary, incidental or consequential provision as the relevant national authority considers appropriate for the purposes of this Act or in consequence of this Act.

(5) The power to make an order under this section—
  (a) is exercisable by statutory instrument [(subject to subsection (9A))],
  (b) includes power to make transitional, transitory or saving provision,
  (c) may, in particular, be exercised by amending, repealing, revoking or otherwise modifying any provision made by or under an enactment (including any Act passed in the same Session as this Act).

(6) Subject to subsection (7), a statutory instrument containing an order of the Secretary of State under this section may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.

(7) A statutory instrument containing an order of the Secretary of State under this section which does not amend or repeal a provision of a public general Act or of devolved legislation is subject to annulment in pursuance of a resolution of either House of Parliament.

(8) Subject to subsection (9), a statutory instrument containing an order of the Scottish Ministers under this section may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, the Scottish Parliament.

(9) A statutory instrument containing an order of the Scottish Ministers under this section which does not amend or repeal a provision of an Act of the Scottish Parliament or of a public general Act is subject to annulment in pursuance of a resolution of the Scottish Parliament.

[(9A) The power of the Department of Justice in Northern Ireland to make an order under this section is exercisable by statutory rule for the purposes of the Statutory Rules (Northern Ireland) Order 1979 (and not by statutory instrument).

(9B) Subject to subsection (9C), an order of the Department of Justice in Northern Ireland made under this section is subject to affirmative resolution (within the meaning of section 41(4) of the Interpretation Act (Northern Ireland) 1954).

(9C) An order of the Department of Justice in Northern Ireland made under this section which does not amend or repeal a provision of an Act of the Northern Ireland Assembly or of a public general Act is subject to negative resolution (within the meaning of section 41(6) of the Interpretation Act (Northern Ireland) 1954).

]

(10) In this section—

"devolved legislation" means an Act of the Scottish Parliament, a Measure of the National Assembly for Wales or an Act of the Northern Ireland Assembly,

"enactment" includes an Act of the Scottish Parliament and Northern Ireland legislation,

"relevant national authority" means—

(a) in the case of provision which would be within the legislative competence of the Scottish Parliament if it were contained in an Act of that Parliament, the Scottish Ministers, [. . .]

[

(aa) in the case of provision which could be made by an Act of the Northern Ireland Assembly without the consent of the Secretary of State (see sections 6 to 8 of the Northern Ireland Act 1998), the Department of Justice in Northern Ireland, and

]

(b) in any other case, the Secretary of State.

Supplementary and final provisions

18 Extent

(1) Subject as follows, this Act extends to England and Wales, Scotland and Northern Ireland.

(2) Subject to subsections (3) to (5), any amendment, repeal or revocation made by Schedule 1 or 2 has the same extent as the provision amended, repealed or revoked.

(3) The amendment of, and repeals in, the Armed Forces Act 2006 do not extend to the Channel Islands.

(4) The amendments of the International Criminal Court Act 2001 extend to England and Wales and Northern Ireland only.

(5) Subsection (2) does not apply to the repeal in the Civil Aviation Act 1982.

Supplementary and final provisions

19 Commencement and transitional provision etc.

(1) Subject to subsection (2), this Act comes into force on such day as the Secretary of State may by order made by statutory instrument appoint.

(2) Sections 16, 17(4) to (10) and 18, this section (other than subsections (5) to (7)) and section 20 come into force on the day on which this Act is passed.

(3) An order under subsection (1) may—

(a) appoint different days for different purposes,

(b) make such transitional, transitory or saving provision as the Secretary of State considers appropriate in connection with the coming into force of any provision of this Act.

(4) The Secretary of State must consult the Scottish Ministers before making an order under this section in connection with any provision of this Act which would be within the legislative competence of the Scottish Parliament if it were contained in an Act of that Parliament.

(5) This Act does not affect any liability, investigation, legal proceeding or penalty for or in respect of—

(a) a common law offence mentioned in subsection (1) of section 17 which is committed wholly or partly before the coming into force of that subsection in relation to such an offence, or

(b) an offence under the Public Bodies Corrupt Practices Act 1889 or the Prevention of Corruption Act 1906 committed wholly or partly before the coming into force of the repeal of the Act by Schedule 2 to this Act.

(6) For the purposes of subsection (5) an offence is partly committed before a particular time if any act or omission which forms part of the offence takes place before that time.

(7) Subsections (5) and (6) are without prejudice to section 16 of the Interpretation Act 1978 (general savings on repeal).

Supplementary and final provisions

20 Short title

This Act may be cited as the Bribery Act 2010.

Schedule 1 CONSEQUENTIAL AMENDMENTS

Ministry of Defence Police Act 1987 (c. 4)

1

In section 2(3)(ba) of the Ministry of Defence Police Act 1987 (jurisdiction of members of Ministry of Defence Police Force) for "Prevention of Corruption Acts 1889 to 1916" substitute "Bribery Act 2010".

Schedule 1 CONSEQUENTIAL AMENDMENTS

Criminal Justice Act 1987 (c. 38)

2

In section 2A of the Criminal Justice Act 1987 (Director of SFO's preinvestigation powers in relation to bribery and corruption: foreign officers etc.) for subsections (5) and (6) substitute—

"(5) This section applies to any conduct—

(a) which, as a result of section 3(6) of the Bribery Act 2010, constitutes an offence under section 1 or 2 of that Act under the law of England and Wales or Northern Ireland, or

(b) which constitutes an offence under section 6 of that Act under the law of England and Wales or Northern Ireland."

Schedule 1 CONSEQUENTIAL AMENDMENTS

International Criminal Court Act 2001 (c. 17)

3

The International Criminal Court Act 2001 is amended as follows.

Schedule 1 CONSEQUENTIAL AMENDMENTS

International Criminal Court Act 2001 (c. 17)

4

In section 54(3) (offences in relation to the ICC: England and Wales)—

(a) in paragraph (b) for "or" substitute ", an offence under the Bribery Act 2010 or (as the case may be) an offence", and
(b) in paragraph (c) after "common law" insert "or (as the case may be) under the Bribery Act 2010".

Schedule 1 CONSEQUENTIAL AMENDMENTS

International Criminal Court Act 2001 (c. 17)

5

In section 61(3)(b) (offences in relation to the ICC: Northern Ireland) after "common law" insert "or (as the case may be) under the Bribery Act 2010".

Schedule 1 CONSEQUENTIAL AMENDMENTS

International Criminal Court (Scotland) Act 2001 (asp 13)

6

In section 4(2) of the International Criminal Court (Scotland) Act 2001 (offences in relation to the ICC)—

(a) in paragraph (b) after "common law" insert "or (as the case may be) under the Bribery Act 2010", and
(b) in paragraph (c) for "section 1 of the Prevention of Corruption Act 1906 (c.34) or at common law" substitute "the Bribery Act 2010".

Schedule 1 CONSEQUENTIAL AMENDMENTS

Serious Organised Crime and Police Act 2005 (c. 15)

7

The Serious Organised Crime and Police Act 2005 is amended as follows.

Schedule 1 CONSEQUENTIAL AMENDMENTS

Serious Organised Crime and Police Act 2005 (c. 15)

8

In section 61(1) (offences in respect of which investigatory powers apply) for paragraph (h) substitute—

"(h) any offence under the Bribery Act 2010."

Schedule 1 CONSEQUENTIAL AMENDMENTS

Serious Organised Crime and Police Act 2005 (c. 15)

9

In section 76(3) (financial reporting orders: making) for paragraphs (d) to (f) substitute—

"(da) an offence under any of the following provisions of the Bribery Act 2010—
section 1 (offences of bribing another person),
section 2 (offences relating to being bribed),
section 6 (bribery of foreign public officials),".

Schedule 1 CONSEQUENTIAL AMENDMENTS

Serious Organised Crime and Police Act 2005 (c. 15)

10

In section 77(3) (financial reporting orders: making in Scotland) after paragraph (b) insert—

"(c) an offence under section 1, 2 or 6 of the Bribery Act 2010."

Schedule 1 CONSEQUENTIAL AMENDMENTS

Armed Forces Act 2006 (c. 52)

11

In Schedule 2 to the Armed Forces Act 2006 (which lists serious offences the possible commission of which, if suspected, must be referred to a service police force), in paragraph 12, at the end insert—

"(aw) an offence under section 1, 2 or 6 of the Bribery Act 2010."

Schedule 1 CONSEQUENTIAL AMENDMENTS

Serious Crime Act 2007 (c. 27)

12

The Serious Crime Act 2007 is amended as follows.

Schedule 1 CONSEQUENTIAL AMENDMENTS

Serious Crime Act 2007 (c. 27)

13

(1) Section 53 of that Act (certain extra-territorial offences to be prosecuted only by, or with the consent of, the Attorney General or the Advocate General for Northern Ireland) is amended as follows.

(2) The existing words in that section become the first subsection of the section.

(3) After that subsection insert—

"(2) Subsection (1) does not apply to an offence under this Part to which section 10 of the Bribery Act 2010 applies by virtue of section 54(1) and (2) below (encouraging or assisting bribery)."

Schedule 1 CONSEQUENTIAL AMENDMENTS

Serious Crime Act 2007 (c. 27)

14

(1) Schedule 1 to that Act (list of serious offences) is amended as follows.

(2) For paragraph 9 and the heading before it (corruption and bribery: England and Wales) substitute—

"9 Bribery

An offence under any of the following provisions of the Bribery Act 2010—

(a) section 1 (offences of bribing another person);

(b) section 2 (offences relating to being bribed);

(c) section 6 (bribery of foreign public officials)."

(3) For paragraph 25 and the heading before it (corruption and bribery: Northern Ireland) substitute—

"25 Bribery

An offence under any of the following provisions of the Bribery Act 2010—

(a) section 1 (offences of bribing another person);

(b) section 2 (offences relating to being bribed);

(c) section 6 (bribery of foreign public officials)."

Schedule 2 REPEALS AND REVOCATIONS

Short title and chapter	*Extent of repeal or revocation*
Public Bodies Corrupt Practices Act 1889 (c. 69)	The whole Act.
Prevention of Corruption Act 1906 (c. 34)	The whole Act.
Prevention of Corruption Act 1916 (c. 64)	The whole Act.
Criminal Justice Act (Northern Ireland) 1945 (c. 15 (N.I.))	Section 22.
Electoral Law Act (Northern Ireland) 1962 (c. 14 (N.I.))	Section 112(3).
Increase of Fines Act (Northern Ireland) 1967 (c. 29 (N.I.))	Section 1(8)(a) and (b).
Criminal Justice (Miscellaneous Provisions) Act (Northern Ireland) 1968 (c. 28 (N.I.))	In Schedule 2, the entry in the table relating to the Prevention of Corruption Act 1906.
Local Government Act (Northern Ireland) 1972 (c. 9 (N.I.))	In Schedule 8, paragraphs 1 and 3.
Civil Aviation Act 1982 (c. 16)	Section 19(1).
Representation of the People Act 1983 (c. 2)	In section 165(1), paragraph (b) and the word "or" immediately before it.
Housing Associations Act 1985 (c. 69)	In Schedule 6, paragraph 1(2).
Criminal Justice Act 1988 (c. 33)	Section 47.
Criminal Justice (Evidence etc.) (Northern Ireland) Order 1988 (S.I. 1988/1847 (N.I.17))	Article 14.
Enterprise and New Towns (Scotland) Act 1990 (c. 35)	In Schedule 1, paragraph 2.
Scotland Act 1998 (c. 46)	Section 43.
Anti-terrorism, Crime and Security Act 2001 (c. 24)	Sections 108 to 110.
Criminal Justice (Scotland) Act 2003 (asp 7)	Sections 68 and 69.
Government of Wales Act 2006 (c. 32)	Section 44.

Short title and chapter	*Extent of repeal or revocation*
Armed Forces Act 2006 (c. 52)	In Schedule 2, paragraph 12(l) and (m).
Local Government and Public Involvement in Health Act 2007 (c. 28)	Section 217(1)(a).
	Section 244(4).
	In Schedule 14, paragraph 1.
Housing and Regeneration Act 2008 (c. 17)	In Schedule 1, paragraph 16.

Explanatory Note

Introduction

1.These explanatory notes relate to the Bribery Act 2010 (c. 23) which received Royal Assent on 8 April 2010. They have been prepared by the Ministry of Justice in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.

2.The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require explanation or comment, none is given.

Summary

3.The purpose of the Act is to reform the criminal law of bribery to provide for a new consolidated scheme of bribery offences to cover bribery both in the United Kingdom (UK) and abroad.

4.The Act replaces the offences at common law and under the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916 (known collectively as the Prevention of Corruption Acts 1889 to 1916 and which will be repealed: see Schedule 2) with two general offences. The first covers the offering, promising or giving of an advantage (broadly, offences of bribing another person). The second deals with the requesting, agreeing to receive or accepting of an advantage (broadly, offences of being bribed). The formulation of these two offences abandons the agent/principal relationship on which the previous law was based in favour of a model based on an intention to induce improper conduct. The Act also creates a discrete offence of bribery of a foreign public official and a new offence where a commercial organisation fails to prevent bribery.

5.The other main provisions of the Act include:

- replacing the requirement for the Attorney General's consent to prosecute a bribery offence with a requirement that the offences in the Act may only be instituted by, or with the consent of, the Director of the relevant prosecuting authority.
- a maximum penalty of 10 years imprisonment for all the offences, except the offence relating to commercial organisations, which will carry an unlimited fine;
- extra-territorial jurisdiction to prosecute bribery committed abroad by persons ordinarily resident in the UK as well as UK nationals and UK corporate bodies;
- a defence for conduct that would constitute a bribery offence where the conduct was necessary for the proper exercise of any function of the intelligence services or the armed forces engaged on active service.

Background

6.The reform of the law on bribery dates back to the Nolan Committee's *Report on Standards in Public Life* in 1995 (Cm 2850I), which was set up in response to concerns about unethical conduct by those in public office, and its suggestion that the Law Commission might usefully take forward the consolidation of the statute law on bribery. The Law Commission first made proposals for reform of bribery in a 1998 report (*Legislating the Criminal Code: Corruption*, Report No. 248).

7.The Government then set up a working group of stakeholders which met over the period 1998–2000, and this was followed in June 2000 by a Government White Paper on corruption (*Raising Standards and Upholding Integrity: the prevention of Corruption* Cm 4759). This was positively received and led to the publication of a draft Corruption Bill in 2003 (*Corruption Draft Legislation* Cm 5777). That draft Bill was then subjected to pre-legislative scrutiny by a Joint Committee of Parliament which reported in July 2003 (*Joint Committee on the Draft Corruption Bill Session 2002–03 Report and Evidence* HL 157, HC 705). The draft Bill failed to win broad support, in particular the Joint Committee was critical of the retention of the agent/principal relationship as the basis for the offence.

8.The Government responded to the Joint Committee's report in December 2003 (*The Government Reply to the Report from the Joint Committee on the Draft Corruption Bill* Session 2002–03 HL 157, HC 705, Cm 6068). In its response, the Government accepted the Report's recommendations in part but expressed reservations about the suggestions made by the Committee in relation to how the offences should be structured given its rejection of the principal/agent model. A Government consultation exercise, *Bribery: Reform of the Prevention of Corruption Acts and SFO powers in cases of bribery of foreign officials*, followed in 2005. The Government concluded that, although there remained support for reform, there was no clear consensus on the form it should take. It was therefore decided to refer the matter back to the Law Commission for a further review.

9.The Law Commission's terms of reference were to consider the full range of options for consolidating and reforming the law on bribery. The Law Commission issued a consultation paper, *Reforming Bribery* (Consultation Paper No. 185), in October 2007. The Law Commission published its report *Reforming Bribery* (Report No. 313) on 20 November 2008.

10.The Government presented a draft Bribery Bill (Cm 7570) to Parliament on 25 March 2009 which built on the proposals in the Law Commission's report. A Joint Committee of Parliament was established to undertake pre-legislative scrutiny of the draft Bill. It reported on 28 July 2009 (*Joint Committee on the Draft Bribery Bill, First Report, Session 2008–09*, HL115, HC430 — I & II). The Government responded to the Joint Committee's report on 20 November 2009 (*Government Response to the conclusions and recommendations of the Joint Committee Report on the Draft Bribery Bill*, Cm7748).

Territorial Extent

11.Section 18 sets out the territorial extent of the Act. Its main substantive provisions extend throughout the UK.

Territorial application: Scotland

12.A legislative consent motion was agreed by the Scottish Parliament on 11 February 2010 under the Sewel Convention. The Convention was triggered as the Act makes provision concerning the criminal law of Scotland in relation to bribery. The Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament.

Territorial application: Wales

13.The Act applies to Wales as it does to the rest of the UK. It does not change the position as regards the National Assembly for Wales nor does it affect the powers of the Welsh Ministers.

Territorial application: Northern Ireland

14.The Act applies to Northern Ireland as it does to the rest of the UK. It does not change the position as regards the Northern Ireland Assembly.

Commentary on Sections

Section 1**: Offences of bribing another person**

15.This section defines the offence of bribery as it applies to the person who offers, promises or gives a financial or other advantage to another. That person is referred to in the section as P. The meaning of *"financial or other advantage"* is left to be determined as a matter of common sense by the tribunal of fact. Section 1 distinguishes two cases: Case 1 (subsection (2)) and Case 2 (subsection (3)).

16.Case 1 concerns cases in which the advantage is intended to bring about an improper performance by another person of a relevant function or activity, or to reward such improper performance. The nature of a "relevant function or activity" is addressed in section 3. The nature of *"improper performance"* is defined in section 4.

17.It is sufficient for the purposes of the offence that P intended to induce or reward impropriety in relation to a function or activity falling within section 3(2) to (5). It is not necessary that the person to whom the advantage is offered, promised or given be the same person as the person who is to engage in the improper performance of an activity or function, or who has already done so (subsection (4)).

18.Case 2 concerns cases in which P knows or believes that the acceptance of the advantage offered, promised or given in itself constitutes the improper performance of a function or activity as defined in section 3.

19.Subsection (5) makes it clear that, in Cases 1 and 2, the advantage can be offered, promised or given by P directly or through someone else.

Section 2**: Offences relating to being bribed**

20.This section defines the offence of bribery as it applies to the recipient or potential recipient of the bribe, who is called R. It distinguishes four cases, namely Case 3 to Case 6.

21.In Cases 3, 4 and 5 there is a requirement that R "requests, agrees to receive or accepts" an advantage, whether or not R actually receives it. This requirement must then be linked with the "improper performance" of a relevant function or activity. As with section 1, the nature of this function or activity is addressed in section 3, and *"improper performance"* is defined in section 4.

22.The link between the request, agreement to receive or acceptance of an advantage and improper performance may take three forms:

- R may intend improper performance to follow as a consequence of the request, agreement to receive or acceptance of the advantage (Case 3, in subsection (2));
- requesting, agreeing to receive or accepting the advantage may itself amount to improper performance of the relevant function or activity (Case 4, in subsection (3));
- alternatively, the advantage may be a reward for performing the function or activity improperly (Case 5, in subsection (4)).

23.In Cases 3 and 5, it does not matter whether the improper performance is by R or by another person. In Case 4, it must be R's requesting, agreeing to receive or acceptance of the advantage which amounts to improper performance, subject to subsection (6).

24.In Case 6 (subsection (5)) what is required is improper performance by R (or another person, where R requests it, assents to or acquiesces in it). This performance must be in anticipation or in consequence of a request, agreement to receive or acceptance of an advantage.

25.Subsection (6) is concerned with the role of R in requesting, agreeing to receive or accepting advantages, or in benefiting from them, in Cases 3 to 6. First, this subsection makes it clear that in Cases 3 to 6 it does not matter whether it is R, or someone else through whom R acts, who requests, agrees to receive or accepts the advantage (subsection (6)(a)). Secondly, subsection (6) indicates that the advantage can be for the benefit of R, or of another person (subsection (6)(b)).

26.Subsection (7) makes it clear that in Cases 4 to 6, it is immaterial whether R knows or believes that the performance of the function is improper. Additionally, by subsection (8), in Case 6 where the function or activity is performed by another person, it is immaterial whether that person knew or believed that the performance of the function is improper.

Section 3**: Function or activity to which bribe relates**

27.This section defines the fields within which bribery can take place, in other words the types of function or activity that can be improperly performed for the purposes of sections 1 and 2. The term "relevant function or activity" is used for this purpose.

28.The purpose of the section is to ensure that the law of bribery applies equally to public and to selected private functions without discriminating between the two. Accordingly the functions or activities in question include all functions of a public nature and all activities connected with a business, trade or profession. The phrase "functions of a public nature" is the same phrase as is used in the definition of *"public authority"* in section 6(3)(b) of the Human Rights Act 1998 but it is not limited in the way it is in that Act. In addition, the functions or activities include all activities performed either in the course of employment or on behalf of any body of persons: these two categories straddle the public/private divide.

29.Not every defective performance of one of these functions for reward or in the hope of advantage engages the law of bribery. Subsections (3) to (5) make clear that there must be an expectation that the functions be carried out in good faith (condition A), or impartially (condition B), or the person performing it must be in a position of trust (condition C).

30.Subsection (6) provides that the functions or activities in question may be carried out either in the UK or abroad, and need have no connection with the UK. This preserves the effect of section 108(1) and (2) of the Anti-terrorism, Crime and Security Act 2001 (which is repealed by the Act).

Section 4**: Improper performance to which bribe relates**

31.Section 4 defines *"improper performance"* as performance which breaches a relevant expectation, as mentioned in condition A or B (subsections (3) and (4) of section 3 respectively) or any expectation as to the manner in which, or reasons for which, a function or activity satisfying condition C (subsection (5) of section 3) will be performed. Subsection (1)(b) states that an omission can in some circumstances amount to improper "performance".

32.Subsection (3) addresses the case where R is no longer engaged in a given function or activity but still carries out acts related to his or her former function or activity. These acts are treated as done in performance of the function or activity in question.

Section 5**: Expectation test**

33.Section 5 provides that when deciding what is expected of a person performing a function or activity for the purposes of sections 3 and 4, the test is what a reasonable person in the UK would expect of a person performing the relevant function or activity. Subsection (2) makes it clear that in deciding what a reasonable person in the UK would expect in relation to functions or activities the performance of which is not subject to UK laws, local practice and custom must not be taken into account unless such practice or custom is

permitted or required by written law. Subsection (3) defines what is meant by *"written law"* for the purposes of this section.

Section 6**: Bribery of foreign public officials**

34.This section creates a separate offence of bribery of a foreign public official. This offence closely follows the requirements of the Organisation for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (http://www.oecd.org/document/21/0,3343,en_2649_34859_2017813_1_1_1_1,00.html).

35.Unlike the general bribery offences in sections 1 and 2, the offence of bribery of a foreign public official only covers the offering, promising or giving of bribes, and not the acceptance of them. The person giving the bribe must intend to influence the recipient in the performance of his or her functions as a public official, and must intend to obtain or retain business or a business advantage.

36.Foreign public officials are defined in subsection (5) to include both government officials and those working for international organisations. The definition draws on Article 1.4(a) of the OECD Convention. Similarly, the definition of *"public international organisation"* in subsection (6) draws on Commentary 17 to the OECD Convention.

The conduct element

37.The conduct element of the offence — what a person must do in order to commit the offence — is set out in subsection (3). The offence may be committed in a number of ways.

38.If a person (P) offers, promises or gives any advantage to a foreign public official (F) with the requisite intention (see below), and the written law applicable to F neither permits nor requires F to be influenced in his or her capacity as a foreign public official by the offer, promise or gift, then P commits an offence.

39.The *"written law"* applicable to F is defined in subsection (7) as the law of the relevant part of the UK where the performance of F's functions would be subject to that law. Where the performance of F's functions would not be subject to the law of a part of the UK, the written law is either the applicable rules of a public international organisation, or the law of the country or territory in relation to which F is a foreign public official as contained in its written constitution, provision made by or under legislation or judicial decisions that are evidenced in writing.

40.The offence will also be committed if the advantage is offered to someone other than the official, if that happens at the official's request, or with the official's assent or acquiescence.

41.It does not matter whether the offer, promise or gift is made directly to the official or through a third party (subsection (3)(a)).

42.The language of the OECD Convention is mirrored in the phrases "obtain or retain business" in subsection (2) and "offers, promises or gives"

and "advantage" in subsection (3), and in the words "public function" in subsection (5)(b).

The fault element

43.The fault element of the offence — what a person must intend in order to commit the offence — is specified in subsections (1), (2) and (4).

44.Subsections (1) and (4) have the effect that, in order to commit the offence, a person must intend to influence a foreign public official in the performance of his or her functions as a public official, including any failure to exercise those functions and any use of his or her position, even if he or she does not have authority to use the position in that way.

45.In order to commit the offence a person must also intend to obtain or retain business or an advantage in the conduct of business (subsection (2)).

46.The effect of subsection (8) is that *"business"* includes what is done in the course of a trade or profession.

Section 7**: Failure of commercial organisations to prevent bribery**

47.Section 7 creates an offence of failing to prevent bribery which can only be committed by a relevant commercial organisation.

48.*"Relevant commercial organisation"* is defined (at subsection (5)) as: • a body incorporated under the law of any part of the UK and which carries on business whether there or elsewhere,

- a partnership that is formed under the law of any part of the UK and which carries on business there or elsewhere, or
- any other body corporate or partnership wherever incorporated or formed which carries on business in any part of the UK.

49.Subsection (5) also provides that *"business"* includes a trade or profession and includes what is done in the course of a trade or profession.

50.The offence is committed where a person (A) who is associated with the commercial organisation (C) bribes another person with the intention of obtaining or retaining business or an advantage in the conduct of business for C. Subsection (2) provides that it is a defence for the commercial organisation to show it had adequate procedures in place to prevent persons associated with C from committing bribery offences. Although not explicit on the face of the Act, in accordance with established case law, the standard of proof the defendant would need to discharge in order to prove the defence is the balance of probabilities.

51.Subsection (3) provides that "bribery" in the context of this offence relates only to the offering, promising or giving of a bribe contrary to sections 1 and 6 (there is no corresponding offence of failure to prevent the taking of bribes). Applying ordinary principles of criminal law, the reference to offences under section 1 and 6 include being liable for such offences by way of aiding, abetting, counselling or procuring (secondary liability). Subsection (3) also makes clear that there is no need for the prosecution to show that

the person who committed the bribery offence has already been successfully prosecuted. The prosecution must, however, show that the person would be guilty of the offence were that person prosecuted under this Act. Finally, subsection (3)(b) makes clear that there is no need for A to have a close connection to the UK as defined in section 12; rather, so long as C falls within the definition of "relevant commercial organisation" that should be enough to provide courts in the UK with jurisdiction.

Section 8**: Meaning of associated person**

52.Section 8 provides that A is associated with C for the purposes of section 7, if A performs services for, or on behalf of C. It also ensures that section 7 relates to the actual activities being undertaken by A at the time rather than A's general position. The section expressly states that A may be the commercial organisation's employee, agent or subsidiary. But where A is an employee it is to be presumed that A is performing services for or on behalf of C unless the contrary is shown.

Section 9**: Guidance about commercial organisations preventing bribery**

53.This section requires the Secretary of State to publish guidance on procedures that relevant commercial organisations can put in place to prevent bribery by persons associated with them (subsection (1)). The Secretary of State may revise such guidance or publish revised guidance from time to time (subsection (2)). The Scottish Ministers must be consulted before publication (subsection (3)). The guidance may be published in such a manner as the Secretary of State considers appropriate (subsection (4)). The Government has indicated its intention to publish guidance ahead of the commencement of section 7 of the Act (Hansard, House of Lords, 2 February 2010, Vol. 717, col.143).

Section 10**: Consent to prosecution**

54.A prosecution under the Act in England and Wales can only be brought with the consent of the Director of one of the three senior prosecuting authorities, that is to say the Director of Public Prosecutions, the Director of the Serious Fraud Office and the Director of Revenue and Customs Prosecutions (subsections (1) and (3)). Under subsection (4), the relevant Director must exercise the consent function personally. However, where the Director is unavailable (for example where he or she is out of the country or is incapacitated) another person who has been designated in writing by the Director to exercise any such function may do so, but must do so personally (subsections (5) and (6)). Provisions of other legislation which would allow another person to exercise the functions of one of the Directors do not apply to the Directors' consent functions under section 10 (subsection (7))

55.A prosecution in Northern Ireland can only be brought with the consent of the Director of Public Prosecutions for Northern Ireland or the Director of the Serious Fraud Office (subsections (2), (3) and (8)). Under

subsection (9) the Director of Public Prosecutions for Northern Ireland must exercise the consent function personally unless the consent function is exercised by the Deputy Director (again personally) by virtue of section 30(4) and (7) of the Justice (Northern Ireland) Act 2002. Under subsection (10), section 36 of the 2002 Act, which provides for the delegation of the Director's functions, does not apply in relation to the Director's functions of giving consent to prosecutions under the Act.

Section 11**: Penalties**

56.Any offence under the Act committed by an individual under sections 1, 2 or 6 is punishable either by a fine or imprisonment for up to 10 years (12 months on summary conviction in England and Wales or Scotland or 6 months in Northern Ireland), or both. An offence committed by a person other than an individual is punishable by a fine. In either case, the fine may be up to the statutory maximum (currently £5000 in England and Wales or Northern Ireland, £10000 in Scotland) if the conviction is summary, and unlimited if it is on indictment. The section 7 offence can only be tried upon indictment.

57.Section 154 of the Criminal Justice Act 2003, which is not yet in force, sets the maximum sentence that can be imposed by a Magistrates' Court in England and Wales at 12 months. Where an offence under this Act is committed before section 154 comes into force, the Magistrates' Court's power is limited to 6 months (subsection (4)(a)).

Section 12**: Offences under this Act: territorial application**

58.Subsection (1) provides that the offences in sections 1, 2 or 6 are committed in any part of the UK if any part of the conduct element takes place in that part of the UK.

59.The effect of subsections (2) to (4) is that, even though all the actions in question take place abroad, they still constitute the offence if the person performing them is a British national or ordinarily resident in the UK, a body incorporated in the UK or a Scottish partnership.

60.Subsection (5) makes it clear that for the purposes of the offence in section 7 (failure of commercial organisation to prevent bribery) it is immaterial where the conduct element of the offence occurs.

61.Subsections (7) to (9) provide that where proceedings are to be taken in Scotland against a person, such proceedings may be taken in any sheriff court district in which the person is apprehended or in custody, or in such sheriff district as the Lord Advocate may determine.

Section 13**: Defence for certain bribery offences etc.**

62.Section 13 deals with the legitimate functions of the intelligence services or the armed forces which may require the use of a financial or other advantage to accomplish the relevant function. The section provides a defence where a person charged with a relevant bribery offence can prove that it was necessary for:

- the proper exercise of any function of one of the intelligence services; or
- the proper exercise of any function of the armed forces when engaged on active service.

Although not explicit on the face of the Act, in accordance with established case law, the standard of proof the defendant would need to discharge in order to prove the defence is the balance of probabilities.

63.The head of each intelligence service is required under subsection (2) to ensure that each service has in place arrangements designed to ensure that the conduct of a member of the service that would otherwise amount to a relevant bribery offence is necessary for a purpose set out in subsection (1)(a). A similar requirement is placed on the Defence Council under subsection (3) to ensure that the armed forces have arrangements in place designed to ensure that the conduct of any member of the armed forces engaged on active service or a civilian subject to service discipline working in support of military personnel so engaged is necessary for a purpose set out in subsection (1)(b). Under subsection (4), the arrangements must be ones that the relevant Secretary of State considers to be satisfactory.

64.Subsection (5) provides that a person's conduct is to be treated as necessary for the purposes of subsection (1)(a) or (b) in circumstances where the person's conduct would otherwise be an offence under section 2 and involves conduct on the part of another person which would amount to an offence under section 1 but for the defence in subsection (1). In other words, subsection (5) has the effect that a recipient of a bribe paid by a member of the intelligence services or armed forces is covered by the defence in any case where the person offering or paying the bribe is able to rely on the section 13 defence.

65.As well as providing definitions for other terms used in the section, subsection (6) makes it clear that a *"relevant bribery offence"* means an offence under section 1 or 2, including one committed by aiding, abetting, counselling or procuring such an offence, and related inchoate offences. *"Relevant bribery offence"* does not include a section 1 offence which would also amount to an offence of bribing a foreign public official under section 6. This addresses concerns raised by the Joint Committee on the 2003 draft Corruption Bill in relation to, in particular, compliance with the UK's obligations under the OECD Convention (see paragraph 152, HL 157 and HC 705, 31 July 2003).

Section 14**: Offences under**sections 1, 2 and 6**by bodies corporate etc.**

66.Section 14 is aimed at individuals who consent or connive at bribery, contrary to section 1, 2 or 6, committed by a body corporate (of any kind) or Scottish partnership. It does not apply to the offence in section 7.

67.The first step is to ascertain that the body corporate or Scottish partnership has indeed been guilty of an offence under section 1, 2 or 6. That established, the section provides that a director, partner or similar senior manager of the body is guilty of the same offence if he or she has consented to or connived in the commission of the offence. In a body corporate managed by its

members, the same applies to members. In relation to a Scottish partnership, the provision applies to partners.

68.It should be noted that in this situation, the body corporate or Scottish partnership and the senior manager are both guilty of the main bribery offence. This section does not create a separate offence of "consent or connivance".

69.Subsection (3) makes clear that for a *"senior officer"* or similar person to be guilty he or she must have a close connection to the UK as defined in section 12(4).

Section 15**: Offences under**section 7**by partnerships**

70.Section 15 deals with proceedings for an offence under section 7 against partnerships. Such proceedings must be brought in the name of the partnership (and not the partners) (subsection (1)); certain rules of court and statutory provisions which apply to bodies corporate are deemed to apply to partnerships (subsection (2)); and any fine imposed on the partnership on conviction must be paid out of the partnership assets (subsection (3)).

Section 16**: Application to Crown**

71.Section 16 applies the Act to individuals in the public service of the Crown. Such individuals will therefore be liable to prosecution if their conduct in the discharge of their duties constitutes an offence under the Act.

Section 17**: Consequential provision**

72.This section abolishes the common law offences of bribery and embracery (bribery etc of jurors), as well as the common law offence in Scotland of accepting a bribe, and gives effect to Schedules 1 and 2, which contain consequential amendments and repeals.

73.Subsections (4) to (10) of this section create a power for the Secretary of State (or, as the case may be, Scottish Ministers) to make supplementary, incidental or consequential provision by order. The order making power is subject to the affirmative resolution procedure where it amends a public general Act or devolved legislation, otherwise the negative resolution procedure applies.

Section 18**: Extent**

74.This section provides that the Act extends to the whole of the UK and that any amendments or repeals of a provision of an enactment have the same extent as that provision. However the amendment of and repeals in the Armed Forces Act 2006 do not extend to the Channel Islands and the amendments of the International Criminal Court Act 2001 and the repeal in the Civil Aviation Act 1982 do not extend to the Channel Islands, Isle of Man or the British overseas territories

Section 19**: Commencement and transitional provision etc.**

75.This section provides for commencement. Details are in paragraph 107 below. A commencement order made under this section may appoint different days for different purposes and may contain transitory, transitional or saving provisions. The section also contains express saving provisions so that any offence committed or partly committed before the operative provisions of the Act come into force must be dealt with under the old law.

Section 20**: Short title**

76.This section deals with citation.

Schedule 1

77.This Schedule contains consequential amendments to other legislation. These are as follows.

Ministry of Defence Police Act 1987

78.Section 2 of that Act gives the Ministry of Defence Police the same powers as normal police, in relation to services property or personnel, including with regard to offences involving the bribery of such persons. That Act is amended to refer to offences under this Act rather than those under the Prevention of Corruption Acts 1889 to 1916.

Criminal Justice Act 1987

79.Section 2A of that Act gives the Director of the Serious Fraud Office power to investigate corruption offences. The amendment replaces the references to the Prevention of Corruption Acts with references to offences under this Act. The offences in question are the bribery of foreign officials (section 6), and the general bribery offence (sections 1 and 2) where the functions in question are performed outside or unconnected with the UK.

International Criminal Court Act 2001

80.Sections 54 and 61 of that Act set out the relevant domestic offences in relation to the International Criminal Court in the law of England and Wales, and Northern Ireland respectively. The amendments make clear that offences under this Act are also relevant domestic offences.

International Criminal Court (Scotland) Act 2001

81.Section 4 of that Act sets out the relevant domestic offences under Scots law in relation to the International Criminal Court. The amendment updates the references to the Prevention of Corruption Act 1906 and to the common law by substituting a reference to the offences under the Act.

Serious Organised Crime and Police Act 2005

82.Chapter 1 of Part 2 of that Act gives investigatory powers to the Director of Public Prosecutions and other prosecuting authorities in relation to offences listed in section 61. This list was amended by SI 2006/1629 to include common law bribery and offences under the Prevention of Corruption Acts. These offences are now replaced by the offences under this Act.

83.A similar amendment applies to section 76 (and section 77 in respect of Scotland), which gives the court power to make a financial reporting order in dealing with a person convicted of (among other offences) corruption offences.

Armed Forces Act 2006

84.Schedule 2 of that Act lists serious civilian offences the possible commission of which, if suspected, must be referred to a service police force. The list of civilian offences is amended to include the offences under this Act.

Serious Crime Act 2007

85.Section 53 of that Act requires the Attorney General's consent prior to commencing proceedings where there is an international element to an offence of encouraging or assisting crime under the 2007 Act. This amendment ensures that the requirement for the Attorney General's consent will not apply in the case of encouraging or assisting bribery by excluding from section 53 any offence to which section 10 (consent to prosecution) of this Act applies.

Explanatory Note

86.The Serious Crime Act also creates a power to make a *"serious crime prevention order"* in relation to offences listed in Schedule 1 of the Act. Part 1 of that Schedule, relating to offences in England and Wales, includes offences under the Prevention of Corruption Acts. Those offences are replaced with offences under sections 1, 2 and 6 of this Act. A corresponding amendment is made in Part 2 of the same Schedule in relation to Northern Ireland.

Schedule 2

87.This Schedule contains repeals and revocations.

88.The three Prevention of Corruption Acts are repealed in their entirety. These offences are wholly replaced by the offences under this Act.

89.Criminal Justice Act (Northern Ireland) 1945 (c. 15 (N.I)) — section 22 amended section 4 of the Public Bodies Corrupt Practices Act 1889 and section 2(1) of the Prevention of Corruption Act 1906 to provide for proceedings to be taken in Northern Ireland only with the consent of the Attorney General for Northern Ireland. Given the 1889 and 1906 Acts will be repealed the section will become redundant.

90.Electoral Law Act (Northern Ireland) 1962 (c.14 (N.I.)) — section 112(3) amended paragraphs (c) and (d) of section 2 of the 1889 Act and will be redundant following the repeal of the 1889 Act.

91.Increase of Fines Act (Northern Ireland) 1967 (c. 29 (N.I.)) — section 1(8)(a) and (b) provide that a court may impose a fine whether greater or less than the amount limited by section 2 of the Public Bodies Corrupt Practices Act 1889 or section 1(1) of the Prevention of Corruption Act 1906 respectively. These references will become redundant once those two Acts are repealed.

92.Criminal Justice (Miscellaneous Provisions) Act (Northern Ireland) 1968 (c. 28 (N.I)) — the entry in the table in Schedule 2 relating to the Prevention of Corruption Act 1906 increased the penalty in Northern Ireland for the offence under section 1(1) of the 1906 Act from 4 months imprisonment to 6 months imprisonment. That entry will become redundant upon repeal of the 1906 Act.

93.Local Government Act (Northern Ireland) 1972 (c.9 (N.I.)) — paragraph 1 of Schedule 8 amended the 1889 Act and will be redundant following the repeal of the 1889 Act.

94.Civil Aviation Act 1982 (c. 16) — section 19(1) designates the Civil Aviation Authority as a public authority for the purposes of the Prevention of Corruption Acts 1889–1916 and will be redundant once they are repealed.

95.Representation of the People Act 1983 (c. 2) — section 165(1) makes certain provision where a candidate at a Parliamentary or local election engages as agent or canvasser an individual who has been convicted and disenfranchised, including under the Public Bodies Corrupt Practices Act 1889. That entry becomes redundant upon repeal of the 1889 Act.

96.Housing Associations Act 1985 (c. 69) — paragraph 1(2) of Schedule 6 provides that the Housing Corporation is a public body for the purposes of the Prevention of Corruption Acts 1889 to 1916. That paragraph becomes redundant upon repeal of those Acts.

97.Criminal Justice Act 1988 (c. 33) — section 47 inserts provisions about penalties into the three Prevention of Corruption Acts, and becomes redundant upon repeal of those Acts.

98.Criminal Justice (Evidence etc.) (Northern Ireland) Order 1988 (S.I. 1988/1847 (N.I.17)) — article 14(1) amended paragraph (a) of section 2 of the 1889 Act and will be redundant following the repeal of the 1889 Act.

99.Enterprise and New Towns (Scotland) Act 1990 (c. 35) — paragraph 2 of Schedule 1 provides that Scottish Enterprise and Highlands and Islands Enterprise are public bodies for the purposes of the Prevention of Corruption Acts 1889 to 1916. That paragraph becomes redundant upon repeal of those Acts.

100.Scotland Act 1998 (c. 46) — section 43 provides that the Scottish Parliament shall be a public body for the purposes of the Prevention of Corruption Acts 1889 to 1916. This section will be redundant once those Acts are repealed.

101.Anti-terrorism, Crime and Security Act 2001 (c. 24) — sections 108 to 110, which extend the geographical scope of the offences under the Prevention of Corruption Acts 1889 to 1916, will be redundant once those Acts are repealed.

102.Criminal Justice (Scotland) Act 2003 (asp7) — sections 68 and 69, which extend the geographical scope of the offences under the Prevention of Corruption Acts 1889 to 1916, will be redundant once those Acts are repealed.

103.Government of Wales Act 2006 (c.32) — section 44 provides that the Welsh Assembly and the Assembly Commission shall be public bodies for the purposes of the Prevention of Corruption Acts 1889 to 1916. This section will be redundant once those Acts are repealed.

104.Armed Forces Act 2006 (c. 52) — those paragraphs in the list in Schedule 2 which refer to offences under the Prevention of Corruption Acts are repealed. This repeal is a corollary of the amendment to that list in Schedule 1 to this Act.

105.Local Government and Public Involvement in Health Act 2007 (c. 28) — section 217(1)(a) gives the Secretary of State power to define an *"entity under the control of a local authority"* and an *"entity jointly controlled by bodies that include a local authority"* for the purposes of section 4(2) of the Prevention of Corruption Act 1916. Section 217(1)(a) becomes redundant upon the repeal of the 1916 Act. Paragraph 1 of Schedule 14 to the 2007 Act, which contains amendments to the 1916 Act and section 244(4) which makes provision as to the extent of a repeal contained in that paragraph, are also repealed.

106.Housing and Regeneration Act 2008 (c.17) — paragraph 16 of Schedule 1 provides that the Home and Communities Agency is a public body for the purposes of the Prevention of Corruption Acts 1889 to 1916. This section will be redundant once those Acts are repealed.

Commencement

107.Sections 16, 17(4) to (10), 18, 19(1) to (4) and 20 of the Act came into force on Royal Assent. The remainder of the Act will be brought into force by one or more commencement orders.

Hansard References

108.The following table sets out the dates and Hansard references for each stage of the Bribery Bill's passage through Parliament.

Stage	Date	Hansard Reference
House of Lords		
Introduction	19 November 2009	Vol 715 Col 27
Second Reading	9 December 2009	Vol 715 Col 1085–1126
Committee	7 January 2010	Vol 716 GC21–GC72
	13 January 2010	Vol 716 GC83–GC118
Report	2 February 2010	Vol 717 Col 117–187
Third Reading	8 February 2010	Vol 717 Col 481–502
House of Commons		
First Reading	9 February 2010	No debate
Second Reading	3 March 2010	Vol 506 Col 945–983
Committee	16 March 2010	Hansard Public Bill Committee
	18 March 2010	
	23 March 2010	
Report	7 April 2010	Vol 508 Col 1005–1009
Third Reading	7 April 2010	Vol 508 Col 1009–1015
Consideration of Amendments		
Lords consideration of Commons amendments	8 April 2010	Vol 718 Col 1704–1713
Royal Assent	8 April 2010	Lords: Vol 718 Col 1738 Commons: Vol 508 Col 1256

1998 CHAPTER 29

An Act to make new provision for the regulation of the processing of information relating to individuals, including the obtaining, holding, use or disclosure of such information.

[16th July 1998]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

Preliminary

1.— Basic interpretative provisions.

(1) In this Act, unless the context otherwise requires—

"data" means information which—

(a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,

(b) is recorded with the intention that it should be processed by means of such equipment,

(c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, **[. . .]**

(d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68; **[** or **]**

[(e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d); **]**

"data controller" means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;

"data processor", in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;

"data subject" means an individual who is the subject of personal data;

"personal data" means data which relate to a living individual who can be identified—

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

"processing", in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—

(a) organisation, adaptation or alteration of the information or data,

(b) retrieval, consultation or use of the information or data,

(c) disclosure of the information or data by transmission, dissemination or otherwise making available, or

(d) alignment, combination, blocking, erasure or destruction of the information or data;

["public authority" means a public authority as defined by the Freedom of Information Act 2000 or a Scottish public authority as defined by the Freedom of Information (Scotland) Act 2002; **]**

"relevant filing system" means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.

(2) In this Act, unless the context otherwise requires—

(a) "obtaining" or "recording", in relation to personal data, includes obtaining or recording the information to be contained in the data, and

(b) "using" or "disclosing", in relation to personal data, includes using or disclosing the information contained in the data.

(3) In determining for the purposes of this Act whether any information is recorded with the intention—

(a) that it should be processed by means of equipment operating automatically in response to instructions given for that purpose, or

(b) that it should form part of a relevant filing system,

it is immaterial that it is intended to be so processed or to form part of such a system only after being transferred to a country or territory outside the European Economic Area.

(4) Where personal data are processed only for purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller.

[(5) In paragraph (e) of the definition of "data" in subsection (1), the reference to information "held" by a public authority shall be construed in accordance with section 3(2) of the Freedom of Information Act 2000 **[** or section 3(2), (4) and (5) of the Freedom of Information (Scotland) Act 2002 **]**.

[(6) Where

(a) section 7 of the Freedom of Information Act 2000 prevents Parts I to V of that Act or

(b) section 7(1) of the Freedom of Information (Scotland) Act 2002 prevents that Act

from applying to certain information held by a public authority, that information is not to be treated for the purposes of paragraph (e) of the definition of "data" in subsection (1) as held by a public authority.

]

]

2. Sensitive personal data.

In this Act "sensitive personal data" means personal data consisting of information as to—

(a) the racial or ethnic origin of the data subject,

(b) his political opinions,

(c) his religious beliefs or other beliefs of a similar nature,

(d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),

(e) his physical or mental health or condition,

(f) his sexual life,

(g) the commission or alleged commission by him of any offence, or

(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

3. The special purposes.

In this Act "the special purposes" means any one or more of the following—

(a) the purposes of journalism,

(b) artistic purposes, and

(c) literary purposes.

4.— The data protection principles.

(1) References in this Act to the data protection principles are to the principles set out in Part I of Schedule 1.

(2) Those principles are to be interpreted in accordance with Part II of Schedule 1.

(3) Schedule 2 (which applies to all personal data) and Schedule 3 (which applies only to sensitive personal data) set out conditions applying for the purposes of the first principle; and Schedule 4 sets out cases in which the eighth principle does not apply.

(4) Subject to section 27(1), it shall be the duty of a data controller to comply with the data protection principles in relation to all personal data with respect to which he is the data controller.

5.— Application of Act.

(1) Except as otherwise provided by or under section 54, this Act applies to a data controller in respect of any data only if—

(a) the data controller is established in the United Kingdom and the data are processed in the context of that establishment, or

(b) the data controller is established neither in the United Kingdom nor in any other EEA State but uses equipment in the United Kingdom for processing the data otherwise than for the purposes of transit through the United Kingdom.

(2) A data controller falling within subsection (1)(b) must nominate for the purposes of this Act a representative established in the United Kingdom.

(3) For the purposes of subsections (1) and (2), each of the following is to be treated as established in the United Kingdom—

(a) an individual who is ordinarily resident in the United Kingdom,

(b) a body incorporated under the law of, or of any part of, the United Kingdom,

(c) a partnership or other unincorporated association formed under the law of any part of the United Kingdom, and

(d) any person who does not fall within paragraph (a), (b) or (c) but maintains in the United Kingdom—

(i) an office, branch or agency through which he carries on any activity, or

(ii) a regular practice;

and the reference to establishment in any other EEA State has a corresponding meaning.

6.— The Commissioner [. . .] .

[(1) For the purposes of this Act and of the Freedom of Information Act 2000 there shall be an officer known as the Information Commissioner (in this Act referred to as "the Commissioner"). **]**

(2) The Commissioner shall be appointed by Her Majesty by Letters Patent.

(3)-(6) **[. . .]**

(7) Schedule 5 has effect in relation to the Commissioner **[. . .]** .

PART II

Rights of data subjects and others

7.— Right of access to personal data.

(1) Subject to the following provisions of this section and to **[** sections 8, 9 and 9A **]** , an individual is entitled—

(a) to be informed by any data controller whether personal data of which that individual is the data subject are being processed by or on behalf of that data controller,

(b) if that is the case, to be given by the data controller a description of—

(i) the personal data of which that individual is the data subject,

(ii) the purposes for which they are being or are to be processed, and

(iii) the recipients or classes of recipients to whom they are or may be disclosed,

(c) to have communicated to him in an intelligible form—

(i) the information constituting any personal data of which that individual is the data subject, and

(ii) any information available to the data controller as to the source of those data, and

(d) where the processing by automatic means of personal data of which that individual is the data subject for the purpose of evaluating matters relating to him such as, for example, his performance at work, his credit worthiness, his reliability or his conduct, has constituted or is likely to constitute the sole basis for any decision significantly affecting him, to be informed by the data controller of the logic involved in that decision-taking.

(2) A data controller is not obliged to supply any information under subsection (1) unless he has received—

(a) a request in writing, and

(b) except in prescribed cases, such fee (not exceeding the prescribed maximum) as he may require.

[(3) Where a data controller—

(a) reasonably requires further information in order to satisfy himself as to the identity of the person making a request under this section and to locate the information which that person seeks, and

(b) has informed him of that requirement,

the data controller is not obliged to comply with the request unless he is supplied with that further information.

]

(4) Where a data controller cannot comply with the request without disclosing information relating to another individual who can be identified from that information, he is not obliged to comply with the request unless—

(a) the other individual has consented to the disclosure of the information to the person making the request, or
(b) it is reasonable in all the circumstances to comply with the request without the consent of the other individual.

(5) In subsection (4) the reference to information relating to another individual includes a reference to information identifying that individual as the source of the information sought by the request; and that subsection is not to be construed as excusing a data controller from communicating so much of the information sought by the request as can be communicated without disclosing the identity of the other individual concerned, whether by the omission of names or other identifying particulars or otherwise.

(6) In determining for the purposes of subsection (4)(b) whether it is reasonable in all the circumstances to comply with the request without the consent of the other individual concerned, regard shall be had, in particular, to—

(a) any duty of confidentiality owed to the other individual,
(b) any steps taken by the data controller with a view to seeking the consent of the other individual,
(c) whether the other individual is capable of giving consent, and
(d) any express refusal of consent by the other individual.

(7) An individual making a request under this section may, in such cases as may be prescribed, specify that his request is limited to personal data of any prescribed description.

(8) Subject to subsection (4), a data controller shall comply with a request under this section promptly and in any event before the end of the prescribed period beginning with the relevant day.

(9) If a court is satisfied on the application of any person who has made a request under the foregoing provisions of this section that the data controller in question has failed to comply with the request in contravention of those provisions, the court may order him to comply with the request.

(10) In this section—

"prescribed" means prescribed by the **[** Secretary of State **]** by regulations; "the prescribed maximum" means such amount as may be prescribed;

"the prescribed period" means forty days or such other period as may be prescribed;

"the relevant day", in relation to a request under this section, means the day on which the data controller receives the request or, if later, the first day on which the data controller has both the required fee and the information referred to in subsection (3).

(11) Different amounts or periods may be prescribed under this section in relation to different cases.

8.— Provisions supplementary to section 7.

(1) The **[** Secretary of State **]** may by regulations provide that, in such cases as may be prescribed, a request for information under any provision of subsection (1) of section 7 is to be treated as extending also to information under other provisions of that subsection.

(2) The obligation imposed by section 7(1)(c)(i) must be complied with by supplying the data subject with a copy of the information in permanent form unless—

(a) the supply of such a copy is not possible or would involve disproportionate effort, or

(b) the data subject agrees otherwise;

and where any of the information referred to in section 7(1)(c)(i) is expressed in terms which are not intelligible without explanation the copy must be accompanied by an explanation of those terms.

(3) Where a data controller has previously complied with a request made under section 7 by an individual, the data controller is not obliged to comply with a subsequent identical or similar request under that section by that individual unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.

(4) In determining for the purposes of subsection (3) whether requests under section 7 are made at reasonable intervals, regard shall be had to the nature of the data, the purposes for which the data are processed and the frequency with which the data are altered.

(5) Section 7(1)(d) is not to be regarded as requiring the provision of information as to the logic involved in any decision-taking if, and to the extent that, the information constitutes a trade secret.

(6) The information to be supplied pursuant to a request under section 7 must be supplied by reference to the data in question at the time when the request is received, except that it may take account of any amendment or deletion made between that time and the time when the information is supplied, being an amendment or deletion that would have been made regardless of the receipt of the request.

(7) For the purposes of section 7(4) and (5) another individual can be identified from the information being disclosed if he can be identified from that information, or from that and any other information which, in the reasonable belief of the data controller, is likely to be in, or to come into, the possession of the data subject making the request.

9.— Application of section 7 where data controller is credit reference agency.

(1) Where the data controller is a credit reference agency, section 7 has effect subject to the provisions of this section.

(2) An individual making a request under section 7 may limit his request to personal data relevant to his financial standing, and shall be taken to have so limited his request unless the request shows a contrary intention.

(3) Where the data controller receives a request under section 7 in a case where personal data of which the individual making the request is the data subject are being processed by or on behalf of the data controller, the obligation to supply information under that section includes an obligation to give the individual making the request a statement, in such form as may be prescribed by the **[** Secretary of State **]** by regulations, of the individual's rights—

(a) under section 159 of the Consumer Credit Act 1974, and

(b) to the extent required by the prescribed form, under this Act.

[9A.— Unstructured personal data held by public authorities.

(1) In this section "unstructured personal data" means any personal data falling within paragraph (e) of the definition of "data" in section 1(1), other than information which is recorded as part of, or with the intention that it should form part of, any set of information relating to individuals to the extent that the set is structured by reference to individuals or by reference to criteria relating to individuals.

(2) A public authority is not obliged to comply with subsection (1) of section 7 in relation to any unstructured personal data unless the request under that section contains a description of the data.

(3) Even if the data are described by the data subject in his request, a public authority is not obliged to comply with subsection (1) of section 7 in relation to unstructured personal data if the authority estimates that the cost of complying with the request so far as relating to those data would exceed the appropriate limit.

(4) Subsection (3) does not exempt the public authority from its obligation to comply with paragraph (a) of section 7(1) in relation to the unstructured personal data unless the estimated cost of complying with that paragraph alone in relation to those data would exceed the appropriate limit.

(5) In subsections (3) and (4) "the appropriate limit" means such amount as may be prescribed by the **[** Secretary of State **]** by regulations, and different amounts may be prescribed in relation to different cases.

(6) Any estimate for the purposes of this section must be made in accordance with regulations under section 12(5) of the Freedom of Information Act 2000.

]

10.— Right to prevent processing likely to cause damage or distress.

(1) Subject to subsection (2), an individual is entitled at any time by notice in writing to a data controller to require the data controller at the end of such period as is reasonable in the circumstances to cease, or not to begin, processing, or processing for a specified purpose or in a specified manner, any personal data in respect of which he is the data subject, on the ground that, for specified reasons—

(a) the processing of those data or their processing for that purpose or in that manner is causing or is likely to cause substantial damage or substantial distress to him or to another, and

(b) that damage or distress is or would be unwarranted.

(2) Subsection (1) does not apply—

(a) in a case where any of the conditions in paragraphs 1 to 4 of Schedule 2 is met, or

(b) in such other cases as may be prescribed by the **[** Secretary of State **]** by order.

(3) The data controller must within twenty-one days of receiving a notice under subsection (1) ("the data subject notice") give the individual who gave it a written notice—

(a) stating that he has complied or intends to comply with the data subject notice, or
(b) stating his reasons for regarding the data subject notice as to any extent unjustified and the extent (if any) to which he has complied or intends to comply with it.

(4) If a court is satisfied, on the application of any person who has given a notice under subsection (1) which appears to the court to be justified (or to be justified to any extent), that the data controller in question has failed to comply with the notice, the court may order him to take such steps for complying with the notice (or for complying with it to that extent) as the court thinks fit.

(5) The failure by a data subject to exercise the right conferred by subsection (1) or section 11(1) does not affect any other right conferred on him by this Part.

11.— Right to prevent processing for purposes of direct marketing.

(1) An individual is entitled at any time by notice in writing to a data controller to require the data controller at the end of such period as is reasonable in the circumstances to cease, or not to begin, processing for the purposes of direct marketing personal data in respect of which he is the data subject.

(2) If the court is satisfied, on the application of any person who has given a notice under subsection (1), that the data controller has failed to comply with the notice, the court may order him to take such steps for complying with the notice as the court thinks fit.

[(2A) This section shall not apply in relation to the processing of such data as are mentioned in paragraph (1) of regulation 8 of the Telecommunications (Data Protection and Privacy) Regulations 1999 (processing of telecommunications billing data for certain marketing purposes) for the purposes mentioned in paragraph (2) of that regulation. **]**

(3) In this section "direct marketing" means the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals.

12.— Rights in relation to automated decision-taking.

(1) An individual is entitled at any time, by notice in writing to any data controller, to require the data controller to ensure that no decision taken by or on behalf of the data controller which significantly affects that individual is based solely on the processing by automatic means of personal data in respect of which that individual is the data subject for the purpose of evaluating matters relating to him such as, for example, his performance at work, his credit worthiness, his reliability or his conduct.

(2) Where, in a case where no notice under subsection (1) has effect, a decision which significantly affects an individual is based solely on such processing as is mentioned in subsection (1)—

(a) the data controller must as soon as reasonably practicable notify the individual that the decision was taken on that basis, and
(b) the individual is entitled, within twenty-one days of receiving

that notification from the data controller, by notice in writing to require the data controller to reconsider the decision or to take a new decision otherwise than on that basis.

(3) The data controller must, within twenty-one days of receiving a notice under subsection (2)(b) ("the data subject notice") give the individual a written notice specifying the steps that he intends to take to comply with the data subject notice.

(4) A notice under subsection (1) does not have effect in relation to an exempt decision; and nothing in subsection (2) applies to an exempt decision.

(5) In subsection (4) "exempt decision" means any decision—

(a) in respect of which the condition in subsection (6) and the condition in subsection (7) are met, or

(b) which is made in such other circumstances as may be prescribed by the **[** Secretary of State **]** by order.

(6) The condition in this subsection is that the decision—

(a) is taken in the course of steps taken—

(i) for the purpose of considering whether to enter into a contract with the data subject,

(ii) with a view to entering into such a contract, or

(iii) in the course of performing such a contract, or

(b) is authorised or required by or under any enactment.

(7) The condition in this subsection is that either—

(a) the effect of the decision is to grant a request of the data subject, or

(b) steps have been taken to safeguard the legitimate interests of the data subject (for example, by allowing him to make representations).

(8) If a court is satisfied on the application of a data subject that a person taking a decision in respect of him ("the responsible person") has failed to comply with subsection (1) or (2)(b), the court may order the responsible person to reconsider the decision, or to take a new decision which is not based solely on such processing as is mentioned in subsection (1).

(9) An order under subsection (8) shall not affect the rights of any person other than the data subject and the responsible person.

12A.— [. . .]

13.— Compensation for failure to comply with certain requirements.

(1) An individual who suffers damage by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that damage.

(2) An individual who suffers distress by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that distress if—

(a) the individual also suffers damage by reason of the contravention, or

(b) the contravention relates to the processing of personal data for the special purposes.

(3) In proceedings brought against a person by virtue of this section it is a defence to prove that he had taken such care as in all the circumstances was reasonably required to comply with the requirement concerned.

14.— Rectification, blocking, erasure and destruction.

(1) If a court is satisfied on the application of a data subject that personal data of which the applicant is the subject are inaccurate, the court may order the data controller to rectify, block, erase or destroy those data and any other personal data in respect of which he is the data controller and which contain an expression of opinion which appears to the court to be based on the inaccurate data.

(2) Subsection (1) applies whether or not the data accurately record information received or obtained by the data controller from the data subject or a third party but where the data accurately record such information, then—

(a) if the requirements mentioned in paragraph 7 of Part II of Schedule 1 have been complied with, the court may, instead of making an order under subsection (1), make an order requiring the data to be supplemented by such statement of the true facts relating to the matters dealt with by the data as the court may approve, and

(b) if all or any of those requirements have not been complied with, the court may, instead of making an order under that subsection, make such order as it thinks fit for securing compliance with those requirements with or without a further order requiring the data to be supplemented by such a statement as is mentioned in paragraph (a).

(3) Where the court—

(a) makes an order under subsection (1), or

(b) is satisfied on the application of a data subject that personal data of which he was the data subject and which have been rectified, blocked, erased or destroyed were inaccurate,

it may, where it considers it reasonably practicable, order the data controller to notify third parties to whom the data have been disclosed of the rectification, blocking, erasure or destruction.

(4) If a court is satisfied on the application of a data subject—

(a) that he has suffered damage by reason of any contravention by a data controller of any of the requirements of this Act in respect of any personal data, in circumstances entitling him to compensation under section 13, and

(b) that there is a substantial risk of further contravention in respect of those data in such circumstances,

the court may order the rectification, blocking, erasure or destruction of any of those data.

(5) Where the court makes an order under subsection (4) it may, where it considers it reasonably practicable, order the data controller to notify third parties to whom the data have been disclosed of the rectification, blocking, erasure or destruction.

(6) In determining whether it is reasonably practicable to require such notification as is mentioned in subsection (3) or (5) the court shall have regard, in particular, to the number of persons who would have to be notified.

15.— Jurisdiction and procedure.

(1) The jurisdiction conferred by sections 7 to 14 is exercisable by the High Court or a county court or, in Scotland, by the Court of Session or the sheriff.

(2) For the purpose of determining any question whether an applicant under subsection (9) of section 7 is entitled to the information which he seeks (including any question whether any relevant data are exempt from that section by virtue of Part IV) a court may require the information constituting any data processed by or on behalf of the data controller and any information as to the logic involved in any decision-taking as mentioned in section 7(1)(d) to be made available for its own inspection but shall not, pending the determination of that question in the applicant's favour, require the information sought by the applicant to be disclosed to him or his representatives whether by discovery (or, in Scotland, recovery) or otherwise.

PART III

Notification by data controllers

16.— Preliminary.

(1) In this Part "the registrable particulars", in relation to a data controller, means—

(a) his name and address,

(b) if he has nominated a representative for the purposes of this Act, the name and address of the representative,

(c) a description of the personal data being or to be processed by or on behalf of the data controller and of the category or categories of data subject to which they relate,

(d) a description of the purpose or purposes for which the data are being or are to be processed,

(e) a description of any recipient or recipients to whom the data controller intends or may wish to disclose the data,

(f) the names, or a description of, any countries or territories outside the European Economic Area to which the data controller directly or indirectly transfers, or intends or may wish directly or indirectly to transfer, the data, **[. . .]**

[(ff) where the data controller is a public authority, a statement of that fact, **[. . .]]**

(g) in any case where—

(i) personal data are being, or are intended to be, processed in circumstances in which the prohibition in subsection (1) of section 17 is excluded by subsection (2) or (3) of that section, and

(ii) the notification does not extend to those data,

a statement of that fact **[** , and **]**

[(h) such information about the data controller as may be prescribed under section 18(5A). **]**

(2) In this Part—

"fees regulations" means regulations made by the **[** Secretary of State **]** under section 18(5) or 19(4) or (7);

"notification regulations" means regulations made by the **[** Secretary of State **]** under the other provisions of this Part;

"prescribed", except where used in relation to fees regulations, means prescribed by notification regulations.

(3) For the purposes of this Part, so far as it relates to the addresses of data controllers—

(a) the address of a registered company is that of its registered office, and

(b) the address of a person (other than a registered company) carrying on a business is that of his principal place of business in the United Kingdom.

17.— Prohibition on processing without registration.

(1) Subject to the following provisions of this section, personal data must not be processed unless an entry in respect of the data controller is included in the register maintained by the Commissioner under section 19 (or is treated by notification regulations made by virtue of section 19(3) as being so included).

(2) Except where the processing is assessable processing for the purposes of section 22, subsection (1) does not apply in relation to personal data consisting of information which falls neither within paragraph (a) of the definition of "data" in section 1(1) nor within paragraph (b) of that definition.

(3) If it appears to the **[** Secretary of State **]** that processing of a particular description is unlikely to prejudice the rights and freedoms of data subjects, notification regulations may provide that, in such cases as may be prescribed, subsection (1) is not to apply in relation to processing of that description.

(4) Subsection (1) does not apply in relation to any processing whose sole purpose is the maintenance of a public register.

18.— Notification by data controllers.

(1) Any data controller who wishes to be included in the register maintained under section 19 shall give a notification to the Commissioner under this section.

(2) A notification under this section must specify in accordance with notification regulations—

(a) the registrable particulars, and

(b) a general description of measures to be taken for the purpose of complying with the seventh data protection principle.

(3) Notification regulations made by virtue of subsection (2) may provide for the determination by the Commissioner, in accordance with any requirements

of the regulations, of the form in which the registrable particulars and the description mentioned in subsection (2)(b) are to be specified, including in particular the detail required for the purposes of section 16(1)(c), (d), (e) and (f) and subsection (2)(b).

(4) Notification regulations may make provision as to the giving of notification—

(a) by partnerships, or

(b) in other cases where two or more persons are the data controllers in respect of any personal data.

(5) The notification must be accompanied by such fee as may be prescribed by fees regulations.

[(5A) Notification regulations may prescribe the information about the data controller which is required for the purpose of verifying the fee payable under subsection (5). **]**

(6) Notification regulations may provide for any fee paid under subsection (5) or section 19(4) to be refunded in prescribed circumstances.

19.— Register of notifications.

(1) The Commissioner shall—

(a) maintain a register of persons who have given notification under section 18, and

(b) make an entry in the register in pursuance of each notification received by him under that section from a person in respect of whom no entry as data controller was for the time being included in the register.

(2) Each entry in the register shall consist of—

(a) the registrable particulars notified under section 18 or, as the case requires, those particulars as amended in pursuance of section 20(4), and

(b) such other information as the Commissioner may be authorised or required by notification regulations to include in the register.

(3) Notification regulations may make provision as to the time as from which any entry in respect of a data controller is to be treated for the purposes of section 17 as having been made in the register.

(4) No entry shall be retained in the register for more than the relevant time except on payment of such fee as may be prescribed by fees regulations.

(5) In subsection (4) "the relevant time" means twelve months or such other period as may be prescribed by notification regulations; and different periods may be prescribed in relation to different cases.

(6) The Commissioner—

(a) shall provide facilities for making the information contained in the entries in the register available for inspection (in visible and legible form) by members of the public at all reasonable hours and free of charge, and

(b) may provide such other facilities for making the information contained in those entries available to the public free of charge as he considers appropriate.

(7) The Commissioner shall, on payment of such fee, if any, as may be prescribed by fees regulations, supply any member of the public with a duly certified copy in writing of the particulars contained in any entry made in the register.

[(8) Nothing in subsection (6) or (7) applies to information which is included in an entry in the register only by reason of it falling within section 16(1)(h). **]**

20.— Duty to notify changes.

(1) For the purpose specified in subsection (2), notification regulations shall include provision imposing on every person in respect of whom an entry as a data controller is for the time being included in the register maintained under section 19 a duty to notify to the Commissioner, in such circumstances and at such time or times and in such form as may be prescribed, such matters relating to the registrable particulars and measures taken as mentioned in section 18(2)(b) as may be prescribed.

(2) The purpose referred to in subsection (1) is that of ensuring, so far as practicable, that at any time—

(a) the entries in the register maintained under section 19 contain current names and addresses and describe the current practice or intentions of the data controller with respect to the processing of personal data, and

(b) the Commissioner is provided with a general description of measures currently being taken as mentioned in section 18(2)(b).

(3) Subsection (3) of section 18 has effect in relation to notification regulations made by virtue of subsection (1) as it has effect in relation to notification regulations made by virtue of subsection (2) of that section.

(4) On receiving any notification under notification regulations made by virtue of subsection (1), the Commissioner shall make such amendments of the relevant entry in the register maintained under section 19 as are necessary to take account of the notification.

21.— Offences.

(1) If section 17(1) is contravened, the data controller is guilty of an offence.

(2) Any person who fails to comply with the duty imposed by notification regulations made by virtue of section 20(1) is guilty of an offence.

(3) It shall be a defence for a person charged with an offence under subsection (2) to show that he exercised all due diligence to comply with the duty.

22.— Preliminary assessment by Commissioner.

(1) In this section "assessable processing" means processing which is of a description specified in an order made by the **[** Secretary of State **]** as appearing to him to be particularly likely—

(a) to cause substantial damage or substantial distress to data subjects, or

(b) otherwise significantly to prejudice the rights and freedoms of data subjects.

(2) On receiving notification from any data controller under section 18 or under notification regulations made by virtue of section 20 the Commissioner shall consider—

(a) whether any of the processing to which the notification relates is assessable processing, and

(b) if so, whether the assessable processing is likely to comply with the provisions of this Act.

(3) Subject to subsection (4), the Commissioner shall, within the period of twenty-eight days beginning with the day on which he receives a notification which relates to assessable processing, give a notice to the data controller stating the extent to which the Commissioner is of the opinion that the processing is likely or unlikely to comply with the provisions of this Act.

(4) Before the end of the period referred to in subsection (3) the Commissioner may, by reason of special circumstances, extend that period on one occasion only by notice to the data controller by such further period not exceeding fourteen days as the Commissioner may specify in the notice.

(5) No assessable processing in respect of which a notification has been given to the Commissioner as mentioned in subsection (2) shall be carried on unless either—

(a) the period of twenty-eight days beginning with the day on which the notification is received by the Commissioner (or, in a case falling within subsection (4), that period as extended under that subsection) has elapsed, or

(b) before the end of that period (or that period as so extended) the data controller has received a notice from the Commissioner under subsection (3) in respect of the processing.

(6) Where subsection (5) is contravened, the data controller is guilty of an offence.

(7) The **[** Secretary of State **]** may by order amend subsections (3), (4) and (5) by substituting for the number of days for the time being specified there a different number specified in the order.

23.— Power to make provision for appointment of data protection supervisors.

(1) The **[** Secretary of State **]** may by order—

(a) make provision under which a data controller may appoint a person to act as a data protection supervisor responsible in particular for monitoring in an independent manner the data controller's compliance with the provisions of this Act, and

(b) provide that, in relation to any data controller who has appointed a data protection supervisor in accordance with the provisions of the order and who complies with such conditions as may be specified in the order, the provisions of this Part are to have effect subject to such exemptions or other modifications as may be specified in the order.

(2) An order under this section may—

(a) impose duties on data protection supervisors in relation to the Commissioner, and
(b) confer functions on the Commissioner in relation to data protection supervisors.

24.— Duty of certain data controllers to make certain information available.

(1) Subject to subsection (3), where personal data are processed in a case where—

(a) by virtue of subsection (2) or (3) of section 17, subsection (1) of that section does not apply to the processing, and
(b) the data controller has not notified the relevant particulars in respect of that processing under section 18,

the data controller must, within twenty-one days of receiving a written request from any person, make the relevant particulars available to that person in writing free of charge.

(2) In this section "the relevant particulars" means the particulars referred to in paragraphs (a) to (f) of section 16(1).

(3) This section has effect subject to any exemption conferred for the purposes of this section by notification regulations.

(4) Any data controller who fails to comply with the duty imposed by subsection (1) is guilty of an offence.

(5) It shall be a defence for a person charged with an offence under subsection (4) to show that he exercised all due diligence to comply with the duty.

25.— Functions of Commissioner in relation to making of notification regulations.

(1) As soon as practicable after the passing of this Act, the Commissioner shall submit to the Secretary of State proposals as to the provisions to be included in the first notification regulations.

(2) The Commissioner shall keep under review the working of notification regulations and may from time to time submit to the **[** Secretary of State **]** proposals as to amendments to be made to the regulations.

(3) The **[** Secretary of State **]** may from time to time require the Commissioner to consider any matter relating to notification regulations and to submit to him proposals as to amendments to be made to the regulations in connection with that matter.

(4) Before making any notification regulations, the **[** Secretary of State **]** shall—

(a) consider any proposals made to him by the Commissioner under **[** subsection (2) or (3) **]**, and
(b) consult the Commissioner.

26.— Fees regulations.

(1) Fees regulations prescribing fees for the purposes of any provision of this Part may provide for different fees to be payable in different cases.

(2) In making any fees regulations, the [Secretary of State] shall have regard to the desirability of securing that the fees payable to the Commissioner are sufficient to offset—

[(a) the expenses incurred by the Commissioner in discharging his functions under this Act and any expenses of the Secretary of State in respect of the Commissioner so far as attributable to those functions; and]

(b) to the extent that the [Secretary of State] considers appropriate—

(i) any deficit previously incurred (whether before or after the passing of this Act) in respect of the expenses mentioned in paragraph (a), and

(ii) expenses incurred or to be incurred by the [Secretary of State] in respect of the inclusion of any officers or staff of the Commissioner in any scheme under section 1 of the Superannuation Act 1972.

PART IV

Exemptions

27.— Preliminary.

(1) References in any of the data protection principles or any provision of Parts II and III to personal data or to the processing of personal data do not include references to data or processing which by virtue of this Part are exempt from that principle or other provision.

(2) In this Part "the subject information provisions" means —

(a) the first data protection principle to the extent to which it requires compliance with paragraph 2 of Part II of Schedule 1, and

(b) section 7.

(3) In this Part "the non-disclosure provisions" means the provisions specified in subsection (4) to the extent to which they are inconsistent with the disclosure in question.

(4) The provisions referred to in subsection (3) are—

(a) the first data protection principle, except to the extent to which it requires compliance with the conditions in Schedules 2 and 3,

(b) the second, third, fourth and fifth data protection principles, and

(c) sections 10 and 14(1) to (3).

(5) Except as provided by this Part, the subject information provisions shall have effect notwithstanding any enactment or rule of law prohibiting or restricting the disclosure, or authorising the withholding, of information.

28.— National security.

(1) Personal data are exempt from any of the provisions of—

(a) the data protection principles,

(b) Parts II, III and V, and

(c) **[** sections 54A and section 55 **]** ,

if the exemption from that provision is required for the purpose of safeguarding national security.

(2) Subject to subsection (4), a certificate signed by a Minister of the Crown certifying that exemption from all or any of the provisions mentioned in subsection (1) is or at any time was required for the purpose there mentioned in respect of any personal data shall be conclusive evidence of that fact.

(3) A certificate under subsection (2) may identify the personal data to which it applies by means of a general description and may be expressed to have prospective effect.

(4) Any person directly affected by the issuing of a certificate under subsection (2) may appeal to the Tribunal against the certificate.

(5) If on an appeal under subsection (4), the Tribunal finds that, applying the principles applied by the court on an application for judicial review, the Minister did not have reasonable grounds for issuing the certificate, the Tribunal may allow the appeal and quash the certificate.

(6) Where in any proceedings under or by virtue of this Act it is claimed by a data controller that a certificate under subsection (2) which identifies the personal data to which it applies by means of a general description applies to any personal data, any other party to the proceedings may appeal to the Tribunal on the ground that the certificate does not apply to the personal data in question and, subject to any determination under subsection (7), the certificate shall be conclusively presumed so to apply.

(7) On any appeal under subsection (6), the Tribunal may determine that the certificate does not so apply.

(8) A document purporting to be a certificate under subsection (2) shall be received in evidence and deemed to be such a certificate unless the contrary is proved.

(9) A document which purports to be certified by or on behalf of a Minister of the Crown as a true copy of a certificate issued by that Minister under subsection (2) shall in any legal proceedings be evidence (or, in Scotland, sufficient evidence) of that certificate.

(10) The power conferred by subsection (2) on a Minister of the Crown shall not be exercisable except by a Minister who is a member of the Cabinet or by the Attorney General or the **[** Advocate General **]** .

(11) No power conferred by any provision of Part V may be exercised in relation to personal data which by virtue of this section are exempt from that provision.

(12) Schedule 6 shall have effect in relation to appeals under subsection (4) or (6) and the proceedings of the Tribunal in respect of any such appeal.

29.— Crime and taxation.

(1) Personal data processed for any of the following purposes—

(a) the prevention or detection of crime,

(b) the apprehension or prosecution of offenders, or

(c) the assessment or collection of any tax or duty or of any imposition of a similar nature,

are exempt from the first data protection principle (except to the extent to which it requires compliance with the conditions in Schedules 2 and 3) and section 7 in any case to the extent to which the application of those provisions to the data would be likely to prejudice any of the matters mentioned in this subsection.

(2) Personal data which—

(a) are processed for the purpose of discharging statutory functions, and

(b) consist of information obtained for such a purpose from a person who had it in his possession for any of the purposes mentioned in subsection (1),

are exempt from the subject information provisions to the same extent as personal data processed for any of the purposes mentioned in that subsection.

(3) Personal data are exempt from the non-disclosure provisions in any case in which—

(a) the disclosure is for any of the purposes mentioned in subsection (1), and

(b) the application of those provisions in relation to the disclosure would be likely to prejudice any of the matters mentioned in that subsection.

(4) Personal data in respect of which the data controller is a relevant authority and which—

(a) consist of a classification applied to the data subject as part of a system of risk assessment which is operated by that authority for either of the following purposes—

(i) the assessment or collection of any tax or duty or any imposition of a similar nature, or

(ii) the prevention or detection of crime, or apprehension or prosecution of offenders, where the offence concerned involves any unlawful claim for any payment out of, or any unlawful application of, public funds, and

(b) are processed for either of those purposes,

are exempt from section 7 to the extent to which the exemption is required in the interests of the operation of the system.

(5) In subsection (4)—

"public funds" includes funds provided by any **[** EU **]** institution "relevant authority" means—

(a) a government department,

(b) a local authority, or

(c) any other authority administering housing benefit or council tax benefit.

30.— Health, education and social work.

(1) The **[** Secretary of State **]** may by order exempt from the subject information provisions, or modify those provisions in relation to, personal data

consisting of information as to the physical or mental health or condition of the data subject.

(2) The **[** Secretary of State **]** may by order exempt from the subject information provisions, or modify those provisions in relation to—

(a) personal data in respect of which the data controller is the proprietor of, or a teacher at, a school, and which consist of information relating to persons who are or have been pupils at the school, or

(b) personal data in respect of which the data controller is an education authority in Scotland, and which consist of information relating to persons who are receiving, or have received, further education provided by the authority.

(3) The **[** Secretary of State **]** may by order exempt from the subject information provisions, or modify those provisions in relation to, personal data of such other descriptions as may be specified in the order, being information—

(a) processed by government departments or local authorities or by voluntary organisations or other bodies designated by or under the order, and

(b) appearing to him to be processed in the course of, or for the purposes of, carrying out social work in relation to the data subject or other individuals;

but the **[** Secretary of State **]** shall not under this subsection confer any exemption or make any modification except so far as he considers that the application to the data of those provisions (or of those provisions without modification) would be likely to prejudice the carrying out of social work.

(4) An order under this section may make different provision in relation to data consisting of information of different descriptions.

(5) In this section—

"education authority" and "further education"have the same meaning as in the Education (Scotland) Act 1980 ("the 1980 Act"), and

"proprietor"—

(a) in relation to a school in England or Wales, has the same meaning as in the Education Act 1996,

(b) in relation to a school in Scotland, means—

(i) **[. . .]**

(ii) in the case of an independent school, the proprietor within the meaning of the 1980 Act,

(iii) in the case of a grant-aided school, the managers within the meaning of the 1980 Act, and

(iv) in the case of a public school, the education authority within the meaning of the 1980 Act, and

(c) in relation to a school in Northern Ireland, has the same meaning as in the Education and Libraries (Northern Ireland) Order 1986 and includes, in the case of a controlled school, the Board of Governors of the school.

31.— Regulatory activity.

(1) Personal data processed for the purposes of discharging functions to which this subsection applies are exempt from the subject information provisions in any case to the extent to which the application of those provisions to the data would be likely to prejudice the proper discharge of those functions.

(2) Subsection (1) applies to any relevant function which is designed—

(a) for protecting members of the public against—

(i) financial loss due to dishonesty, malpractice or other seriously improper conduct by, or the unfitness or incompetence of, persons concerned in the provision of banking, insurance, investment or other financial services or in the management of bodies corporate,

(ii) financial loss due to the conduct of discharged or undischarged bankrupts, or

(iii) dishonesty, malpractice or other seriously improper conduct by, or the unfitness or incompetence of, persons authorised to carry on any profession or other activity,

(b) for protecting charities **[** or community interest companies **]** against misconduct or mismanagement (whether by trustees **[** , directors **]** or other persons) in their administration,

(c) for protecting the property of charities **[** or community interest companies **]** from loss or misapplication,

(d) for the recovery of the property of charities **[** or community interest companies **]**,

(e) for securing the health, safety and welfare of persons at work, or

(f) for protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.

(3) In subsection (2) "relevant function" means—

(a) any function conferred on any person by or under any enactment,

(b) any function of the Crown, a Minister of the Crown or a government department, or

(c) any other function which is of a public nature and is exercised in the public interest.

(4) Personal data processed for the purpose of discharging any function which—

(a) is conferred by or under any enactment on—

(i) the Parliamentary Commissioner for Administration,

(ii) the Commission for Local Administration in England **[. . .] [. . .]**,

(iii) the Health Service Commissioner for England **[. . .] [. . .]**,

[(iv) the Public Services Ombudsman for Wales, **]**

(v) the Assembly Ombudsman for Northern Ireland, **[. . .]**

(vi) the Northern Ireland Commissioner for Complaints, **[** or **]**

[(vii) the Scottish Public Services Ombudsman, and **]**

(b) is designed for protecting members of the public against—

(i) maladministration by public bodies,

(ii) failures in services provided by public bodies, or
(iii) a failure of a public body to provide a service which it was a function of the body to provide,

are exempt from the subject information provisions in any case to the extent to which the application of those provisions to the data would be likely to prejudice the proper discharge of that function.

[(4A) Personal data processed for the purpose of discharging any function which is conferred by or under Part XVI of the Financial Services and Markets Act 2000 on the body established by the Financial Services Authority for the purposes of that Part are exempt from the subject information provisions in any case to the extent to which the application of those provisions to the data would be likely to prejudice the proper discharge of the function. **]**

[(4B) Personal data processed for the purposes of discharging any function of the Legal Services Board are exempt from the subject information provisions in any case to the extent to which the application of those provisions to the data would be likely to prejudice the proper discharge of the function. **]**

[(4C) Personal data processed for the purposes of the function of considering a complaint under the scheme established under Part 6 of the Legal Services Act 2007 (legal complaints) are exempt from the subject information provisions in any case to the extent to which the application of those provisions to the data would be likely to prejudice the proper discharge of the function. **]**

(5) Personal data processed for the purpose of discharging any function which—

(a) is conferred by or under any enactment on **[** the Office of Fair Trading **]**, and
(b) is designed—
(i) for protecting members of the public against conduct which may adversely affect their interests by persons carrying on a business,
(ii) for regulating agreements or conduct which have as their object or effect the prevention, restriction or distortion of competition in connection with any commercial activity, or
(iii) for regulating conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market,

are exempt from the subject information provisions in any case to the extent to which the application of those provisions to the data would be likely to prejudice the proper discharge of that function.

[(5A) Personal data processed by a CPC enforcer for the purpose of discharging any function conferred on such a body by or under the CPC Regulation are exempt from the subject information provisions in any case to the extent to which the application of those provisions to the data would be likely to prejudice the proper discharge of that function.

(5B) In subsection (5A)—

(a) "CPC enforcer"has the meaning given to it in section 213(5A) of the Enterprise Act 2002 but does not include the Office of Fair Trading;

(b) "CPC Regulation"has the meaning given to it in section 235A of that Act.

]

[(6) Personal data processed for the purpose of the function of considering a complaint under section 113(1) or (2) or 114(1) or (3) of the Health and Social Care (Community Health and Standards) Act 2003, or **[** section 24D, 26 or 26ZB of the Children Act 1989 **]**, are exempt from the subject information provisions in any case to the extent to which the application of those provisions to the data would be likely to prejudice the proper discharge of that function.**]**

[(7) Personal data processed for the purpose of discharging any function which is conferred by or under Part 3 of the Local Government Act 2000 on–

(a) the monitoring officer of a relevant authority, **[** or **]**

(b) **[. . .]**

(c) the Public Services Ombudsman for Wales,

are exempt from the subject information provisions in any case to the extent to which the application of those provisions to the data would be likely to prejudice the proper discharge of that function.

(8) In subsection (7)–

(a) "relevant authority"has the meaning given by section 49(6) of the Local Government Act 2000, and

(b) any reference to the monitoring officer of a relevant authority **[. . .]** has the same meaning as in Part 3 of that Act.

]

32.— Journalism, literature and art.

(1) Personal data which are processed only for the special purposes are exempt from any provision to which this subsection relates if—

(a) the processing is undertaken with a view to the publication by any person of any journalistic, literary or artistic material,

(b) the data controller reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and

(c) the data controller reasonably believes that, in all the circumstances, compliance with that provision is incompatible with the special purposes.

(2) Subsection (1) relates to the provisions of—

(a) the data protection principles except the seventh data protection principle,

(b) section 7,

(c) section 10,

(d) section 12, and

(dd) **[. . .]**

(e) section 14(1) to (3).

(3) In considering for the purposes of subsection (1)(b) whether the belief of a data controller that publication would be in the public interest was or

is a reasonable one, regard may be had to his compliance with any code of practice which—

(a) is relevant to the publication in question, and

(b) is designated by the **[** Secretary of State **]** by order for the purposes of this subsection.

(4) Where at any time ("the relevant time") in any proceedings against a data controller under **[** section 7(9), 10(4), 12(8) or 14 **]** or by virtue of section 13 the data controller claims, or it appears to the court, that any personal data to which the proceedings relate are being processed—

(a) only for the special purposes, and

(b) with a view to the publication by any person of any journalistic, literary or artistic material which, at the time twenty-four hours immediately before the relevant time, had not previously been published by the data controller,

the court shall stay the proceedings until either of the conditions in subsection (5) is met.

(5) Those conditions are—

(a) that a determination of the Commissioner under section 45 with respect to the data in question takes effect, or

(b) in a case where the proceedings were stayed on the making of a claim, that the claim is withdrawn.

(6) For the purposes of this Act "publish", in relation to journalistic, literary or artistic material, means make available to the public or any section of the public.

33.— Research, history and statistics.

(1) In this section—

"research purposes"includes statistical or historical purposes;

"the relevant conditions", in relation to any processing of personal data, means the conditions—

(a) that the data are not processed to support measures or decisions with respect to particular individuals, and

(b) that the data are not processed in such a way that substantial damage or substantial distress is, or is likely to be, caused to any data subject.

(2) For the purposes of the second data protection principle, the further processing of personal data only for research purposes in compliance with the relevant conditions is not to be regarded as incompatible with the purposes for which they were obtained.

(3) Personal data which are processed only for research purposes in compliance with the relevant conditions may, notwithstanding the fifth data protection principle, be kept indefinitely.

(4) Personal data which are processed only for research purposes are exempt from section 7 if—

(a) they are processed in compliance with the relevant conditions, and

(b) the results of the research or any resulting statistics are not made available in a form which identifies data subjects or any of them.

(5) For the purposes of subsections (2) to (4) personal data are not to be treated as processed otherwise than for research purposes merely because the data are disclosed—

(a) to any person, for research purposes only,
(b) to the data subject or a person acting on his behalf,
(c) at the request, or with the consent, of the data subject or a person acting on his behalf, or
(d) in circumstances in which the person making the disclosure has reasonable grounds for believing that the disclosure falls within paragraph (a), (b) or (c).

[33A.— Manual data held by public authorities.

(1) Personal data falling within paragraph (e) of the definition of "data" in section 1(1) are exempt from—

(a) the first, second, third, fifth, seventh and eighth data protection principles,
(b) the sixth data protection principle except so far as it relates to the rights conferred on data subjects by sections 7 and 14,
(c) sections 10 to 12,
(d) section 13, except so far as it relates to damage caused by a contravention of section 7 or of the fourth data protection principle and to any distress which is also suffered by reason of that contravention,
(e) Part III, and
(f) section 55.

(2) Personal data which fall within paragraph (e) of the definition of "data" in section 1(1) and relate to appointments or removals, pay, discipline, superannuation or other personnel matters, in relation to—

(a) service in any of the armed forces of the Crown,
(b) service in any office or employment under the Crown or under any public authority, or
(c) service in any office or employment, or under any contract for services, in respect of which power to take action, or to determine or approve the action taken, in such matters is vested in Her Majesty, any Minister of the Crown, the National Assembly for Wales, any Northern Ireland Minister (within the meaning of the Freedom of Information Act 2000) or any public authority,

are also exempt from the remaining data protection principles and the remaining provisions of Part II.

]

34. Information available to the public by or under enactment.

Personal data are exempt from—

(a) the subject information provisions,
(b) the fourth data protection principle and **[** section 14(1) to (3) **]** , and
(c) the non-disclosure provisions,

if the data consist of information which the data controller is obliged by or under any enactment **[** other than an enactment contained in the Freedom of Information Act 2000 **]** to make available to the public, whether by publishing it, by making it available for inspection, or otherwise and whether gratuitously or on payment of a fee.

35.— Disclosures required by law or made in connection with legal proceedings etc.

(1) Personal data are exempt from the non-disclosure provisions where the disclosure is required by or under any enactment, by any rule of law or by the order of a court.

(2) Personal data are exempt from the non-disclosure provisions where the disclosure is necessary—

(a) for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings), or

(b) for the purpose of obtaining legal advice,

or is otherwise necessary for the purposes of establishing, exercising or defending legal rights.

[35A. Parliamentary privilege.

Personal data are exempt from—

(a) the first data protection principle, except to the extent to which it requires compliance with the conditions in Schedules 2 and 3,

(b) the second, third, fourth and fifth data protection principles,

(c) section 7, and

(d) sections 10 and 14(1) to (3),

if the exemption is required for the purpose of avoiding an infringement of the privileges of either House of Parliament.

]

36. Domestic purposes.

Personal data processed by an individual only for the purposes of that individual's personal, family or household affairs (including recreational purposes) are exempt from the data protection principles and the provisions of Parts II and III.

37. Miscellaneous exemptions.

Schedule 7 (which confers further miscellaneous exemptions) has effect.

38.— Powers to make further exemptions by order.

(1) The **[** Secretary of State **]** may by order exempt from the subject information provisions personal data consisting of information the disclosure of which is prohibited or restricted by or under any enactment if and to the

extent that he considers it necessary for the safeguarding of the interests of the data subject or the rights and freedoms of any other individual that the prohibition or restriction ought to prevail over those provisions.

(2) The **[** Secretary of State **]** may by order exempt from the non-disclosure provisions any disclosures of personal data made in circumstances specified in the order, if he considers the exemption is necessary for the safeguarding of the interests of the data subject or the rights and freedoms of any other individual.

39. Transitional relief.

Schedule 8 (which confers transitional exemptions) has effect.

PART V

Enforcement

40.— Enforcement notices.

(1) If the Commissioner is satisfied that a data controller has contravened or is contravening any of the data protection principles, the Commissioner may serve him with a notice (in this Act referred to as "an enforcement notice") requiring him, for complying with the principle or principles in question, to do either or both of the following—

(a) to take within such time as may be specified in the notice, or to refrain from taking after such time as may be so specified, such steps as are so specified, or

(b) to refrain from processing any personal data, or any personal data of a description specified in the notice, or to refrain from processing them for a purpose so specified or in a manner so specified, after such time as may be so specified.

(2) In deciding whether to serve an enforcement notice, the Commissioner shall consider whether the contravention has caused or is likely to cause any person damage or distress.

(3) An enforcement notice in respect of a contravention of the fourth data protection principle which requires the data controller to rectify, block, erase or destroy any inaccurate data may also require the data controller to rectify, block, erase or destroy any other data held by him and containing an expression of opinion which appears to the Commissioner to be based on the inaccurate data.

(4) An enforcement notice in respect of a contravention of the fourth data protection principle, in the case of data which accurately record information received or obtained by the data controller from the data subject or a third party, may require the data controller either—

(a) to rectify, block, erase or destroy any inaccurate data and any other data held by him and containing an expression of opinion as mentioned in subsection (3), or

(b) to take such steps as are specified in the notice for securing compliance with the requirements specified in paragraph 7 of Part II of Schedule 1 and, if the Commissioner thinks fit, for supplementing the data with such statement of the true facts relating to the matters dealt with by the data as the Commissioner may approve.

(5) Where—

(a) an enforcement notice requires the data controller to rectify, block, erase or destroy any personal data, or

(b) the Commissioner is satisfied that personal data which have been rectified, blocked, erased or destroyed had been processed in contravention of any of the data protection principles,

an enforcement notice may, if reasonably practicable, require the data controller to notify third parties to whom the data have been disclosed of the rectification, blocking, erasure or destruction; and in determining whether it is reasonably practicable to require such notification regard shall be had, in particular, to the number of persons who would have to be notified.

(6) An enforcement notice must contain—

(a) a statement of the data protection principle or principles which the Commissioner is satisfied have been or are being contravened and his reasons for reaching that conclusion, and

(b) particulars of the rights of appeal conferred by section 48.

(7) Subject to subsection (8), an enforcement notice must not require any of the provisions of the notice to be complied with before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, the notice need not be complied with pending the determination or withdrawal of the appeal.

(8) If by reason of special circumstances the Commissioner considers that an enforcement notice should be complied with as a matter of urgency he may include in the notice a statement to that effect and a statement of his reasons for reaching that conclusion; and in that event subsection (7) shall not apply but the notice must not require the provisions of the notice to be complied with before the end of the period of seven days beginning with the day on which the notice is served.

(9) Notification regulations (as defined by section 16(2)) may make provision as to the effect of the service of an enforcement notice on any entry in the register maintained under section 19 which relates to the person on whom the notice is served.

(10) This section has effect subject to section 46(1).

41.— Cancellation of enforcement notice.

(1) If the Commissioner considers that all or any of the provisions of an enforcement notice need not be complied with in order to ensure compliance with the data protection principle or principles to which it relates, he may cancel or vary the notice by written notice to the person on whom it was served.

(2) A person on whom an enforcement notice has been served may, at any time after the expiry of the period during which an appeal can be brought against that notice, apply in writing to the Commissioner for the cancellation

or variation of that notice on the ground that, by reason of a change of circumstances, all or any of the provisions of that notice need not be complied with in order to ensure compliance with the data protection principle or principles to which that notice relates.

[41A Assessment notices

(1) The Commissioner may serve a data controller within subsection (2) with a notice (in this Act referred to as an "assessment notice") for the purpose of enabling the Commissioner to determine whether the data controller has complied or is complying with the data protection principles.

(2) A data controller is within this subsection if the data controller is—

(a) a government department,

(b) a public authority designated for the purposes of this section by an order made by the Secretary of State, or

(c) a person of a description designated for the purposes of this section by such an order.

(3) An assessment notice is a notice which requires the data controller to do all or any of the following—

(a) permit the Commissioner to enter any specified premises;

(b) direct the Commissioner to any documents on the premises that are of a specified description;

(c) assist the Commissioner to view any information of a specified description that is capable of being viewed using equipment on the premises;

(d) comply with any request from the Commissioner for—

(i) a copy of any of the documents to which the Commissioner is directed;

(ii) a copy (in such form as may be requested) of any of the information which the Commissioner is assisted to view;

(e) direct the Commissioner to any equipment or other material on the premises which is of a specified description;

(f) permit the Commissioner to inspect or examine any of the documents, information, equipment or material to which the Commissioner is directed or which the Commissioner is assisted to view;

(g) permit the Commissioner to observe the processing of any personal data that takes place on the premises;

(h) make available for interview by the Commissioner a specified number of persons of a specified description who process personal data on behalf of the data controller (or such number as are willing to be interviewed).

(4) In subsection (3) references to the Commissioner include references to the Commissioner's officers and staff.

(5) An assessment notice must, in relation to each requirement imposed by the notice, specify—

(a) the time at which the requirement is to be complied with, or

(b) the period during which the requirement is to be complied with.

(6) An assessment notice must also contain particulars of the rights of appeal conferred by section 48.

(7) The Commissioner may cancel an assessment notice by written notice to the data controller on whom it was served.

(8) Where a public authority has been designated by an order under subsection (2)(b) the Secretary of State must reconsider, at intervals of no greater than 5 years, whether it continues to be appropriate for the authority to be designated.

(9) The Secretary of State may not make an order under subsection (2)(c) which designates a description of persons unless—

(a) the Commissioner has made a recommendation that the description be designated, and

(b) the Secretary of State has consulted—

(i) such persons as appear to the Secretary of State to represent the interests of those that meet the description;

(ii) such other persons as the Secretary of State considers appropriate.

(10) The Secretary of State may not make an order under subsection (2)(c), and the Commissioner may not make a recommendation under subsection (9)(a), unless the Secretary of State or (as the case may be) the Commissioner is satisfied that it is necessary for the description of persons in question to be designated having regard to—

(a) the nature and quantity of data under the control of such persons, and

(b) any damage or distress which may be caused by a contravention by such persons of the data protection principles.

(11) Where a description of persons has been designated by an order under subsection (2)(c) the Secretary of State must reconsider, at intervals of no greater than 5 years, whether it continues to be necessary for the description to be designated having regard to the matters mentioned in subsection (10).

(12) In this section—

"public authority"includes any body, office-holder or other person in respect of which—

(a) an order may be made under section 4 or 5 of the Freedom of Information Act 2000, or

(b) an order may be made under section 4 or 5 of the Freedom of Information (Scotland) Act 2002;

"specified" means specified in an assessment notice.

]

[41B Assessment notices: limitations

(1) A time specified in an assessment notice under section 41A(5) in relation to a requirement must not fall, and a period so specified must not begin, before the end of the period within which an appeal can be brought against the notice, and if such an appeal is brought the requirement need not be complied with pending the determination or withdrawal of the appeal.

(2) If by reason of special circumstances the Commissioner considers that it is necessary for the data controller to comply with a requirement in an assessment notice as a matter of urgency, the Commissioner may include in the notice a statement to that effect and a statement of the reasons for that conclusion; and in that event subsection (1) applies in relation to the requirement as if for the words from "within" to the end there were substituted "of 7 days beginning with the day on which the notice is served".

(3) A requirement imposed by an assessment notice does not have effect in so far as compliance with it would result in the disclosure of—

(a) any communication between a professional legal adviser and the adviser's client in connection with the giving of legal advice with respect to the client's obligations, liabilities or rights under this Act, or

(b) any communication between a professional legal adviser and the adviser's client, or between such an adviser or the adviser's client and any other person, made in connection with or in contemplation of proceedings under or arising out of this Act (including proceedings before the Tribunal) and for the purposes of such proceedings.

(4) In subsection (3) references to the client of a professional legal adviser include references to any person representing such a client.

(5) Nothing in section 41A authorises the Commissioner to serve an assessment notice on—

(a) a judge,

(b) a body specified in section 23(3) of the Freedom of Information Act 2000 (bodies dealing with security matters), or

(c) the Office for Standards in Education, Children's Services and Skills in so far as it is a data controller in respect of information processed for the purposes of functions exercisable by Her Majesty's Chief Inspector of Eduction, Children's Services and Skills by virtue of section 5(1)(a) of the Care Standards Act 2000.

(6) In this section "judge"includes—

(a) a justice of the peace (or, in Northern Ireland, a lay magistrate),

(b) a member of a tribunal, and

(c) a clerk or other officer entitled to exercise the jurisdiction of a court or tribunal;

and in this subsection "tribunal" means any tribunal in which legal proceedings may be brought.

]

!Amendment(s) Pending

[41C Code of practice about assessment notices

(1) The Commissioner must prepare and issue a code of practice as to the manner in which the Commissioner's functions under and in connection with section 41A are to be exercised.

(2) The code must in particular—

(a) specify factors to be considered in determining whether to serve an assessment notice on a data controller;
(b) specify descriptions of documents and information that—
(i) are not to be examined or inspected in pursuance of an assessment notice, or
(ii) are to be so examined or inspected only by persons of a description specified in the code;
(c) deal with the nature of inspections and examinations carried out in pursuance of an assessment notice;
(d) deal with the nature of interviews carried out in pursuance of an assessment notice;
(e) deal with the preparation, issuing and publication by the Commissioner of assessment reports in respect of data controllers that have been served with assessment notices.

(3) The provisions of the code made by virtue of subsection (2)(b) must, in particular, include provisions that relate to—
(a) documents and information concerning an individual's physical or mental health;
(b) documents and information concerning the provision of social care for an individual.

(4) An assessment report is a report which contains—
(a) a determination as to whether a data controller has complied or is complying with the data protection principles,
(b) recommendations as to any steps which the data controller ought to take, or refrain from taking, to ensure compliance with any of those principles, and
(c) such other matters as are specified in the code.

(5) The Commissioner may alter or replace the code.

(6) If the code is altered or replaced, the Commissioner must issue the altered or replacement code.

(7) The Commissioner may not issue the code (or an altered or replacement code) without the approval of the Secretary of State.

(8) The Commissioner must arrange for the publication of the code (and any altered or replacement code) issued under this section in such form and manner as the Commissioner considers appropriate.

(9) In this section "social care"has the same meaning as in Part 1 of the Health and Social Care Act 2008 (see section 9(3) of that Act).

]

42.— Request for assessment.

(1) A request may be made to the Commissioner by or on behalf of any person who is, or believes himself to be, directly affected by any processing of personal data for an assessment as to whether it is likely or unlikely that the processing has been or is being carried out in compliance with the provisions of this Act.

(2) On receiving a request under this section, the Commissioner shall make an assessment in such manner as appears to him to be appropriate, unless he

has not been supplied with such information as he may reasonably require in order to—

(a) satisfy himself as to the identity of the person making the request, and

(b) enable him to identify the processing in question.

(3) The matters to which the Commissioner may have regard in determining in what manner it is appropriate to make an assessment include—

(a) the extent to which the request appears to him to raise a matter of substance,

(b) any undue delay in making the request, and

(c) whether or not the person making the request is entitled to make an application under section 7 in respect of the personal data in question.

(4) Where the Commissioner has received a request under this section he shall notify the person who made the request—

(a) whether he has made an assessment as a result of the request, and

(b) to the extent that he considers appropriate, having regard in particular to any exemption from section 7 applying in relation to the personal data concerned, of any view formed or action taken as a result of the request.

43.— Information notices.

(1) If the Commissioner—

(a) has received a request under section 42 in respect of any processing of personal data, or

(b) reasonably requires any information for the purpose of determining whether the data controller has complied or is complying with the data protection principles,

he may serve the data controller with a notice (in this Act referred to as "an information notice") requiring the data controller **[** to furnish the Commissioner with specified information relating to the request or to compliance with the principles **]**.

[(1A) In subsection (1) "specified information" means information—

(a) specified, or described, in the information notice, or

(b) falling within a category which is specified, or described, in the information notice.

(1B) The Commissioner may also specify in the information notice—

(a) the form in which the information must be furnished;

(b) the period within which, or the time and place at which, the information must be furnished.

]

(2) An information notice must contain—

(a) in a case falling within subsection (1)(a), a statement that the Commissioner has received a request under section 42 in relation to the specified processing, or

(b) in a case falling within subsection (1)(b), a statement that the Commissioner regards the specified information as relevant for

the purpose of determining whether the data controller has complied, or is complying, with the data protection principles and his reasons for regarding it as relevant for that purpose.

(3) An information notice must also contain particulars of the rights of appeal conferred by section 48.

(4) Subject to subsection (5), **[** a period specified in an information notice under subsection (1B)(b) must not end, and a time so specified must not fall, **]** before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, the information need not be furnished pending the determination or withdrawal of the appeal.

(5) If by reason of special circumstances the Commissioner considers that the information is required as a matter of urgency, he may include in the notice a statement to that effect and a statement of his reasons for reaching that conclusion; and in that event subsection (4) shall not apply, but the notice shall not require the information to be furnished before the end of the period of seven days beginning with the day on which the notice is served.

(6) A person shall not be required by virtue of this section to furnish the Commissioner with any information in respect of—

(a) any communication between a professional legal adviser and his client in connection with the giving of legal advice to the client with respect to his obligations, liabilities or rights under this Act, or

(b) any communication between a professional legal adviser and his client, or between such an adviser or his client and any other person, made in connection with or in contemplation of proceedings under or arising out of this Act (including proceedings before the Tribunal) and for the purposes of such proceedings.

(7) In subsection (6) references to the client of a professional legal adviser include references to any person representing such a client.

(8) A person shall not be required by virtue of this section to furnish the Commissioner with any information if the furnishing of that information would, by revealing evidence of the commission of any offence **[** , other than an offence under this Act or an offence within subsection (8A), **]** expose him to proceedings for that offence.

[(8A) The offences mentioned in subsection (8) are—

(a) an offence under section 5 of the Perjury Act 1911 (false statements made otherwise than on oath),

(b) an offence under section 44(2) of the Criminal Law (Consolidation) (Scotland) Act 1995 (false statements made otherwise than on oath), or

(c) an offence under Article 10 of the Perjury (Northern Ireland) Order 1979 (false statutory declarations and other false unsworn statements).

(8B) Any relevant statement provided by a person in response to a requirement under this section may not be used in evidence against that person on a prosecution for any offence under this Act (other than an offence under section 47) unless in the proceedings—

(a) in giving evidence the person provides information inconsistent with it, and
(b) evidence relating to it is adduced, or a question relating to it is asked, by that person or on that person's behalf.

(8C) In subsection (8B) "relevant statement", in relation to a requirement under this section, means—
(a) an oral statement, or
(b) a written statement made for the purposes of the requirement.
]

(9) The Commissioner may cancel an information notice by written notice to the person on whom it was served.

(10) This section has effect subject to section 46(3).

44.— Special information notices.

(1) If the Commissioner—
(a) has received a request under section 42 in respect of any processing of personal data, or
(b) has reasonable grounds for suspecting that, in a case in which proceedings have been stayed under section 32, the personal data to which the proceedings relate—
(i) are not being processed only for the special purposes, or
(ii) are not being processed with a view to the publication by any person of any journalistic, literary or artistic material which has not previously been published by the data controller,

he may serve the data controller with a notice (in this Act referred to as a "special information notice") requiring the data controller **[** to furnish the Commissioner with specified information for the purpose specified in subsection (2). **]**

[(1A) In subsection (1) "specified information" means information—
(a) specified, or described, in the special information notice, or
(b) falling within a category which is specified, or described, in the special information notice.

(1B) The Commissioner may also specify in the special information notice—
(a) the form in which the information must be furnished;
(b) the period within which, or the time and place at which, the information must be furnished.
]

(2) That purpose is the purpose of ascertaining—
(a) whether the personal data are being processed only for the special purposes, or
(b) whether they are being processed with a view to the publication by any person of any journalistic, literary or artistic material which has not previously been published by the data controller.

(3) A special information notice must contain—
(a) in a case falling within paragraph (a) of subsection (1), a statement that the Commissioner has received a request under section 42 in relation to the specified processing, or

(b) in a case falling within paragraph (b) of that subsection, a statement of the Commissioner's grounds for suspecting that the personal data are not being processed as mentioned in that paragraph.

(4) A special information notice must also contain particulars of the rights of appeal conferred by section 48.

(5) Subject to subsection (6), **[** a period specified in a special information notice under subsection (1B)(b) must not end, and a time so specified must not fall, **]** before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, the information need not be furnished pending the determination or withdrawal of the appeal.

(6) If by reason of special circumstances the Commissioner considers that the information is required as a matter of urgency, he may include in the notice a statement to that effect and a statement of his reasons for reaching that conclusion; and in that event subsection (5) shall not apply, but the notice shall not require the information to be furnished before the end of the period of seven days beginning with the day on which the notice is served.

(7) A person shall not be required by virtue of this section to furnish the Commissioner with any information in respect of—

(a) any communication between a professional legal adviser and his client in connection with the giving of legal advice to the client with respect to his obligations, liabilities or rights under this Act, or

(b) any communication between a professional legal adviser and his client, or between such an adviser or his client and any other person, made in connection with or in contemplation of proceedings under or arising out of this Act (including proceedings before the Tribunal) and for the purposes of such proceedings.

(8) In subsection (7) references to the client of a professional legal adviser include references to any person representing such a client.

(9) A person shall not be required by virtue of this section to furnish the Commissioner with any information if the furnishing of that information would, by revealing evidence of the commission of any offence **[** , other than an offence under this Act or an offence within subsection (9A), **]** expose him to proceedings for that offence.

[(9A) The offences mentioned in subsection (9) are—

(a) an offence under section 5 of the Perjury Act 1911 (false statements made otherwise than on oath),

(b) an offence under section 44(2) of the Criminal Law (Consolidation) (Scotland) Act 1995 (false statements made otherwise than on oath), or

(c) an offence under Article 10 of the Perjury (Northern Ireland) Order 1979 (false statutory declarations and other false unsworn statements).

(9B) Any relevant statement provided by a person in response to a requirement under this section may not be used in evidence against that person on a prosecution for any offence under this Act (other than an offence under section 47) unless in the proceedings—

(a) in giving evidence the person provides information inconsistent with it, and
(b) evidence relating to it is adduced, or a question relating to it is asked, by that person or on that person's behalf.

(9C) In subsection (9B) "relevant statement", in relation to a requirement under this section, means—

(a) an oral statement, or
(b) a written statement made for the purposes of the requirement.

]

(10) The Commissioner may cancel a special information notice by written notice to the person on whom it was served.

45.— Determination by Commissioner as to the special purposes.

(1) Where at any time it appears to the Commissioner (whether as a result of the service of a special information notice or otherwise) that any personal data—

(a) are not being processed only for the special purposes, or
(b) are not being processed with a view to the publication by any person of any journalistic, literary or artistic material which has not previously been published by the data controller,

he may make a determination in writing to that effect.

(2) Notice of the determination shall be given to the data controller; and the notice must contain particulars of the right of appeal conferred by section 48.

(3) A determination under subsection (1) shall not take effect until the end of the period within which an appeal can be brought and, where an appeal is brought, shall not take effect pending the determination or withdrawal of the appeal.

46.— Restriction on enforcement in case of processing for the special purposes.

(1) The Commissioner may not at any time serve an enforcement notice on a data controller with respect to the processing of personal data for the special purposes unless—

(a) a determination under section 45(1) with respect to those data has taken effect, and
(b) the court has granted leave for the notice to be served.

(2) The court shall not grant leave for the purposes of subsection (1)(b) unless it is satisfied—

(a) that the Commissioner has reason to suspect a contravention of the data protection principles which is of substantial public importance, and
(b) except where the case is one of urgency, that the data controller has been given notice, in accordance with rules of court, of the application for leave.

(3) The Commissioner may not serve an information notice on a data controller with respect to the processing of personal data for the special purposes

unless a determination under section 45(1) with respect to those data has taken effect.

47.— Failure to comply with notice.

(1) A person who fails to comply with an enforcement notice, an information notice or a special information notice is guilty of an offence.

(2) A person who, in purported compliance with an information notice or a special information notice—

(a) makes a statement which he knows to be false in a material respect, or

(b) recklessly makes a statement which is false in a material respect, is guilty of an offence.

(3) It is a defence for a person charged with an offence under subsection (1) to prove that he exercised all due diligence to comply with the notice in question.

48.— Rights of appeal.

(1) A person on whom an enforcement notice **[**, an assessment notice **]**, an information notice or a special information notice has been served may appeal to the Tribunal against the notice.

(2) A person on whom an enforcement notice has been served may appeal to the Tribunal against the refusal of an application under section 41(2) for cancellation or variation of the notice.

(3) Where an enforcement notice **[**, an assessment notice **]**, an information notice or a special information notice contains a statement by the Commissioner in accordance with **[** section 40(8), 41B(2), 43(5) or 44(6) **]** then, whether or not the person appeals against the notice, he may appeal against—

(a) the Commissioner's decision to include the statement in the notice, or

(b) the effect of the inclusion of the statement as respects any part of the notice.

(4) A data controller in respect of whom a determination has been made under section 45 may appeal to the Tribunal against the determination.

(5) Schedule 6 has effect in relation to appeals under this section and the proceedings of the Tribunal in respect of any such appeal.

49.— Determination of appeals.

(1) If on an appeal under section 48(1) the Tribunal considers—

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice or decision as could have been served or made by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any determination of fact on which the notice in question was based.

(3) If on an appeal under section 48(2) the Tribunal considers that the enforcement notice ought to be cancelled or varied by reason of a change in circumstances, the Tribunal shall cancel or vary the notice.

(4) On an appeal under subsection (3) of section 48 the Tribunal may direct—

(a) that the notice in question shall have effect as if it did not contain any such statement as is mentioned in that subsection, or

(b) that the inclusion of the statement shall not have effect in relation to any part of the notice,

and may make such modifications in the notice as may be required for giving effect to the direction.

(5) On an appeal under section 48(4), the Tribunal may cancel the determination of the Commissioner.

(6)-(7) **[. . .]**

50. Powers of entry and inspection.

Schedule 9 (powers of entry and inspection) has effect.

PART VI Miscellaneous and general

Functions of Commissioner

51.— General duties of Commissioner.

(1) It shall be the duty of the Commissioner to promote the following of good practice by data controllers and, in particular, so to perform his functions under this Act as to promote the observance of the requirements of this Act by data controllers.

(2) The Commissioner shall arrange for the dissemination in such form and manner as he considers appropriate of such information as it may appear to him expedient to give to the public about the operation of this Act, about good practice, and about other matters within the scope of his functions under this Act, and may give advice to any person as to any of those matters.

(3) Where—

(a) the **[** Secretary of State **]** so directs by order, or

(b) the Commissioner considers it appropriate to do so,

the Commissioner shall, after such consultation with trade associations, data subjects or persons representing data subjects as appears to him to be appropriate, prepare and disseminate to such persons as he considers appropriate codes of practice for guidance as to good practice.

(4) The Commissioner shall also—

(a) where he considers it appropriate to do so, encourage trade associations to prepare, and to disseminate to their members, such codes of practice, and

(b) where any trade association submits a code of practice to him for his consideration, consider the code and, after such consultation with data subjects or persons representing data subjects as appears to him to be appropriate, notify the trade association whether in his opinion the code promotes the following of good practice.

(5) An order under subsection (3) shall describe the personal data or processing to which the code of practice is to relate, and may also describe the persons or classes of persons to whom it is to relate.

[(5A) In determining the action required to discharge the duties imposed by subsections (1) to (4), the Commissioner may take account of any action taken to discharge the duty imposed by section 52A (data-sharing code). **]**

(6) The Commissioner shall arrange for the dissemination in such form and manner as he considers appropriate of—

(a) any Community finding as defined by paragraph 15(2) of Part II of Schedule 1,

(b) any decision of the European Commission, under the procedure provided for in Article 31(2) of the Data Protection Directive, which is made for the purposes of Article 26(3) or (4) of the Directive, and

(c) such other information as it may appear to him to be expedient to give to data controllers in relation to any personal data about the protection of the rights and freedoms of data subjects in relation to the processing of personal data in countries and territories outside the European Economic Area.

(7) The Commissioner may, with the consent of the data controller, assess any processing of personal data for the following of good practice and shall inform the data controller of the results of the assessment.

(8) The Commissioner may charge such sums as he may with the consent of the **[** Secretary of State **]** determine for any services provided by the Commissioner by virtue of this Part.

(9) In this section—

"good practice" means such practice in the processing of personal data as appears to the Commissioner to be desirable having regard to the interests of data subjects and others, and includes (but is not limited to) compliance with the requirements of this Act;

"trade association"includes any body representing data controllers.

52.— Reports and codes of practice to be laid before Parliament.

(1) The Commissioner shall lay annually before each House of Parliament a general report on the exercise of his functions under this Act.

(2) The Commissioner may from time to time lay before each House of Parliament such other reports with respect to those functions as he thinks fit.

(3) The Commissioner shall lay before each House of Parliament any code of practice prepared under section 51(3) for complying with a direction of the **[** Secretary of State **]**, unless the code is included in any report laid under subsection (1) or (2).

[52A Data-sharing code

(1) The Commissioner must prepare a code of practice which contains—

(a) practical guidance in relation to the sharing of personal data in accordance with the requirements of this Act, and

(b) such other guidance as the Commissioner considers appropriate to promote good practice in the sharing of personal data.

(2) For this purpose "good practice" means such practice in the sharing of personal data as appears to the Commissioner to be desirable having regard to the interests of data subjects and others, and includes (but is not limited to) compliance with the requirements of this Act.

(3) Before a code is prepared under this section, the Commissioner must consult such of the following as the Commissioner considers appropriate—

(a) trade associations (within the meaning of section 51);

(b) data subjects;

(c) persons who appear to the Commissioner to represent the interests of data subjects.

(4) In this section a reference to the sharing of personal data is to the disclosure of the data by transmission, dissemination or otherwise making it available.

]

[52B Data-sharing code: procedure

(1) When a code is prepared under section 52A, it must be submitted to the Secretary of State for approval.

(2) Approval may be withheld only if it appears to the Secretary of State that the terms of the code could result in the United Kingdom being in breach of any of its **[** EU **]** obligations or any other international obligation.

(3) The Secretary of State must—

(a) if approval is withheld, publish details of the reasons for withholding it;

(b) if approval is granted, lay the code before Parliament.

(4) If, within the 40-day period, either House of Parliament resolves not to approve the code, the code is not to be issued by the Commissioner.

(5) If no such resolution is made within that period, the Commissioner must issue the code.

(6) Where—

(a) the Secretary of State withholds approval, or

(b) such a resolution is passed, the Commissioner must prepare another code of practice under section 52A.

(7) Subsection (4) does not prevent a new code being laid before Parliament.

(8) A code comes into force at the end of the period of 21 days beginning with the day on which it is issued.

(9) A code may include transitional provision or savings.

(10) In this section "the 40-day period" means the period of 40 days beginning with the day on which the code is laid before Parliament (or, if it is not laid before each House of Parliament on the same day, the later of the 2 days on which it is laid).

(11) In calculating the 40-day period, no account is to be taken of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than 4 days.

]

[52C Alteration or replacement of data-sharing code

(1) The Commissioner—

(a) must keep the data-sharing code under review, and

(b) may prepare an alteration to that code or a replacement code.

(2) Where, by virtue of a review under subsection (1)(a) or otherwise, the Commissioner becomes aware that the terms of the code could result in the United Kingdom being in breach of any of its **[** EU **]** obligations or any other international obligation, the Commissioner must exercise the power under subsection (1)(b) with a view to remedying the situation.

(3) Before an alteration or replacement code is prepared under subsection (1), the Commissioner must consult such of the following as the Commissioner considers appropriate—

(a) trade associations (within the meaning of section 51);

(b) data subjects;

(c) persons who appear to the Commissioner to represent the interests of data subjects.

(4) Section 52B (other than subsection (6)) applies to an alteration or replacement code prepared under this section as it applies to the code as first prepared under section 52A.

(5) In this section "the data-sharing code" means the code issued under section 52B(5) (as altered or replaced from time to time).

]

[52D Publication of data-sharing code

(1) The Commissioner must publish the code (and any replacement code) issued under section 52B(5).

(2) Where an alteration is so issued, the Commissioner must publish either—

(a) the alteration, or

(b) the code or replacement code as altered by it.

]

[52E Effect of data-sharing code

(1) A failure on the part of any person to act in accordance with any provision of the data-sharing code does not of itself render that person liable to any legal proceedings in any court or tribunal.

(2) The data-sharing code is admissible in evidence in any legal proceedings.

(3) If any provision of the data-sharing code appears to—

(a) the Tribunal or a court conducting any proceedings under this Act,

(b) a court or tribunal conducting any other legal proceedings, or

(c) the Commissioner carrying out any function under this Act, to

be relevant to any question arising in the proceedings, or in connection with the exercise of that jurisdiction or the carrying out of those functions, in relation to any time when it was in force, that provision of the code must be taken into account in determining that question.

(4) In this section "the data-sharing code" means the code issued under section 52B(5) (as altered or replaced from time to time).

]

53.— Assistance by Commissioner in cases involving processing for the special purposes.

(1) An individual who is an actual or prospective party to any proceedings under **[** section 7(9), 10(4), 12(8) or 14 **]** or by virtue of section 13 which relate to personal data processed for the special purposes may apply to the Commissioner for assistance in relation to those proceedings.

(2) The Commissioner shall, as soon as reasonably practicable after receiving an application under subsection (1), consider it and decide whether and to what extent to grant it, but he shall not grant the application unless, in his opinion, the case involves a matter of substantial public importance.

(3) If the Commissioner decides to provide assistance, he shall, as soon as reasonably practicable after making the decision, notify the applicant, stating the extent of the assistance to be provided.

(4) If the Commissioner decides not to provide assistance, he shall, as soon as reasonably practicable after making the decision, notify the applicant of his decision and, if he thinks fit, the reasons for it.

(5) In this section—

(a) references to "proceedings"include references to prospective proceedings, and

(b) "applicant", in relation to assistance under this section, means an individual who applies for assistance.

(6) Schedule 10 has effect for supplementing this section.

54.— International co-operation.

(1) The Commissioner—

(a) shall continue to be the designated authority in the United Kingdom for the purposes of Article 13 of the Convention, and

(b) shall be the supervisory authority in the United Kingdom for the purposes of the Data Protection Directive.

(2) The **[** Secretary of State **]** may by order make provision as to the functions to be discharged by the Commissioner as the designated authority in the United Kingdom for the purposes of Article 13 of the Convention.

(3) The **[** Secretary of State **]** may by order make provision as to co-operation by the Commissioner with the European Commission and with supervisory authorities in other EEA States in connection with the performance of their respective duties and, in particular, as to—

(a) the exchange of information with supervisory authorities in other EEA States or with the European Commission, and

(b) the exercise within the United Kingdom at the request of a supervisory authority in another EEA State, in cases excluded by section 5 from the application of the other provisions of this Act, of functions of the Commissioner specified in the order.

(4) The Commissioner shall also carry out any data protection functions which the **[** Secretary of State **]** [1] may by order direct him to carry out for the purpose of enabling Her Majesty's Government in the United Kingdom to give effect to any international obligations of the United Kingdom.

(5) The Commissioner shall, if so directed by the **[** Secretary of State **]**, provide any authority exercising data protection functions under the law of a colony specified in the direction with such assistance in connection with the discharge of those functions as the **[** Secretary of State **]** may direct or approve, on such terms (including terms as to payment) as the **[** Secretary of State **]** may direct or approve.

(6) Where the European Commission makes a decision for the purposes of Article 26(3) or (4) of the Data Protection Directive under the procedure provided for in Article 31(2) of the Directive, the Commissioner shall comply with that decision in exercising his functions under paragraph 9 of Schedule 4 or, as the case may be, paragraph 8 of that Schedule.

(7) The Commissioner shall inform the European Commission and the supervisory authorities in other EEA States—

(a) of any approvals granted for the purposes of paragraph 8 of Schedule 4, and

(b) of any authorisations granted for the purposes of paragraph 9 of that Schedule.

(8) In this section—

"the Convention" means the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data which was opened for signature on 28th January 1981;

"data protection functions" means functions relating to the protection of individuals with respect to the processing of personal information.

[54A Inspection of overseas information systems

(1) The Commissioner may inspect any personal data recorded in–

(a) the Schengen information system,

(b) the Europol information system,

(c) the Customs information system.

(2) The power conferred by subsection (1) is exercisable only for the purpose of assessing whether or not any processing of the data has been or is being carried out in compliance with this Act.

(3) The power includes power to inspect, operate and test equipment which is used for the processing of personal data.

(4) Before exercising the power, the Commissioner must give notice in writing of his intention to do so to the data controller.

(5) But subsection (4) does not apply if the Commissioner considers that the case is one of urgency.

(6) Any person who–

(a) intentionally obstructs a person exercising the power conferred by subsection (1), or

(b) fails without reasonable excuse to give any person exercising the power any assistance he may reasonably require, is guilty of an offence.

(7) In this section–

"the Customs information system" means the information system established under Chapter II of the Convention on the Use of Information Technology for Customs Purposes,

"the Europol information system" means the information system established under Title II of the Convention on the Establishment of a European Police Office,

"the Schengen information system" means the information system established under Title IV of the Convention implementing the Schengen Agreement of 14th June 1985, or any system established in its place in pursuance of any **[**EU**]** obligation.

]

Unlawful obtaining etc. of personal data

55.— Unlawful obtaining etc. of personal data.

(1) A person must not knowingly or recklessly, without the consent of the data controller—

(a) obtain or disclose personal data or the information contained in personal data, or

(b) procure the disclosure to another person of the information contained in personal data.

(2) Subsection (1) does not apply to a person who shows—

(a) that the obtaining, disclosing or procuring—

(i) was necessary for the purpose of preventing or detecting crime, or

(ii) was required or authorised by or under any enactment, by any rule of law or by the order of a court,

(b) that he acted in the reasonable belief that he had in law the right to obtain or disclose the data or information or, as the case may be, to procure the disclosure of the information to the other person,

(c) that he acted in the reasonable belief that he would have had the consent of the data controller if the data controller had known of the obtaining, disclosing or procuring and the circumstances of it, or

(d) that in the particular circumstances the obtaining, disclosing or procuring was justified as being in the public interest.

(3) A person who contravenes subsection (1) is guilty of an offence.

(4) A person who sells personal data is guilty of an offence if he has obtained the data in contravention of subsection (1).

(5) A person who offers to sell personal data is guilty of an offence if—

(a) he has obtained the data in contravention of subsection (1), or

(b) he subsequently obtains the data in contravention of that subsection.

(6) For the purposes of subsection (5), an advertisement indicating that personal data are or may be for sale is an offer to sell the data.

(7) Section 1(2) does not apply for the purposes of this section; and for the purposes of subsections (4) to (6), "personal data" includes information extracted from personal data.

(8) References in this section to personal data do not include references to personal data which by virtue of **[** section 28 or 33A **]** are exempt from this section.

[*Monetary penalties* ***]***

[55A Power of Commissioner to impose monetary penalty

[(1) The Commissioner may serve a data controller with a monetary penalty notice if the Commissioner is satisfied that—

(a) there has been a serious contravention of section 4(4) by the data controller,

(b) the contravention was of a kind likely to cause substantial damage or substantial distress, and

(c) subsection (2) or (3) applies.

(2) This subsection applies if the contravention was deliberate.

(3) This subsection applies if the data controller—

(a) knew or ought to have known—

(i) that there was a risk that the contravention would occur, and

(ii) that such a contravention would be of a kind likely to cause substantial damage or substantial distress, but

(b) failed to take reasonable steps to prevent the contravention.

]

[(3A) The Commissioner may not be satisfied as mentioned in subsection (1) by virtue of any matter which comes to the Commissioner's attention as a result of anything done in pursuance of—

(a) an assessment notice;

(b) an assessment under section 51(7).

]

(4) A monetary penalty notice is a notice requiring the data controller to pay to the Commissioner a monetary penalty of an amount determined by the Commissioner and specified in the notice.

(5) The amount determined by the Commissioner must not exceed the prescribed amount.

[(6) The monetary penalty must be paid to the Commissioner within the period specified in the notice. **]**

(7) The notice must contain such information as may be prescribed.

[(8) Any sum received by the Commissioner by virtue of this section must be paid into the Consolidated Fund. **]**

(9) In this section—
"data controller"does not include the Crown Estate Commissioners or a person who is a data controller by virtue of section 63(3);
"prescribed" means prescribed by regulations made by the Secretary of State.
]

Extent

Pt VI s. 55A(1)-(9) definition of "prescribed": United Kingdom

[55B Monetary penalty notices: procedural rights

[(1) Before serving a monetary penalty notice, the Commissioner must serve the data controller with a notice of intent. **]**
(2) A notice of intent is a notice that the Commissioner proposes to serve a monetary penalty notice.
(3) A notice of intent must—
[(a) inform the data controller that he may make written representations in relation to the Commissioner's proposal within a period specified in the notice, and **]**
(b) contain such other information as may be prescribed.
[(4) The Commissioner may not serve a monetary penalty notice until the time within which the data controller may make representations has expired.
(5) A person on whom a monetary penalty notice is served may appeal to the Tribunal against—
(a) the issue of the monetary penalty notice;
(b) the amount of the penalty specified in the notice.
]
(6) In this section, "prescribed" means prescribed by regulations made by the Secretary of State.
]

[55C Guidance about monetary penalty notices

(1) The Commissioner must prepare and issue guidance on how he proposes to exercise his functions under sections 55A and 55B.
(2) The guidance must, in particular, deal with—
(a) the circumstances in which he would consider it appropriate to issue a monetary penalty notice, and
(b) how he will determine the amount of the penalty.
(3) The Commissioner may alter or replace the guidance.
(4) If the guidance is altered or replaced, the Commissioner must issue the altered or replacement guidance.
(5) The Commissioner may not issue guidance under this section without the approval of the Secretary of State.
(6) The Commissioner must lay any guidance issued under this section before each House of Parliament.

(7) The Commissioner must arrange for the publication of any guidance issued under this section in such form and manner as he considers appropriate.

(8) In subsections (5) to (7), "guidance"includes altered or replacement guidance.

]

[55D Monetary penalty notices: enforcement

(1) This section applies in relation to any penalty payable to the Commissioner by virtue of section 55A.

(2) In England and Wales, the penalty is recoverable—

(a) if a county court so orders, as if it were payable under an order of that court;

(b) if the High Court so orders, as if it were payable under an order of that court.

(3) In Scotland, the penalty may be enforced in the same manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.

(4) In Northern Ireland, the penalty is recoverable—

(a) if a county court so orders, as if it were payable under an order of that court;

(b) if the High Court so orders, as if it were payable under an order of that court.

]

[55E Notices under sections 55A and 55B: supplemental

(1) The Secretary of State may by order make further provision in connection with monetary penalty notices and notices of intent.

(2) An order under this section may in particular—

(a) provide that a monetary penalty notice may not be served on a data controller with respect to the processing of personal data for the special purposes except in circumstances specified in the order;

(b) make provision for the cancellation or variation of monetary penalty notices;

(c) confer rights of appeal to the Tribunal against decisions of the Commissioner in relation to the cancellation or variation of such notices;

(d) **[. . .]**

(e) make provision for the determination of **[** appeals made by virtue of paragraph (c) **] [** . **]**

(f) **[. . .]**

(3) An order under this section may apply any provision of this Act with such modifications as may be specified in the order.

(4) An order under this section may amend this Act.

]

Records obtained under data subject's right of access

56.— Prohibition of requirement as to production of certain records.

(1) A person must not, in connection with—

(a) the recruitment of another person as an employee,

(b) the continued employment of another person, or

(c) any contract for the provision of services to him by another person,

require that other person or a third party to supply him with a relevant record or to produce a relevant record to him.

(2) A person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public must not, as a condition of providing or offering to provide any goods, facilities or services to another person, require that other person or a third party to supply him with a relevant record or to produce a relevant record to him.

(3) Subsections (1) and (2) do not apply to a person who shows—

(a) that the imposition of the requirement was required or authorised by or under any enactment, by any rule of law or by the order of a court, or

(b) that in the particular circumstances the imposition of the requirement was justified as being in the public interest.

(4) Having regard to the provisions of Part V of the Police Act 1997 (certificates of criminal records etc.), the imposition of the requirement referred to in subsection (1) or (2) is not to be regarded as being justified as being in the public interest on the ground that it would assist in the prevention or detection of crime.

(5) A person who contravenes subsection (1) or (2) is guilty of an offence.

(6) In this section "a relevant record" means any record which—

(a) has been or is to be obtained by a data subject from any data controller specified in the first column of the Table below in the exercise of the right conferred by section 7, and

(b) contains information relating to any matter specified in relation to that data controller in the second column,

and includes a copy of such a record or a part of such a record.

TABLE

Data controller	***Subject-matter***
1. Any of the following persons—	(a) Convictions.
(a) a chief officer of police of a police force in England and Wales.	(b) Cautions.
(b) a chief constable of a police force in Scotland.	

(c) the Chief Constable of the Royal Ulster Constabulary.	
[(d) the Director General of the Serious Organised Crime Agency.	**]**
2. The Secretary of State.	(a) Convictions.
	(b) Cautions.
	(c) His functions under **[** section 92 of the Powers of Criminal Courts (Sentencing) Act 2000 **]** , section 205(2) or 208 of the Criminal Procedure (Scotland) Act 1995 or section 73 of the Children and Young Persons Act (Northern Ireland) 1968 in relation to any person sentenced to detention.
	(d) His functions under the Prison Act 1952, the Prisons (Scotland) Act 1989 or the Prison Act (Northern Ireland) 1953 in relation to any person imprisoned or detained.
	(e) His functions under the Social Security Contributions and Benefits Act 1992, the Social Security Administration Act 1992 **[** , the Jobseekers Act 1995 or Part 1 of the Welfare Reform Act 2007 **]** .
	(f) His functions under Part V of the Police Act 1997.
	(g) His functions under the Safeguarding Vulnerable Groups Act 2006 **[** or the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 **]** .**]**
3. The Department of Health and Social Services for Northern Ireland.	Its functions under the Social Security Contributions and Benefits (Northern Ireland) Act 1992, the Social Security Administration (Northern Ireland) Act 1992 **[** , the Jobseekers (Northern Ireland) Order 1995 or Part 1 of the Welfare Reform Act (Northern Ireland) 2007 . **]**
[4. The **[** Independent Safeguarding Authority**]**	Its functions under the Safeguarding Vulnerable Groups Act 2006 **[** or the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 **]** .**]**
[5. The Scottish Ministers.	Their functions under Parts 1 and 2 of the Protection of Vulnerable Groups (Scotland) Act 2007 (asp 14).**]**

[(6A) A record is not a relevant record to the extent that it relates, or is to relate, only to personal data falling within paragraph (e) of the definition of "data" in section 1(1).**]**

(7) In the Table in subsection (6)—

"caution" means a caution given to any person in England and Wales or Northern Ireland in respect of an offence which, at the time when the caution is given, is admitted; "conviction" has the same meaning as in the Rehabilitation of Offenders Act 1974 or the Rehabilitation of Offenders (Northern Ireland) Order 1978.

(8) The **[** Secretary of State **]** may by order amend—

(a) the Table in subsection (6), and

(b) subsection (7).

(9) For the purposes of this section a record which states that a data controller is not processing any personal data relating to a particular matter shall be taken to be a record containing information relating to that matter.

(10) In this section "employee" means an individual who—

(a) works under a contract of employment, as defined by section 230(2) of the Employment Rights Act 1996, or

(b) holds any office,

whether or not he is entitled to remuneration;

and "employment" shall be construed accordingly.

57.— Avoidance of certain contractual terms relating to health records.

(1) Any term or condition of a contract is void in so far as it purports to require an individual—

(a) to supply any other person with a record to which this section applies, or with a copy of such a record or a part of such a record, or

(b) to produce to any other person such a record, copy or part.

(2) This section applies to any record which—

(a) has been or is to be obtained by a data subject in the exercise of the right conferred by section 7, and

(b) consists of the information contained in any health record as defined by section 68(2).

Information provided to Commissioner or Tribunal

58. Disclosure of information.

No enactment or rule of law prohibiting or restricting the disclosure of information shall preclude a person from furnishing the Commissioner or the Tribunal with any information necessary for the discharge of their functions under this Act **[** or the Freedom of Information Act 2000 **]**.

59.— Confidentiality of information.

(1) No person who is or has been the Commissioner, a member of the Commissioner's staff or an agent of the Commissioner shall disclose any information which—

(a) has been obtained by, or furnished to, the Commissioner under or for the purposes of **[** the information Acts **]**,

(b) relates to an identified or identifiable individual or business, and

(c) is not at the time of the disclosure, and has not previously been, available to the public from other sources,

unless the disclosure is made with lawful authority.

(2) For the purposes of subsection (1) a disclosure of information is made with lawful authority only if, and to the extent that—

(a) the disclosure is made with the consent of the individual or of the person for the time being carrying on the business,

(b) the information was provided for the purpose of its being made available to the public (in whatever manner) under any provision of **[** the information Acts **]** ,

(c) the disclosure is made for the purposes of, and is necessary for, the discharge of—

(i) any functions under **[** the information Acts **]**, or

(ii) any **[** EU **]** obligation,

(d) the disclosure is made for the purposes of any proceedings, whether criminal or civil and whether arising under, or by virtue of, **[** the information Acts **]** or otherwise, or

(e) having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest.

(3) Any person who knowingly or recklessly discloses information in contravention of subsection (1) is guilty of an offence.

[(4) In this section "the information Acts" means this Act and the Freedom of Information Act 2000.**]**

General provisions relating to offences

60.— Prosecutions and penalties.

(1) No proceedings for an offence under this Act shall be instituted—

(a) in England or Wales, except by the Commissioner or by or with the consent of the Director of Public Prosecutions;

(b) in Northern Ireland, except by the Commissioner or by or with the consent of the Director of Public Prosecutions for Northern Ireland.

(2) A person guilty of an offence under any provision of this Act other than **[** section 54A and paragraph 12 of Schedule 9 **]** is liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum, or

(b) on conviction on indictment, to a fine.

(3) A person guilty of an offence under **[** section 54A and paragraph 12 of

Schedule 9 **]** is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(4) Subject to subsection (5), the court by or before which a person is convicted of—

(a) an offence under section 21(1), 22(6), 55 or 56,

(b) an offence under section 21(2) relating to processing which is assessable processing for the purposes of section 22, or

(c) an offence under section 47(1) relating to an enforcement notice,

may order any document or other material used in connection with the processing of personal data and appearing to the court to be connected with the commission of the offence to be forfeited, destroyed or erased.

(5) The court shall not make an order under subsection (4) in relation to any material where a person (other than the offender) claiming to be the owner of or otherwise interested in the material applies to be heard by the court, unless an opportunity is given to him to show cause why the order should not be made.

61.— Liability of directors etc.

(1) Where an offence under this Act has been committed by a body corporate and is proved to have been committed with the consent or connivance of or to be attributable to any neglect on the part of any director, manager, secretary or similar officer of the body corporate or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and be liable to be proceeded against and punished accordingly.

(2) Where the affairs of a body corporate are managed by its members subsection (1) shall apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.

(3) Where an offence under this Act has been committed by a Scottish partnership and the contravention in question is proved to have occurred with the consent or connivance of, or to be attributable to any neglect on the part of, a partner, he as well as the partnership shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Amendments of Consumer Credit Act 1974

62.— Amendments of Consumer Credit Act 1974.

(1) In section 158 of the Consumer Credit Act 1974 (duty of agency to disclose filed information)—

(a) in subsection (1)—

(i) in paragraph (a) for "individual" there is substituted "partnership or other unincorporated body of persons not consisting entirely of bodies corporate", and

(ii) for "him" there is substituted "it",

(b) in subsection (2), for "his" there is substituted "the consumer's", and

(c) in subsection (3), for "him" there is substituted "the consumer".

(2) In section 159 of that Act (correction of wrong information) for subsection (1) there is substituted—

"(1) Any individual (the "objector") given—

(a) information under section 7 of the Data Protection Act 1998 by a credit reference agency, or

(b) information under section 158,

who considers that an entry in his file is incorrect, and that if it is not corrected he is likely to be prejudiced, may give notice to the agency requiring it either to remove the entry from the file or amend it."

(3) In subsections (2) to (6) of that section—

(a) for "consumer", wherever occurring, there is substituted "objector", and

(b) for "Director", wherever occurring, there is substituted "the relevant authority".

(4) After subsection (6) of that section there is inserted—

"(7) The Data Protection Commissioner may vary or revoke any order made by him under this section.

(8) In this section "the relevant authority" means—

(a) where the objector is a partnership or other unincorporated body of persons, the Director, and

(b) in any other case, the Data Protection Commissioner."

(5) In section 160 of that Act (alternative procedure for business consumers)—

(a) in subsection (4)—

(i) for "him" there is substituted "to the consumer", and

(ii) in paragraphs (a) and (b) for "he" there is substituted "the consumer", and for "his" there is substituted "the consumer's", and

(b) after subsection (6) there is inserted—

"(7) In this section "consumer"has the same meaning as in section 158."

General

63.— Application to Crown.

(1) This Act binds the Crown.

(2) For the purposes of this Act each government department shall be treated as a person separate from any other government department.

(3) Where the purposes for which and the manner in which any personal data are, or are to be, processed are determined by any person acting on behalf of the Royal Household, the Duchy of Lancaster or the Duchy of Cornwall, the data controller in respect of those data for the purposes of this Act shall be—

(a) in relation to the Royal Household, the Keeper of the Privy Purse,

(b) in relation to the Duchy of Lancaster, such person as the Chancellor of the Duchy appoints, and

(c) in relation to the Duchy of Cornwall, such person as the Duke

of Cornwall, or the possessor for the time being of the Duchy of Cornwall, appoints.

(4) Different persons may be appointed under subsection (3)(b) or (c) for different purposes.

(5) Neither a government department nor a person who is a data controller by virtue of subsection (3) shall be liable to prosecution under this Act, but **[** sections 54A and 55 and paragraph 12 of Schedule 9 **]** shall apply to a person in the service of the Crown as they apply to any other person.

[63A.— Application to Parliament.

(1) Subject to the following provisions of this section and to section 35A, this Act applies to the processing of personal data by or on behalf of either House of Parliament as it applies to the processing of personal data by other persons.

(2) Where the purposes for which and the manner in which any personal data are, or are to be, processed are determined by or on behalf of the House of Commons, the data controller in respect of those data for the purposes of this Act shall be the Corporate Officer of that House.

(3) Where the purposes for which and the manner in which any personal data are, or are to be, processed are determined by or on behalf of the House of Lords, the data controller in respect of those data for the purposes of this Act shall be the Corporate Officer of that House.

(4) Nothing in subsection (2) or (3) is to be taken to render the Corporate Officer of the House of Commons or the Corporate Officer of the House of Lords liable to prosecution under this Act, but section 55 and paragraph 12 of Schedule 9 shall apply to a person acting on behalf of either House as they apply to any other person.

]

64.— Transmission of notices etc. by electronic or other means.

(1) This section applies to—

(a) a notice or request under any provision of Part II,

(b) a notice under subsection (1) of section 24 or particulars made available under that subsection, or

(c) an application under section 41(2),

but does not apply to anything which is required to be served in accordance with rules of court.

(2) The requirement that any notice, request, particulars or application to which this section applies should be in writing is satisfied where the text of the notice, request, particulars or application—

(a) is transmitted by electronic means,

(b) is received in legible form, and

(c) is capable of being used for subsequent reference.

(3) The **[** Secretary of State **]** may by regulations provide that any requirement that any notice, request, particulars or application to which this section applies should be in writing is not to apply in such circumstances as may be prescribed by the regulations.

65.— Service of notices by Commissioner.

(1) Any notice authorised or required by this Act to be served on or given to any person by the Commissioner may—

(a) if that person is an individual, be served on him—
  (i) by delivering it to him, or
  (ii) by sending it to him by post addressed to him at his usual or last-known place of residence or business, or
  (iii) by leaving it for him at that place;
(b) if that person is a body corporate or unincorporate, be served on that body—
  (i) by sending it by post to the proper officer of the body at its principal office, or
  (ii) by addressing it to the proper officer of the body and leaving it at that office;
(c) if that person is a partnership in Scotland, be served on that partnership—
  (i) by sending it by post to the principal office of the partnership, or
  (ii) by addressing it to that partnership and leaving it at that office.

(2) In subsection (1)(b) "principal office", in relation to a registered company, means its registered office and "proper officer", in relation to any body, means the secretary or other executive officer charged with the conduct of its general affairs.

(3) This section is without prejudice to any other lawful method of serving or giving a notice.

66.— Exercise of rights in Scotland by children.

(1) Where a question falls to be determined in Scotland as to the legal capacity of a person under the age of sixteen years to exercise any right conferred by any provision of this Act, that person shall be taken to have that capacity where he has a general understanding of what it means to exercise that right.

(2) Without prejudice to the generality of subsection (1), a person of twelve years of age or more shall be presumed to be of sufficient age and maturity to have such understanding as is mentioned in that subsection.

67.— Orders, regulations and rules.

(1) Any power conferred by this Act on the **[** Secretary of State **]** to make an order, regulations or rules shall be exercisable by statutory instrument.

(2) Any order, regulations or rules made by the **[** Secretary of State **]** under this Act may—

(a) make different provision for different cases, and
(b) make such supplemental, incidental, consequential or transi-

tional provision or savings as the **[** Secretary of State **]** considers appropriate;

and nothing in section 7(11), 19(5), 26(1) or 30(4) limits the generality of paragraph (a).

(3) Before making—

(a) an order under any provision of this Act other than section 75(3),

(b) any regulations under this Act other than notification regulations (as defined by section 16(2)),

the **[** Secretary of State **]** shall consult the Commissioner.

(4) A statutory instrument containing (whether alone or with other provisions) an order under—

section 10(2)(b),
section 12(5)(b),
section 22(1),
section 30,
section 32(3),
section 38,
[section 41A(2)(c), **]**
[section 55E(1), **]**
section 56(8),
paragraph 10 of Schedule 3, or
paragraph 4 of Schedule 7,

shall not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.

(5) A statutory instrument which contains (whether alone or with other provisions)—

(a) an order under—
section 22(7),
section 23,
[section 41A(2)(b), **]**
section 51(3),
section 54(2), (3) or (4),
paragraph 3, 4 or 14 of Part II of Schedule 1,
paragraph 6 of Schedule 2,
paragraph 2, 7 or 9 of Schedule 3,
paragraph 4 of Schedule 4,
paragraph 6 of Schedule 7,

(b) regulations under section 7 which—
(i) prescribe cases for the purposes of subsection (2)(b),
(ii) are made by virtue of subsection (7), or
(iii) relate to the definition of "the prescribed period",

(c) regulations under **[** section 8(1), 9(3) or 9A(5) **]** ,
[(ca) regulations under section 55A(5) or (7) or 55B(3)(b), **]**

(d) regulations under section 64,

(e) notification regulations (as defined by section 16(2)), or

(f) rules under paragraph 7 of Schedule 6,

and which is not subject to the requirement in subsection (4) that a draft of

the instrument be laid before and approved by a resolution of each House of Parliament, shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(6) A statutory instrument which contains only—

(a) regulations prescribing fees for the purposes of any provision of this Act, or

(b) regulations under section 7 prescribing fees for the purposes of any other enactment,

shall be laid before Parliament after being made.

68.— Meaning of "accessible record".

(1) In this Act "accessible record" means —

(a) a health record as defined by subsection (2),

(b) an educational record as defined by Schedule 11, or

(c) an accessible public record as defined by Schedule 12.

(2) In subsection (1)(a) "health record" means any record which—

(a) consists of information relating to the physical or mental health or condition of an individual, and

(b) has been made by or on behalf of a health professional in connection with the care of that individual.

69.— Meaning of "health professional".

(1) **[. . .]** In this Act "health professional" means any of the following—

(a) a registered medical practitioner,

(b) a registered dentist as defined by section 53(1) of the Dentists Act 1984,

[(c) a registered dispensing optician or a registered optometrist within the meaning of the Opticians Act 1989, **]**

(d) **[** a registered pharmacist or a registered pharmacy technician within the meaning of article 3(1) of the Pharmacy Order 2010 **]** or a registered person as defined by Article 2(2) of the Pharmacy (Northern Ireland) Order 1976,

[(e) a registered nurse or midwife, **]**

(f) a registered osteopath as defined by section 41 of the Osteopaths Act 1993,

(g) a registered chiropractor as defined by section 43 of the Chiropractors Act 1994,

(h) any person who is registered as a member of a profession to which **[** the Health and Social Work Professions Order 2001 **]** for the time being extends **[** , except in so far as the person is registered as a social worker in England (within the meaning of that Order) **]**,

(i) a **[. . .] [** child psychotherapist **]**, **[** and **]**

(j) **[. . .]**

(k) a scientist employed by such a body as head of a department.

(2) In subsection (1)(a) "registered medical practitioner" includes any

person who is provisionally registered under section 15 or 21 of the Medical Act 1983 and is engaged in such employment as is mentioned in subsection (3) of that section.

(3) In subsection (1) "health service body" means —

(a) a **[** Strategic Health Authority **] [** established under section 13 of the National Health Service Act 2006 **]**,

(b) a Special Health Authority established under **[** section 28 of that Act, or section 22 of the National Health Service (Wales) Act 2006 **]** ,

[(bb) a Primary Care Trust established under **[** section 18 of the National Health Service Act 2006 **]** , **]**

[(bbb) a Local Health Board established under **[** section 11 of the National Health Service (Wales) Act 2006 **]** , **]**

(c) a Health Board within the meaning of the National Health Service (Scotland) Act 1978,

(d) a Special Health Board within the meaning of that Act,

(e) the managers of a State Hospital provided under section 102 of that Act,

(f) a National Health Service trust first established under section 5 of the National Health Service and Community Care Act 1990 **[** , section 25 of the National Health Service Act 2006, section 18 of the National Health Service (Wales) Act 2006 **]** or section 12A of the National Health Service (Scotland) Act 1978,

[(fa) an NHS foundation trust, **]**

(g) a Health and Social Services Board established under Article 16 of the Health and Personal Social Services (Northern Ireland) Order 1972,

(h) a special health and social services agency established under the Health and Personal Social Services (Special Agencies) (Northern Ireland) Order 1990, or

(i) a Health and Social Services trust established under Article 10 of the Health and Personal Social Services (Northern Ireland) Order 1991.

70.— Supplementary definitions.

(1) In this Act, unless the context otherwise requires—

"business" includes any trade or profession;

"the Commissioner" means **[** the Information Commissioner **]** ;

"credit reference agency" has the same meaning as in the Consumer Credit Act 1974;

"the Data Protection Directive" means Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data;

"EEA State" means a State which is a contracting party to the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 as adjusted by the Protocol signed at Brussels on 17th March 1993;

"enactment" includes an enactment passed after this Act **[** and any

enactment comprised in, or in any instrument made under, an Act of the Scottish Parliament **]** ;

["government department" includes—

(a) any part of the Scottish Administration;

(b) a Northern Ireland department;

(c) the Welsh Assembly Government;

(d) any body or authority exercising statutory functions on behalf of the Crown;

]

"Minister of the Crown" has the same meaning as in the Ministers of the Crown Act 1975; "public register" means any register which pursuant to a requirement imposed—

(a) by or under any enactment, or

(b) in pursuance of any international agreement,

is open to public inspection or open to inspection by any person having a legitimate interest;

"pupil"—

(a) in relation to a school in England and Wales, means a registered pupil within the meaning of the Education Act 1996,

(b) in relation to a school in Scotland, means a pupil within the meaning of the Education (Scotland) Act 1980, and

(c) in relation to a school in Northern Ireland, means a registered pupil within the meaning of the Education and Libraries (Northern Ireland) Order 1986;

"recipient", in relation to any personal data, means any person to whom the data are disclosed, including any person (such as an employee or agent of the data controller, a data processor or an employee or agent of a data processor) to whom they are disclosed in the course of processing the data for the data controller, but does not include any person to whom disclosure is or may be made as a result of, or with a view to, a particular inquiry by or on behalf of that person made in the exercise of any power conferred by law;

"registered company" means a company registered under the enactments relating to companies for the time being in force in the United Kingdom;

"school"—

(a) in relation to England and Wales, has the same meaning as in the Education Act 1996,

(b) in relation to Scotland, has the same meaning as in the Education (Scotland) Act 1980, and

(c) in relation to Northern Ireland, has the same meaning as in the Education and Libraries (Northern Ireland) Order 1986;

"teacher" includes—

(a) in Great Britain, head teacher, and

(b) in Northern Ireland, the principal of a school;

"third party", in relation to personal data, means any person other than—

(a) the data subject,

(b) the data controller, or

(c) any data processor or other person authorised to process data for the data controller or processor;

["the Tribunal", in relation to any appeal under this Act, means—

(a) the Upper Tribunal, in any case where it is determined by or under Tribunal Procedure Rules that the Upper Tribunal is to hear the appeal; or

(b) the First-tier Tribunal, in any other case.

]

(2) For the purposes of this Act data are inaccurate if they are incorrect or misleading as to any matter of fact.

71. Index of defined expressions.

The following Table shows provisions defining or otherwise explaining expressions used in this Act (other than provisions defining or explaining an expression only used in the same section or Schedule)—

accessible record	section 68
address (in Part III)	section 16(3)
business	section 70(1)
the Commissioner	section 70(1)
credit reference agency	section 70(1)
data	section 1(1)
data controller	sections 1(1) and (4) and 63(3)
data processor	section 1(1)
the Data Protection Directive	section 70(1)
data protection principles	section 4 and Schedule 1)
data subject	section 1(1)
disclosing (of personal data)	section 1(2)(b)
EEA State	section 70(1)
enactment	section 70(1)
enforcement notice	section 40(1)
fees regulations (in Part III)	section 16(2)
government department	section 70(1)
health professional	section 69
inaccurate (in relation to data)	section 70(2)
information notice	section 43(1)
Minister of the Crown	section 70(1)
the non-disclosure provisions (in Part IV)	section 27(3)
notification regulations (in Part III)	section 16(2)

obtaining (of personal data)	section 1(2)(a)
personal data	section 1(1)
prescribed (in Part III)	section 16(2)
processing (of information or data)	section 1(1) and paragraph 5 of Schedule 8
[public authority	section 1(1)**]**
public register	section 70(1)
publish (in relation to journalistic, literary or artistic material)	section 32(6)
pupil (in relation to a school)	section 70(1)
recipient (in relation to personal data)	section 70(1)
recording (of personal data)	section 1(2)(a)
registered company	section 70(1)
registrable particulars (in Part III)	section 16(1)
relevant filing system	section 1(1)
school	section 70(1)
sensitive personal data	section 2
special information notice	section 44(1)
the special purposes	section 3
the subject information provisions (in Part IV)	section 27(2)
teacher	section 70(1)
third party (in relation to processing of personal data)	section 70(1)
the Tribunal	section 70(1)
using (of personal data)	section 1(2)(b)

72. Modifications of Act.

During the period beginning with the commencement of this section and ending with 23rd October 2007, the provisions of this Act shall have effect subject to the modifications set out in Schedule 13.

73. Transitional provisions and savings.

Schedule 14 (which contains transitional provisions and savings) has effect.

74.— Minor and consequential amendments and repeals and revocations.

(1) Schedule 15 (which contains minor and consequential amendments) has effect.

(2) The enactments and instruments specified in Schedule 16 are repealed or revoked to the extent specified.

75.— Short title, commencement and extent.

(1) This Act may be cited as the Data Protection Act 1998.

(2) The following provisions of this Act—

(a) sections 1 to 3,
(b) section 25(1) and (4),
(c) section 26,
(d) sections 67 to 71,
(e) this section,
(f) paragraph 17 of Schedule 5,
(g) Schedule 11,
(h) Schedule 12, and
(i) so much of any other provision of this Act as confers any power to make subordinate legislation,

shall come into force on the day on which this Act is passed.

(3) The remaining provisions of this Act shall come into force on such day as the **[** Secretary of State **]** may by order appoint; and different days may be appointed for different purposes.

(4) The day appointed under subsection (3) for the coming into force of section 56 must not be earlier than the first day on which **[** sections 112, 113A and 113B of the Police Act 1997 **]** (which provide for the issue by the Secretary of State of criminal conviction certificates, criminal record certificates and enhanced criminal record certificates) are all in force.

[(4A) Subsection (4) does not apply to section 56 so far as that section relates to a record containing information relating to–

(a) the Secretary of State's functions under the Safeguarding Vulnerable Groups Act 2006 **[** or the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 **]** , **[. . .]**
(b) the **[** Independent Safeguarding Authority's**]** functions under that Act **[** or that Order **] [** , or **]**
[(c) the Scottish Ministers' functions under Parts 1 and 2 of the Protection of Vulnerable Groups (Scotland) Act 2007 (asp 14). **]**

]

(5) Subject to **[** subsections (5A) and (6) **]** , this Act extends to Northern Ireland.

[(5A) In section 56(6) (prohibition of requirement as to production of certain records), paragraph (2)(e) of the Table in that section, insofar as it relates to Part 1 of the Welfare Reform Act 2007, extends to England and Wales and Scotland only. **]**

(6) Any amendment, repeal or revocation made by Schedule 15 or 16 has the same extent as that of the enactment or instrument to which it relates.

SCHEDULE 1

The data protection principles

Section 4(1) and (2)

PART I

The principles

1.

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

2.

Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

Commencement

Sch. 1(I) para. 2: March 1, 2000 (SI 2000/183 art. 2(1))

Extent

Sch. 1(I) para. 2: United Kingdom (subject to s.75(6))

3.

Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.

4.

Personal data shall be accurate and, where necessary, kept up to date.

5.

Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.

6.

Personal data shall be processed in accordance with the rights of data subjects under this Act.

7.

Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.

8.

Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

PART II

Interpretation of the principles in Part I

The first principle

1.—

(1) In determining for the purposes of the first principle whether personal data are processed fairly, regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed.

(2) Subject to paragraph 2, for the purposes of the first principle data are to be treated as obtained fairly if they consist of information obtained from a person who—

(a) is authorised by or under any enactment to supply it, or

(b) is required to supply it by or under any enactment or by any convention or other instrument imposing an international obligation on the United Kingdom.

2.—

(1) Subject to paragraph 3, for the purposes of the first principle personal data are not to be treated as processed fairly unless—

(a) in the case of data obtained from the data subject, the data controller ensures so far as practicable that the data subject has, is provided with, or has made readily available to him, the information specified in sub-paragraph (3), and

(b) in any other case, the data controller ensures so far as practicable that, before the relevant time or as soon as practicable after that time, the data subject has, is provided with, or has made readily available to him, the information specified in sub-paragraph (3).

(2) In sub-paragraph (1)(b) "the relevant time" means—

(a) the time when the data controller first processes the data, or

(b) in a case where at that time disclosure to a third party within a reasonable period is envisaged—

(i) if the data are in fact disclosed to such a person within that period, the time when the data are first disclosed,

(ii) if within that period the data controller becomes, or ought to become, aware that the data are unlikely to be disclosed to such a person within that period, the time when the data controller does become, or ought to become, so aware, or

(iii) in any other case, the end of that period.

(3) The information referred to in sub-paragraph (1) is as follows, namely—

(a) the identity of the data controller,

(b) if he has nominated a representative for the purposes of this Act, the identity of that representative,

(c) the purpose or purposes for which the data are intended to be processed, and

(d) any further information which is necessary, having regard to the specific circumstances in which the data are or are to be processed, to enable processing in respect of the data subject to be fair.

3.—

(1) Paragraph 2(1)(b) does not apply where either of the primary conditions in sub-paragraph (2), together with such further conditions as may be prescribed by the **[** Secretary of State **]** by order, are met.

(2) The primary conditions referred to in sub-paragraph (1) are—

(a) that the provision of that information would involve a disproportionate effort, or

(b) that the recording of the information to be contained in the data by, or the disclosure of the data by, the data controller is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

4.—

(1) Personal data which contain a general identifier falling within a description prescribed by the **[** Secretary of State **]** by order are not to be treated as processed fairly and lawfully unless they are processed in compliance with any conditions so prescribed in relation to general identifiers of that description.

(2) In sub-paragraph (1) "a general identifier" means any identifier (such as, for example, a number or code used for identification purposes) which—

(a) relates to an individual, and

(b) forms part of a set of similar identifiers which is of general application.

The second principle

5.

The purpose or purposes for which personal data are obtained may in particular be specified—

(a) in a notice given for the purposes of paragraph 2 by the data controller to the data subject, or

(b) in a notification given to the Commissioner under Part III of this Act.

6.

In determining whether any disclosure of personal data is compatible with the purpose or purposes for which the data were obtained, regard is to be had to the purpose or purposes for which the personal data are intended to be processed by any person to whom they are disclosed.

The fourth principle

7.

The fourth principle is not to be regarded as being contravened by reason of any inaccuracy in personal data which accurately record information obtained by the data controller from the data subject or a third party in a case where—

(a) having regard to the purpose or purposes for which the data were obtained and further processed, the data controller has taken reasonable steps to ensure the accuracy of the data, and

(b) if the data subject has notified the data controller of the data subject's view that the data are inaccurate, the data indicate that fact.

The sixth principle

8.

A person is to be regarded as contravening the sixth principle if, but only if—

(a) he contravenes section 7 by failing to supply information in accordance with that section,

(b) he contravenes section 10 by failing to comply with a notice given under subsection (1) of that section to the extent that the notice is justified or by failing to give a notice under subsection (3) of that section,

(c) he contravenes section 11 by failing to comply with a notice given under subsection (1) of that section, **[** or **] [. . .]**

(d) he contravenes section 12 by failing to comply with a notice given under subsection (1) or (2)(b) of that section or by failing to give a notification under subsection (2)(a) of that section or a notice under subsection (3) of that section **[.]**

(e) **[. . .]**

The seventh principle

9.

Having regard to the state of technological development and the cost of implementing any measures, the measures must ensure a level of security appropriate to—

(a) the harm that might result from such unauthorised or unlawful processing or accidental loss, destruction or damage as are mentioned in the seventh principle, and

(b) the nature of the data to be protected.

10.

The data controller must take reasonable steps to ensure the reliability of any employees of his who have access to the personal data.

11.

Where processing of personal data is carried out by a data processor on behalf of a data controller, the data controller must in order to comply with the seventh principle—

(a) choose a data processor providing sufficient guarantees in respect of the technical and organisational security measures governing the processing to be carried out, and

(b) take reasonable steps to ensure compliance with those measures.

12.

Where processing of personal data is carried out by a data processor on behalf of a data controller, the data controller is not to be regarded as complying with the seventh principle unless—

(a) the processing is carried out under a contract—

(i) which is made or evidenced in writing, and

(ii) under which the data processor is to act only on instructions from the data controller, and

(b) the contract requires the data processor to comply with obligations equivalent to those imposed on a data controller by the seventh principle.

The eighth principle

13.

An adequate level of protection is one which is adequate in all the circumstances of the case, having regard in particular to—

(a) the nature of the personal data,
(b) the country or territory of origin of the information contained in the data,
(c) the country or territory of final destination of that information,
(d) the purposes for which and period during which the data are intended to be processed, (e) the law in force in the country or territory in question,
(f) the international obligations of that country or territory,
(g) any relevant codes of conduct or other rules which are enforceable in that country or territory (whether generally or by arrangement in particular cases), and
(h) any security measures taken in respect of the data in that country or territory.

14.

The eighth principle does not apply to a transfer falling within any paragraph of Schedule 4 , except in such circumstances and to such extent as the **[** Secretary of State **]** may by order provide.

15.—

(1) Where—

(a) in any proceedings under this Act any question arises as to whether the requirement of the eighth principle as to an adequate level of protection is met in relation to the transfer of any personal data to a country or territory outside the European Economic Area, and
(b) a Community finding has been made in relation to transfers of the kind in question, that question is to be determined in accordance with that finding.

(2) In sub-paragraph (1) "Community finding" means a finding of the European Commission, under the procedure provided for in Article 31(2) of the Data Protection Directive, that a country or territory outside the European Economic Area does, or does not, ensure an adequate level of protection within the meaning of Article 25(2) of the Directive.

SCHEDULE 2

Conditions relevant for purposes of the first principle: processing of any personal data

Section 4(3)

1.

The data subject has given his consent to the processing.

2.

The processing is necessary—

(a) for the performance of a contract to which the data subject is a party, or

(b) for the taking of steps at the request of the data subject with a view to entering into a contract.

3.

The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

4.

The processing is necessary in order to protect the vital interests of the data subject.

5.

The processing is necessary—

(a) for the administration of justice, **[** (aa) for the exercise of any functions of either House of Parliament, **]**

(b) for the exercise of any functions conferred on any person by or under any enactment,

(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or

(d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

6.—

(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

(2) The **[** Secretary of State **]** may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.

SCHEDULE 3

Conditions relevant for purposes of the first principle: processing of sensitive personal data

Section 4(3)

1.

The data subject has given his explicit consent to the processing of the personal data.

2.—

(1) The processing is necessary for the purposes of exercising or performing any right or obligation which is conferred or imposed by law on the data controller in connection with employment.

(2) The **[** Secretary of State **]** may by order—

(a) exclude the application of sub-paragraph (1) in such cases as may be specified, or

(b) provide that, in such cases as may be specified, the condition in sub-paragraph (1) is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied.

3.

The processing is necessary—

(a) in order to protect the vital interests of the data subject or another person, in a case where—

(i) consent cannot be given by or on behalf of the data subject, or

(ii) the data controller cannot reasonably be expected to obtain the consent of the data subject, or

(b) in order to protect the vital interests of another person, in a case where consent by or on behalf of the data subject has been unreasonably withheld.

4.

The processing—

(a) is carried out in the course of its legitimate activities by any body or association which—

(i) is not established or conducted for profit, and

(ii) exists for political, philosophical, religious or trade-union purposes,

(b) is carried out with appropriate safeguards for the rights and freedoms of data subjects,

(c) relates only to individuals who either are members of the body or

association or have regular contact with it in connection with its purposes, and

(d) does not involve disclosure of the personal data to a third party without the consent of the data subject.

5.

The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.

6.

The processing—

(a) is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings),

(b) is necessary for the purpose of obtaining legal advice, or

(c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights.

7.—

(1) The processing is necessary—

(a) for the administration of justice, **[** (aa) for the exercise of any functions of either House of Parliament, **]**

(b) for the exercise of any functions conferred on any person by or under an enactment, or

(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department.

(2) The **[** Secretary of State **]** may by order—

(a) exclude the application of sub-paragraph (1) in such cases as may be specified, or

(b) provide that, in such cases as may be specified, the condition in sub-paragraph (1) is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied.

[7A

(1) The processing–

(a) is either–

(i) the disclosure of sensitive personal data by a person as a member of an anti-fraud organisation or otherwise in accordance with any arrangements made by such an organisation; or

(ii) any other processing by that person or another person of sensitive personal data so disclosed; and

(b) is necessary for the purposes of preventing fraud or a particular kind of fraud.

(2) In this paragraph "an anti-fraud organisation" means any unincorporated association, body corporate or other person which enables or

facilitates any sharing of information to prevent fraud or a particular kind of fraud or which has any of these functions as its purpose or one of its purposes.
]

8.—

(1) The processing is necessary for medical purposes and is undertaken by—
(a) a health professional, or
(b) a person who in the circumstances owes a duty of confidentiality which is equivalent to that which would arise if that person were a health professional.

(2) In this paragraph "medical purposes" includes the purposes of preventative medicine, medical diagnosis, medical research, the provision of care and treatment and the management of health care services.

9.—

(1) The processing—
(a) is of sensitive personal data consisting of information as to racial or ethnic origin,
(b) is necessary for the purpose of identifying or keeping under review the existence or absence of equality of opportunity or treatment between persons of different racial or ethnic origins, with a view to enabling such equality to be promoted or maintained, and
(c) is carried out with appropriate safeguards for the rights and freedoms of data subjects.

(2) The **[** Secretary of State **]** may by order specify circumstances in which processing falling within sub-paragraph (1)(a) and (b) is, or is not, to be taken for the purposes of sub-paragraph (1)(c) to be carried out with appropriate safeguards for the rights and freedoms of data subjects.

10.

The personal data are processed in circumstances specified in an order made by the **[** Secretary of State **]** for the purposes of this paragraph.

SCHEDULE 4

Cases where the eighth principle does not apply

Section 4(3)

1.

The data subject has given his consent to the transfer.

2.

The transfer is necessary—

(a) for the performance of a contract between the data subject and the data controller, or

(b) for the taking of steps at the request of the data subject with a view to his entering into a contract with the data controller.

3.

The transfer is necessary—

(a) for the conclusion of a contract between the data controller and a person other than the data subject which—

(i) is entered into at the request of the data subject, or

(ii) is in the interests of the data subject, or

(b) for the performance of such a contract.

4.—

(1) The transfer is necessary for reasons of substantial public interest. (2) The **[** Secretary of State **]** may by order specify—

(a) circumstances in which a transfer is to be taken for the purposes of sub-paragraph (1) to be necessary for reasons of substantial public interest, and

(b) circumstances in which a transfer which is not required by or under an enactment is not to be taken for the purpose of sub-paragraph (1) to be necessary for reasons of substantial public interest.

5.

The transfer—

(a) is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings),

(b) is necessary for the purpose of obtaining legal advice, or

(c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights.

6.

The transfer is necessary in order to protect the vital interests of the data subject.

7.

The transfer is of part of the personal data on a public register and any conditions subject to which the register is open to inspection are complied with by any person to whom the data are or may be disclosed after the transfer.

8.

The transfer is made on terms which are of a kind approved by the Commissioner as ensuring adequate safeguards for the rights and freedoms of data subjects.

9.

The transfer has been authorised by the Commissioner as being made in such a manner as to ensure adequate safeguards for the rights and freedoms of data subjects.

SCHEDULE 5

The [Information Commissioner] [Information Tribunal]-

Section 6(7)

PART I

The Commissioner

Status and capacity

1.—

(1) The corporation sole by the name of the Data Protection Registrar established by the Data Protection Act 1984 shall continue in existence by the name of the **[** Information Commissioner **]**.

(2) The Commissioner and his officers and staff are not to be regarded as servants or agents of the Crown.

Tenure of office

2.—

(1) Subject to the provisions of this paragraph, the Commissioner shall hold office for such term not exceeding five years as may be determined at the time of his appointment.

(2) The Commissioner may be relieved of his office by Her Majesty at his own request.

(3) The Commissioner may be removed from office by Her Majesty in pursuance of an Address from both Houses of Parliament.

(4) The Commissioner shall in any case vacate his office—

(a) on completing the year of service in which he attains the age of sixty-five years, or

(b) if earlier, on completing his fifteenth year of service.

(5) Subject to sub-paragraph (4), a person who ceases to be Commissioner on the expiration of his term of office shall be eligible for re-appointment, but a person may not be re-appointed for a third or subsequent term as Commissioner unless, by reason of special circumstances, the person's re-appointment for such a term is desirable in the public interest.

Salary etc.

3.—

(1) There shall be paid—

(a) to the Commissioner such salary, and

(b) to or in respect of the Commissioner such pension, as may be specified by a resolution of the House of Commons.

(2) A resolution for the purposes of this paragraph may—

(a) specify the salary or pension,

(b) provide that the salary or pension is to be the same as, or calculated on the same basis as, that payable to, or to or in respect of, a person employed in a specified office under, or in a specified capacity in the service of, the Crown, or

(c) specify the salary or pension and provide for it to be increased by reference to such variables as may be specified in the resolution.

(3) A resolution for the purposes of this paragraph may take effect from the date on which it is passed or from any earlier or later date specified in the resolution.

(4) A resolution for the purposes of this paragraph may make different provision in relation to the pension payable to or in respect of different holders of the office of Commissioner.

(5) Any salary or pension payable under this paragraph shall be charged on and issued out of the Consolidated Fund.

(6) In this paragraph "pension" includes an allowance or gratuity and any reference to the payment of a pension includes a reference to the making of payments towards the provision of a pension.

Officers and staff

4.—

(1) The Commissioner—

(a) shall appoint a deputy commissioner **[** or two deputy commissioners **]** , and

(b) may appoint such number of other officers and staff as he may determine.

[(1A) The Commissioner shall, when appointing any second deputy commissioner, specify which of the Commissioner's functions are to be performed, in the circumstances referred to in paragraph

5(1), by each of the deputy commissioners. **]**

(2) The remuneration and other conditions of service of the persons appointed under this paragraph shall be determined by the Commissioner.

(3) The Commissioner may pay such pensions, allowances or gratuities to or in respect of the persons appointed under this paragraph, or make such payments towards the provision of such pensions, allowances or gratuities, as he may determine.

(4) The references in sub-paragraph (3) to pensions, allowances or gratuities to or in respect of the persons appointed under this paragraph include references to pensions, allowances or gratuities by way of compensation to or in respect of any of those persons who suffer loss of office or employment.

(5) Any determination under sub-paragraph (1)(b), (2) or (3) shall require the approval of the

[Secretary of State **]** .

(6) The Employers' Liability (Compulsory Insurance) Act 1969 shall not require insurance to be effected by the Commissioner.

5.—

(1) The deputy commissioner **[** or deputy commissioners **]** shall perform the functions conferred by this Act **[** or the Freedom of Information Act 2000 **]** on the Commissioner during any vacancy in that office or at any time when the Commissioner is for any reason unable to act.

(2) Without prejudice to sub-paragraph (1), any functions of the Commissioner under this Act **[** or the Freedom of Information Act 2000 **]** may, to the extent authorised by him, be performed by any of his officers or staff.

Authentication of seal of the Commissioner

6.

The application of the seal of the Commissioner shall be authenticated by his signature or by the signature of some other person authorised for the purpose.

Presumption of authenticity of documents issued by the Commissioner

7.

Any document purporting to be an instrument issued by the Commissioner and to be duly executed under the Commissioner's seal or to be signed by or on behalf of the Commissioner shall be received in evidence and shall be deemed to be such an instrument unless the contrary is shown.

Money

8.

The **[** Secretary of State **]** may make payments to the Commissioner out of money provided by Parliament.

Commencement
Sch. 5(I) para. 8: March 1, 2000 (SI 2000/183 art. 2(1))

Extent
Sch. 5(I) para. 8: United Kingdom (subject to s.75(6))

9.—

(1) All fees and other sums received by the Commissioner in the exercise of his functions under this Act **[** , under section 159 of the Consumer Credit Act 1974 or under the Freedom of Information Act 2000 **]** shall be paid by him to the **[** Secretary of State **]**.

(2) Sub-paragraph (1) shall not apply where the **[** Secretary of State **]** , with the consent of the Treasury, otherwise directs.

(3) Any sums received by the **[** Secretary of State **]** under sub-paragraph (1) shall be paid into the Consolidated Fund.

Accounts

10.—

(1) It shall be the duty of the Commissioner—

(a) to keep proper accounts and other records in relation to the accounts,

(b) to prepare in respect of each financial year a statement of account in such form as the **[** Secretary of State **]** may direct, and

(c) to send copies of that statement to the Comptroller and Auditor General on or before 31st August next following the end of the year to which the statement relates or on or before such earlier date after the end of that year as the Treasury may direct.

(2) The Comptroller and Auditor General shall examine and certify any statement sent to him under this paragraph and lay copies of it together with his report thereon before each House of Parliament.

(3) In this paragraph "financial year" means a period of twelve months beginning with 1st April.

Application of Part I in Scotland

11.

Paragraphs 1(1), 6 and 7 do not extend to Scotland.

PART II

The Tribunal

Tenure of office

12.— [. . .]

Salary etc.

13. [. . .]

Officers and staff

14. [. . .]

Expenses

15. [. . .]

PART III

Transitional provisions

16. [. . .]

17. [. . .]

SCHEDULE 6

Appeal proceedings

Sections 28(12), 48(5)

Hearing of appeals

1. [. . .]

Constitution of Tribunal in national security cases

2.— [. . .]

3. [. . .]

Constitution of Tribunal in other cases

4.— [. . .]

Determination of questions by full Tribunal

5. [. . .]

Ex par

6.— [. . .]

[** Tribunal Procedure Rules **]

7.—

[(1) Tribunal Procedure Rules may make provision for regulating the exercise of the rights of appeal conferred—

(a) by sections 28(4) and (6) and 48 of this Act, and

(b) by sections 47(1) and (2) and 60(1) and (4) of the Freedom of Information Act 2000.

(2) In the case of appeals under this Act and the Freedom of Information Act 2000, Tribunal Procedure Rules may make provision—

(a) for securing the production of material used for the processing of personal data;

(b) for the inspection, examination, operation and testing of any equipment or material used in connection with the processing of personal data;

(c) for hearing an appeal in the absence of the appellant or for determining an appeal without a hearing.

]

(3) [. . .]

Obstruction etc.

8.—

(1) If any person is guilty of any act or omission in relation to proceedings before the Tribunal which, if those proceedings were proceedings before a court having power to commit for contempt, would constitute contempt of court, the Tribunal may certify the offence to the High Court or, in Scotland, the Court of Session.

(2) Where an offence is so certified, the court may inquire into the matter and, after hearing any witness who may be produced against or on behalf of the person charged with the offence, and after hearing any statement that may

be offered in defence, deal with him in any manner in which it could deal with him if he had committed the like offence in relation to the court.

SCHEDULE 7

Miscellaneous exemptions

Section 37

Confidential references given by the data controller

1.

Personal data are exempt from section 7 if they consist of a reference given or to be given in confidence by the data controller for the purposes of—

(a) the education, training or employment, or prospective education, training or employment, of the data subject,

(b) the appointment, or prospective appointment, of the data subject to any office, or

(c) the provision, or prospective provision, by the data subject of any service.

Armed forces

2.

Personal data are exempt from the subject information provisions in any case to the extent to which the application of those provisions would be likely to prejudice the combat effectiveness of any of the armed forces of the Crown.

Judicial appointments and honours

3.

Personal data processed for the purposes of—

(a) assessing any person's suitability for judicial office or the office of Queen's Counsel, or

(b) the conferring by the Crown of any honour **[** or dignity **]** ,

are exempt from the subject information provisions.

[4.

(1) The **[** Secretary of State **]** may by order exempt from the subject information provisions personal data processed for the purposes of assessing any person's suitability for—

(a) employment by or under the Crown, or

(b) any office to which appointments are made by Her Majesty, by a Minister of the Crown or by a Northern Ireland authority.

(2) In this paragraph "Northern Ireland authority" means the First Minister, the deputy First Minister, a Northern Ireland Minister or a Northern Ireland department.

]

Management forecasts etc.

5.

Personal data processed for the purposes of management forecasting or management planning to assist the data controller in the conduct of any business or other activity are exempt from the subject information provisions in any case to the extent to which the application of those provisions would be likely to prejudice the conduct of that business or other activity.

6.—

(1) Where personal data are processed for the purposes of, or in connection with, a corporate finance service provided by a relevant person—

(a) the data are exempt from the subject information provisions in any case to the extent to which either—

(i) the application of those provisions to the data could affect the price of any instrument which is already in existence or is to be or may be created, or

(ii) the data controller reasonably believes that the application of those provisions to the data could affect the price of any such instrument, and

(b) to the extent that the data are not exempt from the subject information provisions by virtue of paragraph (a), they are exempt from those provisions if the exemption is required for the purpose of safeguarding an important economic or financial interest of the United Kingdom.

(2) For the purposes of sub-paragraph (1)(b) the **[** Secretary of State **]** may by order specify—

(a) matters to be taken into account in determining whether exemption from the subject information provisions is required for the purpose of safeguarding an important economic or financial interest of the United Kingdom, or

(b) circumstances in which exemption from those provisions is, or is not, to be taken to be required for that purpose.

(3) In this paragraph—

"corporate finance service" means a service consisting in—

(a) underwriting in respect of issues of, or the placing of issues of, any instrument,

(b) advice to undertakings on capital structure, industrial strategy and related matters and advice and service relating to mergers and the purchase of undertakings, or

(c) services relating to such underwriting as is mentioned in par-

agraph (a); "instrument" means any instrument listed in **[** section C of Annex I to Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments **] [. . .]** ;

"price" includes value; "relevant person" means—

[(a) any person who, by reason of any permission he has under Part IV of the Financial Services and Markets Act 2000, is able to carry on a corporate finance service without contravening the general prohibition, within the meaning of section 19 of that Act,

(b) an EEA firm of the kind mentioned in paragraph 5(a) or (b) of Schedule 3 to that Act which has qualified for authorisation under paragraph 12 of that Schedule, and may lawfully carry on a corporate finance service,

(c) any person who is exempt from the general prohibition in respect of any corporate finance service—

(i) as a result of an exemption order made under section 38(1) of that Act, or

(ii) by reason of section 39(1) of that Act (appointed representatives), (cc) any person, not falling within paragraph (a), (b) or (c) who may lawfully carry on a corporate finance service without contravening the general prohibition, **]**

(d) any person who, in the course of his employment, provides to his employer a service falling within paragraph (b) or (c) of the definition of "corporate finance service", or

(e) any partner who provides to other partners in the partnership a service falling within either of those paragraphs.

Negotiations

7.

Personal data which consist of records of the intentions of the data controller in relation to any negotiations with the data subject are exempt from the subject information provisions in any case to the extent to which the application of those provisions would be likely to prejudice those negotiations.

Examination marks

8.—

(1) Section 7 shall have effect subject to the provisions of sub-paragraphs (2) to (4) in the case of personal data consisting of marks or other information processed by a data controller—

(a) for the purpose of determining the results of an academic, professional or other examination or of enabling the results of any such examination to be determined, or

(b) in consequence of the determination of any such results.

(2) Where the relevant day falls before the day on which the results of the

examination are announced, the period mentioned in section 7(8) shall be extended until—

(a) the end of five months beginning with the relevant day, or

(b) the end of forty days beginning with the date of the announcement, whichever is the earlier.

(3) Where by virtue of sub-paragraph (2) a period longer than the prescribed period elapses after the relevant day before the request is complied with, the information to be supplied pursuant to the request shall be supplied both by reference to the data in question at the time when the request is received and (if different) by reference to the data as from time to time held in the period beginning when the request is received and ending when it is complied with.

(4) For the purposes of this paragraph the results of an examination shall be treated as announced when they are first published or (if not published) when they are first made available or communicated to the candidate in question.

(5) In this paragraph—

"examination" includes any process for determining the knowledge, intelligence, skill or ability of a candidate by reference to his performance in any test, work or other activity;

"the prescribed period" means forty days or such other period as is for the time being prescribed under section 7 in relation to the personal data in question;

"relevant day" has the same meaning as in section 7.

Examination scripts etc.

9.—

(1) Personal data consisting of information recorded by candidates during an academic, professional or other examination are exempt from section 7.

(2) In this paragraph "examination" has the same meaning as in paragraph 8.

Legal professional privilege

10.

Personal data are exempt from the subject information provisions if the data consist of information in respect of which a claim to legal professional privilege **[** or, in Scotland, to confidentiality of communications **]** could be maintained in legal proceedings.

Self-incrimination

11.—

(1) A person need not comply with any request or order under section 7 to the extent that compliance would, by revealing evidence of the commission of

any offence **[** , other than an offence under this Act or an offence within sub-paragraph (1A), **]** expose him to proceedings for that offence.

[(1A) The offences mentioned in sub-paragraph (1) are—

(a) an offence under section 5 of the Perjury Act 1911 (false statements made otherwise than on oath),

(b) an offence under section 44(2) of the Criminal Law (Consolidation) (Scotland) Act 1995 (false statements made otherwise than on oath), or

(c) an offence under Article 10 of the Perjury (Northern Ireland) Order 1979 (false statutory declarations and other false unsworn statements).

]

(2) Information disclosed by any person in compliance with any request or order under section 7 shall not be admissible against him in proceedings for an offence under this Act.

SCHEDULE 8

Transitional relief

Section 39

PART I

Interpretation of Schedule

1.—

(1) For the purposes of this Schedule, personal data are "eligible data" at any time if, and to the extent that, they are at that time subject to processing which was already under way immediately before 24th October 1998.

(2) In this Schedule—

"eligible automated data" means eligible data which fall within paragraph (a) or (b) of the definition of "data" in section 1(1);

"eligible manual data" means eligible data which are not eligible automated data;

"the first transitional period" means the period beginning with the commencement of this Schedule and ending with 23rd October 2001;

"the second transitional period" means the period beginning with 24th October 2001 and ending with 23rd October 2007.

PART II

Exemptions available before 24th October 2001

Manual data

2.—

(1) Eligible manual data, other than data forming part of an accessible record, are exempt from the data protection principles and Parts II and III of this Act during the first transitional period.

(2) This paragraph does not apply to eligible manual data to which paragraph 4 applies.

3.—

(1) This paragraph applies to—

(a) eligible manual data forming part of an accessible record, and

(b) personal data which fall within paragraph (d) of the definition of "data" in section 1(1) but which, because they are not subject to processing which was already under way immediately before 24th October 1998, are not eligible data for the purposes of this Schedule.

(2) During the first transitional period, data to which this paragraph applies are exempt from—

(a) the data protection principles, except the sixth principle so far as relating to sections 7 and 12A,

(b) Part II of this Act, except—

(i) section 7 (as it has effect subject to section 8) and section 12A, and

(ii) section 15 so far as relating to those sections, and

(c) Part III of this Act.

4.—

(1) This paragraph applies to eligible manual data which consist of information relevant to the financial standing of the data subject and in respect of which the data controller is a credit reference agency.

(2) During the first transitional period, data to which this paragraph applies are exempt from—

(a) the data protection principles, except the sixth principle so far as relating to sections 7 and 12A,

(b) Part II of this Act, except—

(i) section 7 (as it has effect subject to sections 8 and 9) and section 12A, and

(ii) section 15 so far as relating to those sections, and

(c) Part III of this Act.

Processing otherwise than by reference to the data subject

5.

During the first transitional period, for the purposes of this Act (apart from paragraph 1), eligible automated data are not to be regarded as being "processed" unless the processing is by reference to the data subject.

Payrolls and accounts

6.—

(1) Subject to sub-paragraph (2), eligible automated data processed by a data controller for one or more of the following purposes—

(a) calculating amounts payable by way of remuneration or pensions in respect of service in any employment or office or making payments of, or of sums deducted from, such remuneration or pensions, or

(b) keeping accounts relating to any business or other activity carried on by the data controller or keeping records of purchases, sales or other transactions for the purpose of ensuring that the requisite payments are made by or to him in respect of those transactions or for the purpose of making financial or management forecasts to assist him in the conduct of any such business or activity,

are exempt from the data protection principles and Parts II and III of this Act during the first transitional period.

(2) It shall be a condition of the exemption of any eligible automated data under this paragraph that the data are not processed for any other purpose, but the exemption is not lost by any processing of the eligible data for any other purpose if the data controller shows that he had taken such care to prevent it as in all the circumstances was reasonably required.

(3) Data processed only for one or more of the purposes mentioned in sub-paragraph (1)(a) may be disclosed—

(a) to any person, other than the data controller, by whom the remuneration or pensions in question are payable,

(b) for the purpose of obtaining actuarial advice,

(c) for the purpose of giving information as to the persons in any employment or office for use in medical research into the health of, or injuries suffered by, persons engaged in particular occupations or working in particular places or areas,

(d) if the data subject (or a person acting on his behalf) has requested or consented to the disclosure of the data either generally or in the circumstances in which the disclosure in question is made, or

(e) if the person making the disclosure has reasonable grounds for believing that the disclosure falls within paragraph (d).

(4) Data processed for any of the purposes mentioned in sub-paragraph (1) may be disclosed—

(a) for the purpose of audit or where the disclosure is for the purpose

only of giving information about the data controller's financial affairs, or

(b) in any case in which disclosure would be permitted by any other provision of this Part of this Act if sub-paragraph (2) were included among the non-disclosure provisions.

(5) In this paragraph "remuneration" includes remuneration in kind and "pensions" includes gratuities or similar benefits.

Unincorporated members' clubs and mailing lists

7.

Eligible automated data processed by an unincorporated members' club and relating only to the members of the club are exempt from the data protection principles and Parts II and III of this Act during the first transitional period.

8.

Eligible automated data processed by a data controller only for the purposes of distributing, or recording the distribution of, articles or information to the data subjects and consisting only of their names, addresses or other particulars necessary for effecting the distribution, are exempt from the data protection principles and Parts II and III of this Act during the first transitional period.

9.

Neither paragraph 7 nor paragraph 8 applies to personal data relating to any data subject unless he has been asked by the club or data controller whether he objects to the data relating to him being processed as mentioned in that paragraph and has not objected.

10.

It shall be a condition of the exemption of any data under paragraph 7 that the data are not disclosed except as permitted by paragraph 11 and of the exemption under paragraph 8 that the data are not processed for any purpose other than that mentioned in that paragraph or as permitted by paragraph 11, but—

(a) the exemption under paragraph 7 shall not be lost by any disclosure in breach of that condition, and

(b) the exemption under paragraph 8 shall not be lost by any processing in breach of that condition,

if the data controller shows that he had taken such care to prevent it as in all the circumstances was reasonably required.

11.

Data to which paragraph 10 applies may be disclosed—

(a) if the data subject (or a person acting on his behalf) has requested or consented to the disclosure of the data either generally or in the circumstances in which the disclosure in question is made,

(b) if the person making the disclosure has reasonable grounds for believing that the disclosure falls within paragraph (a), or

(c) in any case in which disclosure would be permitted by any other provision of this Part of this Act if paragraph 10 were included among the non-disclosure provisions.

Back-up data

12.

Eligible automated data which are processed only for the purpose of replacing other data in the event of the latter being lost, destroyed or impaired are exempt from section 7 during the first transitional period.

Exemption of all eligible automated data from certain requirements

13.—

(1) During the first transitional period, eligible automated data are exempt from the following provisions—

(a) the first data protection principle to the extent to which it requires compliance with—
  (i) paragraph 2 of Part II of Schedule 1,
  (ii) the conditions in Schedule 2, and
  (iii) the conditions in Schedule 3,

(b) the seventh data protection principle to the extent to which it requires compliance with paragraph 12 of Part II of Schedule 1;

(c) the eighth data protection principle,

(d) in section 7(1), paragraphs (b), (c)(ii) and (d),

(e) sections 10 and 11,

(f) section 12, and

(g) section 13, except so far as relating to—
  (i) any contravention of the fourth data protection principle,
  (ii) any disclosure without the consent of the data controller,
  (iii) loss or destruction of data without the consent of the data controller, or
  (iv) processing for the special purposes.

(2) The specific exemptions conferred by sub-paragraph (1)(a), (c) and (e) do not limit the data controller's general duty under the first data protection principle to ensure that processing is fair.

PART III

Exemptions available after 23rd October 2001 but before 24th October 2007

14.—

(1) This paragraph applies to—

(a) eligible manual data which were held immediately before 24th October 1998, and

(b) personal data which fall within paragraph (d) of the definition of "data" in section 1(1) but do not fall within paragraph (a) of this sub-paragraph.

but does not apply to eligible manual data to which the exemption in paragraph 16 applies.

(2) During the second transitional period, data to which this paragraph applies are exempt from the following provisions—

(a) the first data protection principle except to the extent to which it requires compliance with paragraph 2 of Part II of Schedule 1,

(b) the second, third, fourth and fifth data protection principles, and

(c) section 14(1) to (3).

[14A.—

(1) This paragraph applies to personal data which fall within paragraph (e) of the definition of "data" in section 1(1) and do not fall within paragraph 14(1)(a), but does not apply to eligible manual data to which the exemption in paragraph 16 applies.

(2) During the second transitional period, data to which this paragraph applies are exempt from—

(a) the fourth data protection principle, and

(b) section 14(1) to (3).

]

PART IV

Exemptions after 23rd October 2001 for historical research

15.

In this Part of this Schedule "the relevant conditions" has the same meaning as in section 33.

16.—

(1) Eligible manual data which are processed only for the purpose of historical research in compliance with the relevant conditions are exempt from the provisions specified in sub-paragraph (2) after 23rd October 2001.

(2) The provisions referred to in sub-paragraph (1) are—

(a) the first data protection principle except in so far as it requires compliance with paragraph 2 of Part II of Schedule 1,

(b) the second, third, fourth and fifth data protection principles, and

(c) section 14(1) to (3).

17.—

(1) After 23rd October 2001 eligible automated data which are processed only for the purpose of historical research in compliance with the relevant conditions are exempt from the first data protection principle to the extent to which it requires compliance with the conditions in Schedules 2 and 3.

(2) Eligible automated data which are processed—

(a) only for the purpose of historical research,

(b) in compliance with the relevant conditions, and

(c) otherwise than by reference to the data subject,

are also exempt from the provisions referred to in sub-paragraph (3) after 23rd October 2001.

(3) The provisions referred to in sub-paragraph (2) are—

(a) the first data protection principle except in so far as it requires compliance with paragraph 2 of Part II of Schedule 1,

(b) the second, third, fourth and fifth data protection principles, and

(c) section 14(1) to (3).

18.

For the purposes of this Part of this Schedule personal data are not to be treated as processed otherwise than for the purpose of historical research merely because the data are disclosed—

(a) to any person, for the purpose of historical research only,

(b) to the data subject or a person acting on his behalf,

(c) at the request, or with the consent, of the data subject or a person acting on his behalf, or

(d) in circumstances in which the person making the disclosure has reasonable grounds for believing that the disclosure falls within paragraph (a), (b) or (c).

PART V

Exemption from section 22

19.

Processing which was already under way immediately before 24th October 1998 is not assessable processing for the purposes of section 22.

SCHEDULE 9

Powers of entry and inspection

Section 50

Issue of warrants

1.—

(1) If a circuit judge is satisfied by information on oath supplied by the Commissioner that there are reasonable grounds for suspecting—

(a) that a data controller has contravened or is contravening any of the data protection principles, or

(b) that an offence under this Act has been or is being committed,

and that evidence of the contravention or of the commission of the offence is to be found on any premises specified in the information, he may, subject to sub-paragraph (2) and paragraph 2, grant a warrant to the Commissioner.

[(1A) Sub-paragraph (1B) applies if a circuit judge or a District Judge (Magistrates' Courts) is satisfied by information on oath supplied by the Commissioner that a data controller has failed to comply with a requirement imposed by an assessment notice.

(1B) The judge may, for the purpose of enabling the Commissioner to determine whether the data controller has complied or is complying with the data protection principles, grant a warrant to the Commissioner in relation to any premises that were specified in the assessment notice; but this is subject to sub-paragraph (2) and paragraph 2. **]**

(2) A judge shall not issue a warrant under this Schedule in respect of any personal data processed for the special purposes unless a determination by the Commissioner under section 45 with respect to those data has taken effect.

(3) A warrant issued under **[** this Schedule **]** shall authorise the Commissioner or any of his officers or staff at any time within seven days of the date of the warrant **[** — **]**

[(a) to enter the premises;

(b) to search the premises;

(c) to inspect, examine, operate and test any equipment found on the premises which is used or intended to be used for the processing of personal data;

(d) to inspect and seize any documents or other material found on the premises which—

(i) in the case of a warrant issued under subparagraph (1), may be such evidence as is mentioned in that paragraph;

(ii) in the case of a warrant issued under subparagraph (1B), may enable the Commissioner to determine whether the data controller has complied or is complying with the data protection principles;

(e) to require any person on the premises to provide an explanation of any document or other material found on the premises;

(f) to require any person on the premises to provide such other

information as may reasonably be required for the purpose of determining whether the data controller has contravened, or is contravening, the data protection principles. **]**

2.—

(1) A judge shall not issue a warrant under this Schedule unless he is satisfied—

(a) that the Commissioner has given seven days' notice in writing to the occupier of the premises in question demanding access to the premises, and

(b) that either—

(i) access was demanded at a reasonable hour and was unreasonably refused, or

(ii) although entry to the premises was granted, the occupier unreasonably refused to comply with a request by the Commissioner or any of the Commissioner's officers or staff to permit the Commissioner or the officer or member of staff to do any of the things referred to in paragraph 1(3), and

(c) that the occupier, has, after the refusal, been notified by the Commissioner of the application for the warrant and has had an opportunity of being heard by the judge on the question whether or not it should be issued.

[(1A) In determining whether the Commissioner has given an occupier the seven days' notice referred to in sub-paragraph (1)(a) any assessment notice served on the occupier is to be disregarded. **]**

(2) Sub-paragraph (1) shall not apply if the judge is satisfied that the case is one of urgency or that compliance with those provisions would defeat the object of the entry.

3.

A judge who issues a warrant under this Schedule shall also issue two copies of it and certify them clearly as copies.

Execution of warrants

4.

A person executing a warrant issued under this Schedule may use such reasonable force as may be necessary.

5.

A warrant issued under this Schedule shall be executed at a reasonable hour unless it appears to the person executing it that there are grounds for suspecting that the **[** object of the warrant would be defeated **]** if it were so executed.

6.

If the person who occupies the premises in respect of which a warrant is issued under this Schedule is present when the warrant is executed, he shall be shown the warrant and supplied with a copy of it; and if that person is not present a copy of the warrant shall be left in a prominent place on the premises.

7.—

(1) A person seizing anything in pursuance of a warrant under this Schedule shall give a receipt for it if asked to do so.

(2) Anything so seized may be retained for so long as is necessary in all the circumstances but the person in occupation of the premises in question shall be given a copy of anything that is seized if he so requests and the person executing the warrant considers that it can be done without undue delay.

Matters exempt from inspection and seizure

8.

The powers of inspection and seizure conferred by a warrant issued under this Schedule shall not be exercisable in respect of personal data which by virtue of section 28 are exempt from any of the provisions of this Act.

9.—

(1) Subject to the provisions of this paragraph, the powers of inspection and seizure conferred by a warrant issued under this Schedule shall not be exercisable in respect of—

(a) any communication between a professional legal adviser and his client in connection with the giving of legal advice to the client with respect to his obligations, liabilities or rights under this Act, or

(b) any communication between a professional legal adviser and his client, or between such an adviser or his client and any other person, made in connection with or in contemplation of proceedings under or arising out of this Act (including proceedings before the Tribunal) and for the purposes of such proceedings.

(2) Sub-paragraph (1) applies also to—

(a) any copy or other record of any such communication as is there mentioned, and

(b) any document or article enclosed with or referred to in any such communication if made in connection with the giving of any advice or, as the case may be, in connection with or in contemplation of and for the purposes of such proceedings as are there mentioned.

(3) This paragraph does not apply to anything in the possession of any person other than the professional legal adviser or his client or to anything held with the intention of furthering a criminal purpose.

(4) In this paragraph references to the client of a professional legal adviser include references to any person representing such a client.

10.

If the person in occupation of any premises in respect of which a warrant is issued under this Schedule objects to the inspection or seizure under the warrant of any material on the grounds that it consists partly of matters in respect of which those powers are not exercisable, he shall, if the person executing the warrant so requests, furnish that person with a copy of so much of the material as is not exempt from those powers.

Return of warrants

11.

A warrant issued under this Schedule shall be returned to the court from which it was issued—

(a) after being executed, or

(b) if not executed within the time authorised for its execution;

and the person by whom any such warrant is executed shall make an endorsement on it stating what powers have been exercised by him under the warrant.

Offences

12.

Any person who—

(a) intentionally obstructs a person in the execution of a warrant issued under this Schedule, **[. . .]**

(b) fails without reasonable excuse to give any person executing such a warrant such assistance as he may reasonably require for the execution of the warrant,

[(c) makes a statement in response to a requirement under paragraph (e) or (f) of paragraph 1(3) which that person knows to be false in a material respect, or

(d) recklessly makes a statement in response to such a requirement which is false in a material respect, **]**

is guilty of an offence.

Vessels, vehicles etc.

13.

In this Schedule "premises" includes any vessel, vehicle, aircraft or hovercraft, and references to the occupier of any premises include references to the person in charge of any vessel, vehicle, aircraft or hovercraft.

Scotland and Northern Ireland

14.

In the application of this Schedule to Scotland—

(a) for any reference to a circuit judge there is substituted a reference to the sheriff,

(b) for any reference to information on oath there is substituted a reference to evidence on oath, and

(c) for the reference to the court from which the warrant was issued there is substituted a reference to the sheriff clerk.

15.

In the application of this Schedule to Northern Ireland—

(a) for any reference to a circuit judge there is substituted a reference to a county court judge, and

(b) for any reference to information on oath there is substituted a reference to a complaint on oath.

[Self-incrimination]

[16

An explanation given, or information provided, by a person in response to a requirement under paragraph (e) or (f) of paragraph 1(3) may only be used in evidence against that person—

(a) on a prosecution for an offence under—

(i) paragraph 12,

(ii) section 5 of the Perjury Act 1911 (false statements made otherwise than on oath),

(iii) section 44(2) of the Criminal Law (Consolidation) (Scotland) Act 1995 (false statements made otherwise than on oath), or

(iv) Article 10 of the Perjury (Northern Ireland) Order 1979 (false statutory declarations and other false unsworn statements), or

(b) on a prosecution for any other offence where—

(i) in giving evidence that person makes a statement inconsistent with that explanation or information, and

(ii) evidence relating to that explanation or information is adduced, or a question relating to it is asked, by that person or on that person's behalf.

]

SCHEDULE 10

Further provisions relating to assistance under section 53

Section 53(6)

1.

In this Schedule "applicant" and "proceedings" have the same meaning as in section 53.

2.

The assistance provided under section 53 may include the making of arrangements for, or for the Commissioner to bear the costs of—

(a) the giving of advice or assistance by a solicitor or counsel, and

(b) the representation of the applicant, or the provision to him of such assistance as is usually given by a solicitor or counsel—

(i) in steps preliminary or incidental to the proceedings, or

(ii) in arriving at or giving effect to a compromise to avoid or bring an end to the proceedings.

3.

Where assistance is provided with respect to the conduct of proceedings—

(a) it shall include an agreement by the Commissioner to indemnify the applicant (subject only to any exceptions specified in the notification) in respect of any liability to pay costs or expenses arising by virtue of any judgment or order of the court in the proceedings,

(b) it may include an agreement by the Commissioner to indemnify the applicant in respect of any liability to pay costs or expenses arising by virtue of any compromise or settlement arrived at in order to avoid the proceedings or bring the proceedings to an end, and

(c) it may include an agreement by the Commissioner to indemnify the applicant in respect of any liability to pay damages pursuant to an undertaking given on the grant of interlocutory relief (in Scotland, an interim order) to the applicant.

4.

Where the Commissioner provides assistance in relation to any proceedings, he shall do so on such terms, or make such other arrangements, as will secure that a person against whom the proceedings have been or are commenced is informed that assistance has been or is being provided by the Commissioner in relation to them.

5.

In England and Wales or Northern Ireland, the recovery of expenses incurred by the Commissioner in providing an applicant with assistance (as taxed or assessed in such manner as may be prescribed by rules of court) shall constitute a first charge for the benefit of the Commissioner—

(a) on any costs which, by virtue of any judgment or order of the court, are payable to the applicant by any other person in respect of the matter in connection with which the assistance is provided, and

(b) on any sum payable to the applicant under a compromise or settlement arrived at in connection with that matter to avoid or bring to an end any proceedings.

6.

In Scotland, the recovery of such expenses (as taxed or assessed in such manner as may be prescribed by rules of court) shall be paid to the Commissioner, in priority to other debts—

(a) out of any expenses which, by virtue of any judgment or order of the court, are payable to the applicant by any other person in respect of the matter in connection with which the assistance is provided, and

(b) out of any sum payable to the applicant under a compromise or settlement arrived at in connection with that matter to avoid or bring to an end any proceedings.

SCHEDULE 11

Educational records

Section 68(1)(b)

Meaning of "educational record"

1.

For the purposes of section 68 "educational record" means any record to which paragraph 2, 5 or 7 applies.

England and Wales

2.

This paragraph applies to any record of information which—

(a) is processed by or on behalf of the governing body of, or a teacher at, any school in England and Wales specified in paragraph 3,

(b) relates to any person who is or has been a pupil at the school, and

(c) originated from or was supplied by or on behalf of any of the persons specified in paragraph 4,

other than information which is processed by a teacher solely for the teacher's own use.

3.

The schools referred to in paragraph 2(a) are—

(a) a school maintained by a **[** local authority **]** , and

(b) a special school, as defined by section 6(2) of the Education Act 1996, which is not so maintained.

4.

The persons referred to in paragraph 2(c) are—

(a) an employee of the **[** local authority **]** which maintains the school,

(b) in the case of—

(i) a voluntary aided, foundation or foundation special school (within the meaning of the School Standards and Framework Act 1998), or

(ii) a special school which is not maintained by a **[** local authority **]** , a teacher or other employee at the school (including an educational psychologist engaged by the governing body under a contract for services),

(c) the pupil to whom the record relates, and

(d) a parent, as defined by section 576(1) of the Education Act 1996, of that pupil.

[4A.

In paragraphs 3 and 4 "local authority" has the meaning given by section 579(1) of the Education Act 1996.

]

Scotland

5.

This paragraph applies to any record of information which is processed—

(a) by an education authority in Scotland, and

(b) for the purpose of the relevant function of the authority,

other than information which is processed by a teacher solely for the teacher's own use.

6.

For the purposes of paragraph 5—

(a) "education authority" means an education authority within the meaning of the Education (Scotland) Act 1980 ("the 1980 Act") **[. . .]** ,

(b) "the relevant function" means, in relation to each of those authorities, their function under section 1 of the 1980 Act and section 7(1) of the 1989 Act, and

(c) information processed by an education authority is processed for the purpose of the relevant function of the authority if the processing relates to the discharge of that function in respect of a person—

(i) who is or has been a pupil in a school provided by the authority, or

(ii) who receives, or has received, further education (within the meaning of the 1980 Act) so provided.

Northern Ireland

7.—

(1) This paragraph applies to any record of information which—

(a) is processed by or on behalf of the Board of Governors of, or a teacher at, any grant-aided school in Northern Ireland,

(b) relates to any person who is or has been a pupil at the school, and

(c) originated from or was supplied by or on behalf of any of the persons specified in paragraph 8,

other than information which is processed by a teacher solely for the teacher's own use.

(2) In sub-paragraph (1) "grant-aided school" has the same meaning as in the Education and Libraries (Northern Ireland) Order 1986.

8.

The persons referred to in paragraph 7(1) are—

(a) a teacher at the school,

(b) an employee of an education and library board, other than such a teacher,

(c) the pupil to whom the record relates, and

(d) a parent (as defined by Article 2(2) of the Education and Libraries (Northern Ireland) Order 1986) of that pupil.

England and Wales: transitory provisions

9.—

(1) Until the appointed day within the meaning of section 20 of the School Standards and Framework Act 1998, this Schedule shall have effect subject to the following modifications.

(2) Paragraph 3 shall have effect as if for paragraph (b) and the "and" immediately preceding it there were substituted—

"(aa) a grant-maintained school, as defined by section 183(1) of the Education Act 1996,

(ab) a grant-maintained special school, as defined by section 337(4) of that Act, and

(b) a special school, as defined by section 6(2) of that Act, which is neither a maintained special school, as defined by section 337(3) of that Act, nor a grant-maintained special school."

(3) Paragraph 4(b)(i) shall have effect as if for the words from "foundation", in the first place where it occurs, to "1998)" there were substituted "or grant-maintained school".

SCHEDULE 12

Accessible public records

Section 68(1)(c)

Meaning of "accessible public record"

1.

For the purposes of section 68 "accessible public record" means any record which is kept by an authority specified—

(a) as respects England and Wales, in the Table in paragraph 2,

(b) as respects Scotland, in the Table in paragraph 4, or

(c) as respects Northern Ireland, in the Table in paragraph 6,

and is a record of information of a description specified in that Table in relation to that authority.

Housing and social services records: England and Wales:

2.

The following is the Table referred to in paragraph 1(a).

Table of authorities and information

The authorities	*The accessible information*
Housing Act local authority.	Information held for the purpose of any of the authority's tenancies.
Local social services authority.	Information held for any purpose of the authority's social services functions.

3.—

(1) The following provisions apply for the interpretation of the Table in paragraph 2.

(2) Any authority which, by virtue of section 4(e) of the Housing Act 1985, is a local authority for the purpose of any provision of that Act is a "Housing

Act local authority" for the purposes of this Schedule, and so is any housing action trust established under Part III of the Housing Act 1988.

(3) Information contained in records kept by a Housing Act local authority is "held for the purpose of any of the authority's tenancies" if it is held for any purpose of the relationship of landlord and tenant of a dwelling which subsists, has subsisted or may subsist between the authority and any individual who is, has been or, as the case may be, has applied to be, a tenant of the authority.

(4) Any authority which, by virtue of section 1 or 12 of the Local Authority Social Services Act 1970, is or is treated as a local authority for the purposes of that Act is a "local social services authority" for the purposes of this Schedule; and information contained in records kept by such an authority is "held for any purpose of the authority's social services functions" if it is held for the purpose of any past, current or proposed exercise of such a function in any case.

(5) Any expression used in paragraph 2 or this paragraph and in Part II of the Housing Act 1985 or the Local Authority Social Services Act 1970 has the same meaning as in that Act.

Housing and social services records: Scotland

4.

The following is the Table referred to in paragraph 1(b).

Table of authorities and information

The authorities	***The accessible information***
Local authority.	Information held for the purpose of any of the body's tenancies.
Scottish Homes.	
Social work authority.	Information held for any purpose of the authority's functions under the Social Work (Scotland) Act 1968 and the enactments referred to in section 5(1B) of that Act.

5.—

(1) The following provisions apply for the interpretation of the Table in paragraph 4.

(2) "Local authority" means —

(a) a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994,

(b) a joint board or joint committee of two or more of those councils, or

(c) any trust under the control of such a council.

(3) Information contained in records kept by a local authority or Scottish Homes is held for the purpose of any of their tenancies if it is held for any purpose of the relationship of landlord and tenant of a dwelling-house which

subsists, has subsisted or may subsist between the authority or, as the case may be, Scottish Homes and any individual who is, has been or, as the case may be, has applied to be a tenant of theirs.

(4) "Social work authority" means a local authority for the purposes of the Social Work (Scotland) Act 1968; and information contained in records kept by such an authority is held for any purpose of their functions if it is held for the purpose of any past, current or proposed exercise of such a function in any case.

Housing and social services records: Northern Ireland

6.

The following is the Table referred to in paragraph 1(c).

Table of authorities and information

The authorities	*The accessible information*
The Northern Ireland Housing Executive.	Information held for the purpose of any of the Executive's tenancies.
A Health and Social Services Board.	Information held for the purpose of any past, current or proposed exercise by the Board of any function exercisable, by virtue of directions under Article 17(1) of the Health and Personal Social Services (Northern Ireland) Order 1972, by the Board on behalf of the Department of Health and Social Services with respect to the administration of personal social services under— (a) the Children and Young Persons Act (Northern Ireland) 1968; (b) the Health and Personal Social Services (Northern Ireland) Order 1972; (c) Article 47 of the Matrimonial Causes (Northern Ireland) Order 1978; (d) Article 11 of the Domestic Proceedings (Northern Ireland) Order 1980; (e) the Adoption (Northern Ireland) Order 1987; or (f) the Children (Northern Ireland) Order 1995.
An HSS trust	Information held for the purpose of any past, current or proposed exercise by the trust of any function exercisable, by virtue of an authorisation under Article 3(1) of the Health and Personal Social Services (Northern Ireland) Order 1994, by the trust on behalf of

The authorities	*The accessible information*
An HSS trust	a Health and Social Services Board with respect to the administration of personal social services under any statutory provision mentioned in the last preceding entry.

7.—

(1) This paragraph applies for the interpretation of the Table in paragraph 6.

(2) Information contained in records kept by the Northern Ireland Housing Executive is "held for the purpose of any of the Executive's tenancies" if it is held for any purpose of the relationship of landlord and tenant of a dwelling which subsists, has subsisted or may subsist between the Executive and any individual who is, has been or, as the case may be, has applied to be, a tenant of the Executive.

SCHEDULE 13

Modifications of Act having effect before 24th October 2007

Section 72

1.

After section 12 there is inserted—

"12A.— Rights of data subjects in relation to exempt manual data.

(1) A data subject is entitled at any time by notice in writing—

(a) to require the data controller to rectify, block, erase or destroy exempt manual data which are inaccurate or incomplete, or

(b) to require the data controller to cease holding exempt manual data in a way incompatible with the legitimate purposes pursued by the data controller.

(2) A notice under subsection (1)(a) or (b) must state the data subject's reasons for believing that the data are inaccurate "or incomplete or, as the case may be, his reasons for believing that they are held in a way incompatible with the legitimate purposes pursued by the data controller.

(3) If the court is satisfied, on the application of any person who has given a notice under subsection (1) which appears to the court to be justified (or to be justified to any extent) that the data controller in question has failed to comply with the notice, the court may order him to take such steps for complying with the notice (or for complying with it to that extent) as the court thinks fit.

(4) In this section "exempt manual data" means —

(a) in relation to the first transitional period, as defined by paragraph 1(2) of Schedule 8, data to which paragraph 3 or 4 of that Schedule applies, and

(b) in relation to the second transitional period, as so defined, data to which **[** paragraph 14 or 14A **] 1** of that Schedule applies.

(5) For the purposes of this section personal data are incomplete if, and only if, the data, although not inaccurate, are such that their incompleteness would constitute a contravention of the third or fourth data protection principles, if those principles applied to the data."

2.

In section 32—

(a) in subsection (2) after "section 12" there is inserted— and

"(dd) section 12A,"

(b) in subsection (4) after "12(8)" there is inserted ", 12A(3)".

3.

In section 34 for "section 14(1) to (3)" there is substituted "sections 12A and 14(1) to (3)."

4.

In section 53(1) after "12(8)" there is inserted ", 12A(3)".

5.

In paragraph 8 of Part II of Schedule 1, the word "or" at the end of paragraph (c) is omitted and after paragraph (d) there is inserted

"or

(e) he contravenes section 12A by failing to comply with a notice given under subsection (1) of that section to the extent that the notice is justified."

SCHEDULE 14

Transitional provisions and savings

Section 73

Interpretation

1.

In this Schedule—

"the 1984 Act" means the Data Protection Act 1984;

"the old principles" means the data protection principles within the meaning of the 1984 Act;
"the new principles" means the data protection principles within the meaning of this Act.

Effect of registration under Part II of 1984 Act

2.—

(1) Subject to sub-paragraphs (4) and (5) any person who, immediately before the commencement of Part III of this Act—

(a) is registered as a data user under Part II of the 1984 Act, or

(b) is treated by virtue of section 7(6) of the 1984 Act as so registered,

is exempt from section 17(1) of this Act until the end of the registration period **[. . .]** .

(2) In sub-paragraph (1) "the registration period", in relation to a person, means —

(a) where there is a single entry in respect of that person as a data user, the period at the end of which, if section 8 of the 1984 Act had remained in force, that entry would have fallen to be removed unless renewed, and

(b) where there are two or more entries in respect of that person as a data user, the period at the end of which, if that section had remained in force, the last of those entries to expire would have fallen to be removed unless renewed.

(3) Any application for registration as a data user under Part II of the 1984 Act which is received by the Commissioner before the commencement of Part III of this Act (including any appeal against a refusal of registration) shall be determined in accordance with the old principles and the provisions of the 1984 Act.

(4) If a person falling within paragraph (b) of sub-paragraph (1) receives a notification under section 7(1) of the 1984 Act of the refusal of his application, sub-paragraph (1) shall cease to apply to him—

(a) if no appeal is brought, at the end of the period within which an appeal can be brought against the refusal, or

(b) on the withdrawal or dismissal of the appeal.

(5) If a data controller gives a notification under section 18(1) at a time when he is exempt from section 17(1) by virtue of sub-paragraph (1), he shall cease to be so exempt.

(6) The Commissioner shall include in the register maintained under section 19 an entry in respect of each person who is exempt from section 17(1) by virtue of sub-paragraph (1); and each entry shall consist of the particulars which, immediately before the commencement of Part III of this Act, were included (or treated as included) in respect of that person in the register maintained under section 4 of the 1984 Act.

(7) Notification regulations under Part III of this Act may make provision modifying the duty referred to in section 20(1) in its application to any person in respect of whom an entry in the register maintained under section 19 has been made under sub-paragraph (6).

(8) Notification regulations under Part III of this Act may make further transitional provision in connection with the substitution of Part III of this Act for Part II of the 1984 Act (registration), including provision modifying the application of provisions of Part III in transitional cases.

Rights of data subjects

3.—

(1) The repeal of section 21 of the 1984 Act (right of access to personal data) does not affect the application of that section in any case in which the request (together with the information referred to in paragraph (a) of subsection (4) of that section and, in a case where it is required, the consent referred to in paragraph (b) of that subsection) was received before the day on which the repeal comes into force.

(2) Sub-paragraph (1) does not apply where the request is made by reference to this Act.

(3) Any fee paid for the purposes of section 21 of the 1984 Act before the commencement of section 7 in a case not falling within sub-paragraph (1) shall be taken to have been paid for the purposes of section 7.

4.

The repeal of section 22 of the 1984 Act (compensation for inaccuracy) and the repeal of section 23 of that Act (compensation for loss or unauthorised disclosure) do not affect the application of those sections in relation to damage or distress suffered at any time by reason of anything done or omitted to be done before the commencement of the repeals.

5.

The repeal of section 24 of the 1984 Act (rectification and erasure) does not affect any case in which the application to the court was made before the day on which the repeal comes into force.

6.

Subsection (3)(b) of section 14 does not apply where the rectification, blocking, erasure or destruction occurred before the commencement of that section.

Enforcement and transfer prohibition notices served under Part V of 1984 Act

7.—

(1) If, immediately before the commencement of section 40—

(a) an enforcement notice under section 10 of the 1984 Act has effect, and

(b) either the time for appealing against the notice has expired or any appeal has been determined,

then, after that commencement, to the extent mentioned in sub-paragraph (3), the notice shall have effect for the purposes of sections 41 and 47 as if it were an enforcement notice under section 40.

(2) Where an enforcement notice has been served under section 10 of the 1984 Act before the commencement of section 40 and immediately before that commencement either—

(a) the time for appealing against the notice has not expired, or

(b) an appeal has not been determined,

the appeal shall be determined in accordance with the provisions of the 1984 Act and the old principles and, unless the notice is quashed on appeal, to the extent mentioned in sub-paragraph (3) the notice shall have effect for the purposes of sections 41 and 47 as if it were an enforcement notice under section 40.

(3) An enforcement notice under section 10 of the 1984 Act has the effect described in sub-paragraph (1) or (2) only to the extent that the steps specified in the notice for complying with the old principle or principles in question are steps which the data controller could be required by an enforcement notice under section 40 to take for complying with the new principles or any of them.

8.—

(1) If, immediately before the commencement of section 40—

(a) a transfer prohibition notice under section 12 of the 1984 Act has effect, and

(b) either the time for appealing against the notice has expired or any appeal has been determined,

then, on and after that commencement, to the extent specified in sub-paragraph (3), the notice shall have effect for the purposes of sections 41 and 47 as if it were an enforcement notice under section 40.

(2) Where a transfer prohibition notice has been served under section 12 of the 1984 Act and immediately before the commencement of section 40 either—

(a) the time for appealing against the notice has not expired, or

(b) an appeal has not been determined,

the appeal shall be determined in accordance with the provisions of the 1984 Act and the old principles and, unless the notice is quashed on appeal, to the extent mentioned in sub-paragraph (3) the notice shall have effect for the purposes of sections 41 and 47 as if it were an enforcement notice under section 40.

(3) A transfer prohibition notice under section 12 of the 1984 Act has the effect described in sub-paragraph (1) or (2) only to the extent that the prohibition imposed by the notice is one which could be imposed by an enforcement notice under section 40 for complying with the new principles or any of them.

Notices under new law relating to matters in relation to which 1984 Act had effect

9.

The Commissioner may serve an enforcement notice under section 40 on or after the day on which that section comes into force if he is satisfied that, before that day, the data controller contravened the old principles by reason of any act or omission which would also have constituted a contravention of the new principles if they had applied before that day.

10.

Subsection (5)(b) of section 40 does not apply where the rectification, blocking, erasure or destruction occurred before the commencement of that section.

11.

The Commissioner may serve an information notice under section 43 on or after the day on which that section comes into force if he has reasonable grounds for suspecting that, before that day, the data controller contravened the old principles by reason of any act or omission which would also have constituted a contravention of the new principles if they had applied before that day.

12.

Where by virtue of paragraph 11 an information notice is served on the basis of anything done or omitted to be done before the day on which section 43 comes into force, subsection (2)(b) of that section shall have effect as if the reference to the data controller having complied, or complying, with the new principles were a reference to the data controller having contravened the old principles by reason of any such act or omission as is mentioned in paragraph 11.

Self-incrimination, etc.

13.—

(1) In section 43(8), section 44(9) and paragraph 11 of Schedule 7, any reference to an offence under this Act includes a reference to an offence under the 1984 Act.

(2) In section 34(9) of the 1984 Act, any reference to an offence under that Act includes a reference to an offence under this Act.

Warrants issued under 1984 Act

14.

The repeal of Schedule 4 to the 1984 Act does not affect the application of that Schedule in any case where a warrant was issued under that Schedule before the commencement of the repeal.

Complaints under section 36(2) of 1984 Act and requests for assessment under section 42

15.

The repeal of section 36(2) of the 1984 Act does not affect the application of that provision in any case where the complaint was received by the Commissioner before the commencement of the repeal.

16.

In dealing with a complaint under section 36(2) of the 1984 Act or a request for an assessment under section 42 of this Act, the Commissioner shall have regard to the provisions from time to time applicable to the processing, and accordingly—

(a) in section 36(2) of the 1984 Act, the reference to the old principles and the provisions of that Act includes, in relation to any time when the new principles and the provisions of this Act have effect, those principles and provisions, and

(b) in section 42 of this Act, the reference to the provisions of this Act includes, in relation to any time when the old principles and the provisions of the 1984 Act had effect, those principles and provisions.

Applications under Access to Health Records Act 1990 or corresponding Northern Ireland legislation

17.—

(1) The repeal of any provision of the Access to Health Records Act 1990 does not affect—

(a) the application of section 3 or 6 of that Act in any case in which the application under that section was received before the day on which the repeal comes into force, or

(b) the application of section 8 of that Act in any case in which the application to the court was made before the day on which the repeal comes into force.

(2) Sub-paragraph (1)(a) does not apply in relation to an application for access to information which was made by reference to this Act.

18.—

(1) The revocation of any provision of the Access to Health Records (Northern Ireland) Order 1993 does not affect—

(a) the application of Article 5 or 8 of that Order in any case in which the application under that Article was received before the day on which the repeal comes into force, or

(b) the application of Article 10 of that Order in any case in which the application to the court was made before the day on which the repeal comes into force.

(2) Sub-paragraph (1)(a) does not apply in relation to an application for access to information which was made by reference to this Act.

Applications under regulations under Access to Personal Files Act 1987 or corresponding Northern Ireland legislation

19.—

(1) The repeal of the personal files enactments does not affect the application of regulations under those enactments in relation to—

(a) any request for information,

(b) any application for rectification or erasure, or

(c) any application for review of a decision,

which was made before the day on which the repeal comes into force.

(2) Sub-paragraph (1)(a) does not apply in relation to a request for information which was made by reference to this Act.

(3) In sub-paragraph (1) "the personal files enactments" means —

(a) in relation to Great Britain, the Access to Personal Files Act 1987, and

(b) in relation to Northern Ireland, Part II of the Access to Personal Files and Medical Reports (Northern Ireland) Order 1991.

Applications under section 158 of Consumer Credit Act 1974

20.

Section 62 does not affect the application of section 158 of the Consumer Credit Act 1974 in any case where the request was received before the commencement of section 62, unless the request is made by reference to this Act.

SCHEDULE 15

Minor and consequential amendments

Section 74(1)

Public Records Act 1958 (c. 51)

1.— [. . .]

Parliamentary Commissioner Act 1967 (c. 13)

2. [. . .]

3. [. . .]

Superannuation Act 1972 (c. 11)

4. [. . .]

House of Commons Disqualification Act 1975 (c. 24)

5.— [. . .]

Northern Ireland Assembly Disqualification Act 1975 (c. 25)

6.— [. . .]

Representation of the People Act 1983 (c. 2)

7.

In Schedule 2 of the Representation of the People Act 1983 (provisions which may be included in regulations as to registration etc), in paragraph 11A(2)—

(a) for "data user" there is substituted "data controller", and

(b) for "the Data Protection Act 1984" there is substituted "the Data Protection Act 1998".

Access to Medical Reports Act 1988 (c. 28)

8.

In section 2(1) of the Access to Medical Reports Act 1988 (interpretation), in the definition of "health professional", for "the Data Protection (Subject Access Modification) Order 1987" there is substituted "the Data Protection Act 1998".

Football Spectators Act 1989 (c. 37)

9.— [. . .]

Education (Student Loans) Act 1990 (c. 6)

10.

Schedule 2 to the Education (Student Loans) Act 1990 (loans for students) so far as that Schedule continues in force shall have effect as if the reference in paragraph 4(2) to the Data Protection Act
1984 were a reference to this Act.

Access to Health Records Act 1990 (c. 23)

11.

For section 2 of the Access to Health Records Act 1990 there is substituted—

> **"2. Health professionals.**
> In this Act "health professional"has the same meaning as in the Data Protection Act 1998."

12.

In section 3(4) of that Act (cases where fee may be required) in paragraph (a), for "the maximum prescribed under section 21 of the Data Protection Act 1984" there is substituted "such maximum as may be prescribed for the purposes of this section by regulations under section 7 of the Data Protection Act 1998".

13.

In section 5(3) of that Act (cases where right of access may be partially excluded) for the words from the beginning to "record" in the first place where it occurs there is substituted "Access shall not be given under section 3(2) to any part of a health record".

Access to Personal Files and Medical Reports (Northern Ireland) Order 1991 (1991/1707 (N.I. 14))

14.

In Article 4 of the Access to Personal Files and Medical Reports (Northern Ireland) Order 1991 (obligation to give access), in paragraph (2) (exclusion of information to which individual entitled under section 21 of the Data Protection Act 1984) for "section 21 of the Data Protection Act 1984" there is substituted "section 7 of the Data Protection Act 1998".

15.

In Article 6(1) of that Order (interpretation), in the definition of "health professional", for "the Data Protection (Subject Access Modification) (Health) Order 1987" there is substituted "the Data Protection Act 1998".

Tribunals and Inquiries Act 1992 (c. 53)

16.

In Part 1 of Schedule 1 to the Tribunals and Inquiries Act 1992 (tribunals under direct supervision of Council on Tribunals), for paragraph 14 there is substituted—

"Data protection	14.(a) The Data Protection Commissioner appointed under section 6 of the Data Protection Act 1998; (b) the Data Protection Tribunal constituted under that section, in respect of its jurisdiction under section 48 of that Act."

Access to Health Records (Northern Ireland) Order 1993 (1993/1250 (N.I. 4))

17.

For paragraphs (1) and (2) of Article 4 of the Access to Health Records (Northern Ireland) Order 1993 there is substituted—

"(1) In this Order "health professional" has the same meaning as in the Data Protection Act 1998."

18.

In Article 5(4) of that Order (cases where fee may be required) in sub-paragraph (a), for "the maximum prescribed under section 21 of the Data Protection Act 1984" there is substituted "such maximum as may be prescribed for the purposes of this Article by regulations under section 7 of the Data Protection Act 1998".

19.

In Article 7 of that Order (cases where right of access may be partially excluded) for the words from the beginning to "record" in the first place where it occurs there is substituted "Access shall not be given under Article 5(2) to any part of a health record".

SCHEDULE 16

Repeals and revocations

Section 74(2)

PART I

Repeals

Chapter	Short title	Extent of repeal
1984 c. 35.	The Data Protection Act 1984.	The whole Act.
1986 c. 60.	The Financial Services Act 1986.	Section 190.
1987 c. 37.	The Access to Personal Files Act 1987.	The whole Act.
1988 c. 40.	The Education Reform Act 1988.	Section 223.
1988 c. 50.	The Housing Act 1988.	In Schedule 17, paragraph 80.
1990 c. 23.	The Access to Health Records Act 1990.	In section 1(1), the words from "but does not" to the end.
		In section 3, subsection (1)(a) to (e) and, in subsection (6)(a), the words "in the case of an application made otherwise than by the patient".
		Section 4(1) and (2).
		In section 5(1)(a)(i), the words "of the patient or" and the word "other".
		In section 10, in subsection (2) the words "or orders" and in subsection (3) the words "or an order under section 2(3) above".
		In section 11, the definitions of "child" and "parental responsibility".
1990 c. 37.	The Human Fertilisation and Embryology Act 1990.	Section 33(8).

1990 c. 41.	The Courts and Legal Services Act 1990.	In Schedule 10, paragraph 58.
1992 c. 13.	The Further and Higher Education Act 1992.	Section 86.
1992 c. 37.	The Further and Higher Education (Scotland) Act 1992.	Section 59.
1993 c. 8.	The Judicial Pensions and Retirement Act 1993.	In Schedule 6, paragraph 50.
1993 c. 10.	The Charities Act 1993.	Section 12.
1993 c. 21.	The Osteopaths Act 1993.	Section 38.
1994 c. 17.	The Chiropractors Act 1994.	Section 38.
1994 c. 19.	The Local Government (Wales) Act 1994.	In Schedule 13, paragraph 30.
1994 c. 33.	The Criminal Justice and Public Order Act 1994.	Section 161.
1994 c. 39.	The Local Government etc. (Scotland) Act 1994.	In Schedule 13, paragraph 154.

PART II

Revocations

Number	Title	Extent of revocation
S.I. 1991/1142.	The Data Protection Registration Fee Order 1991.	The whole Order.
S.I. 1991/1707 (N.I. 14).	The Access to Personal Files and Medical Reports (Northern Ireland) Order 1991.	Part II. The Schedule.
S.I. 1992/3218.	The Banking Co-ordination (Second Council Directive) Regulations 1992.	In Schedule 10, paragraphs 15 and 40.
S.I. 1993/1250 (N.I. 4).	The Access to Health Records (Northern Ireland) Order 1993.	In Article 2(2), the definitions of "child" and "parental responsibility".

		In Article 3(1), the words from "but does not include" to the end. In Article 5, paragraph (1)(a) to (d) and, in paragraph (6)(a), the words "in the case of an application made otherwise than by the patient". Article 6(1) and (2). In Article 7(1)(a)(i), the words "of the patient or" and the word "other".
S.I. 1994/429 (N.I. 2).	The Health and Personal Social Services (Northern Ireland) Order 1994.	In Schedule 1, the entries relating to the Access to Personal Files and Medical Reports (Northern Ireland) Order 1991.
S.I. 1994/1696.	The Insurance Companies (Third Insurance Directives) Regulations 1994.	In Schedule 8, paragraph 8.
S.I. 1995/755 (N.I. 2).	The Children (Northern Ireland) Order 1995.	In Schedule 9, paragraphs 177 and 191.
S.I. 1995/3275.	The Investment Services Regulations 1995.	In Schedule 10, paragraphs 3 and 15.
S.I. 1996/2827.	The Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996.	In Schedule 8, paragraphs 3 and 26.

Modifications

Whole Document	Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003/2818, Pt 3 art. 11(4) Scotland Act 1998 c. 46, Sch. 5(II)(002) para. B2
Pt I s. 6(4)(a)	Transfer of Functions (Lord Advocate and Secretary of State) Order 1999/678, art. 7(4)

Pt II s. 7	Data Protection (Subject Access Modification) (Education) Order 2000/414, art. 6 Data Protection (Subject Access Modification) (Education) Order 2000/414, art. 7 Data Protection (Subject Access Modification) (Health) Order 2000/413, art. 6(1) Data Protection (Subject Access Modification) (Health) Order 2000/413, art. 8 Data Protection (Subject Access Modification) (Social Work) Order 2000/415, art. 6 Data Protection (Subject Access Modification) (Social Work) Order 2000/415, art. 7 Data Protection Act 1998 c. 29, Sch. 7 para. 8(1)
Pt II s. 7(1)	Data Protection Act 1998 c. 29, Pt II s. 8(1)
Pt II s. 7(8)	Data Protection Act 1998 c. 29, Sch. 7 para. 8(2)
Pt II s. 7(9)	Data Protection (Subject Access Modification) (Education) Order 2000/414, art. 7(1)(b)(ii) Data Protection (Subject Access Modification) (Health) Order 2000/413, art. 8(b)(ii) Data Protection (Subject Access Modification) (Social Work) Order 2000/415, art. 7(1)(b)(ii)
Pt III	Data Protection Act 1998 c. 29, Sch. 14 para. 2(7) Data Protection Act 1998 c. 29, Sch. 14 para. 2(8)
Pt III s. 18(1)	Data Protection Act 1998 c. 29, Sch. 14 para. 2(5)
Pt III s. 19(4)-(5)	Data Protection (Notification and Notification Fees) Regulations 2000/188, reg. 15(3)
Pt III s. 25	Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003/2818, Pt 3 art. 12(1)(b)
Pt IV s. 28(4)	Data Protection Act 1998 c. 29, Sch. 6 para. 6(1)
Pt IV s. 28(6)	Data Protection Act 1998 c. 29, Sch. 6 para. 6(1)
Pt IV s. 30	National Assembly for Wales (Transfer of Functions) Order 1999/672, Sch. 1 para. 1
Pt V	Privacy and Electronic Communications (EC Directive) Regulations 2003/2426, reg. 31 Telecommunications (Data Protection and Privacy) Regulations 1999/2093, Pt VII reg. 36(1)
Pt V s. 40	Data Protection Act 1998 c. 29, Sch. 14 para. 7(1) Data Protection Act 1998 c. 29, Sch. 14 para. 7(2) Data Protection Act 1998 c. 29, Sch. 14 para. 8(1) Data Protection Act 1998 c. 29, Sch. 14 para. 8(2) Data Protection Act 1998 c. 29, Sch. 14 para. 9

	Privacy and Electronic Communications (EC Directive) Regulations 2003/2426, Sch. 1 para. 1 Telecommunications (Data Protection and Privacy) Regulations 1999/2093, Sch. 3 para. 5 Telecommunications (Data Protection and Privacy) Regulations 1999/2093, Sch. 4 para. 1
Pt V s. 41	Telecommunications (Data Protection and Privacy) Regulations 1999/2093, Sch. 3 para. 5 Telecommunications (Data Protection and Privacy) Regulations 1999/2093, Sch. 4 para. 2
Pt V s. 41(1)-(2)	Privacy and Electronic Communications (EC Directive) Regulations 2003/2426, Sch. 1 para. 2
Pt V s. 41A-41C	Privacy and Electronic Communications (EC Directive) Regulations 2003/2426, Sch. 1 para. 2A
Pt V s. 42	Data Protection Act 1998 c. 29, Sch. 14 para. 16 Data Protection Act 1998 c. 29, Sch. 14 para. 16(b) Privacy and Electronic Communications (EC Directive) Regulations 2003/2426, Sch. 1 para. 3 Telecommunications (Data Protection and Privacy) Regulations 1999/2093, Sch. 4 para. 3
Pt V s. 43	Privacy and Electronic Communications (EC Directive) Regulations 2003/2426, Sch. 1 para. 4 Telecommunications (Data Protection and Privacy) Regulations 1999/2093, Sch. 3 para. 5 Telecommunications (Data Protection and Privacy) Regulations 1999/2093, Sch. 4 para. 4 Telecommunications (Data Protection and Privacy) Regulations 1999/2093, Sch. 4 para. 5
Pt V s. 43(2)(b)	Data Protection Act 1998 c. 29, Sch. 14 para. 12
Pt V s. 43(8)	Data Protection Act 1998 c. 29, Sch. 14 para. 13(1)
Pt V s. 44-46	Privacy and Electronic Communications (EC Directive) Regulations 2003/2426, Sch. 1 para. 5 Telecommunications (Data Protection and Privacy) Regulations 1999/2093, Sch. 4 para. 6
Pt V s. 44(9)	Data Protection Act 1998 c. 29, Sch. 14 para. 13(1)
Pt V s. 47	Privacy and Electronic Communications (EC Directive) Regulations 2003/2426, Sch. 1 para. 6
Pt V s. 48	Privacy and Electronic Communications (EC Directive) Regulations 2003/2426, Sch. 1 para. 7 Telecommunications (Data Protection and Privacy) Regulations 1999/2093, Sch. 4 para. 7
Pt V s. 48(3)	Data Protection Act 1998 c. 29, Sch. 6 para. 6(2)

Pt V s. 48(5)	Telecommunications (Data Protection and Privacy) Regulations 1999/2093, Sch. 4 para. 8
Pt V s. 49	Data Protection (Monetary Penalties) Order 2010/910, art. 7 Privacy and Electronic Communications (EC Directive) Regulations 2003/2426, Sch. 1 para. 8
Pt VI s. 55A	Privacy and Electronic Communications (EC Directive) Regulations 2003/2426, Sch. 1 para. 8A
Pt VI s. 55B	Privacy and Electronic Communications (EC Directive) Regulations 2003/2426, Sch. 1 para. 8B
Pt VI s. 58	Privacy and Electronic Communications (EC Directive) Regulations 2003/2426, reg. 28(8)(c)
Sch. 6	Data Protection (Monetary Penalties) Order 2010/910, art. 7 Privacy and Electronic Communications (EC Directive) Regulations 2003/2426, reg. 31 Telecommunications (Data Protection and Privacy) Regulations 1999/2093, Pt VII reg. 36(1)
Sch. 6 para. 2(1)	Data Protection Act 1998 c. 29, Sch. 6 para. 2(2)
Sch. 6 para. 4(1)	Privacy and Electronic Communications (EC Directive) Regulations 2003/2426, Sch. 1 para. 9 Telecommunications (Data Protection and Privacy) Regulations 1999/2093, Sch. 4 para. 9
Sch. 7 para. 11	Data Protection Act 1998 c. 29, Sch. 14 para. 13(1)
Sch. 9	Data Protection Act 1998 c. 29, Sch. 9 para. 14(a) Data Protection Act 1998 c. 29, Sch. 9 para. 14(b) Data Protection Act 1998 c. 29, Sch. 9 para. 14(c) Data Protection Act 1998 c. 29, Sch. 9 para. 15(a) Data Protection Act 1998 c. 29, Sch. 9 para. 15(b) Privacy and Electronic Communications (EC Directive) Regulations 2003/2426, reg. 31 Telecommunications (Data Protection and Privacy) Regulations 1999/2093, Pt VII reg. 36(1) Telecommunications (Data Protection and Privacy) Regulations 1999/2093, Sch. 3 para. 5
Sch. 9 para. 1	Privacy and Electronic Communications (EC Directive) Regulations 2003/2426, Sch. 1 para. 10 Telecommunications (Data Protection and Privacy) Regulations 1999/2093, Sch. 4 para. 10
Sch. 9 para. 1(1A)	Coroners and Justice Act 2009 c. 25, Sch. 22(5) para. 46
Sch. 9 para. 2(1A)	Privacy and Electronic Communications (EC Directive) Regulations 2003/2426, Sch. 1 para. 10A

Sch. 9 para. 9	Privacy and Electronic Communications (EC Directive) Regulations 2003/2426, Sch. 1 para. 11 Telecommunications (Data Protection and Privacy) Regulations 1999/2093, Sch. 4 para. 11
Sch. 11 para. 3(b)	Data Protection Act 1998 c. 29, Sch. 11 para. 9(2)
Sch. 11 para. 4(b)(i)	Data Protection Act 1998 c. 29, Sch. 11 para. 9(3)

Defamation Act 2013 c. 26

An Act to amend the law of defamation.

[25th April 2013]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Requirement of serious harm

1.— Serious harm

(1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.

(2) For the purposes of this section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss.

Defences

2.— Truth

(1) It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true.

(2) Subsection (3) applies in an action for defamation if the statement complained of conveys two or more distinct imputations.

(3) If one or more of the imputations is not shown to be substantially true, the defence under this section does not fail if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not seriously harm the claimant's reputation.

(4) The common law defence of justification is abolished and, accordingly, section 5 of the Defamation Act 1952 (justification) is repealed.

Defences

3.— Honest opinion

(1) It is a defence to an action for defamation for the defendant to show that the following conditions are met.

(2) The first condition is that the statement complained of was a statement of opinion.

(3) The second condition is that the statement complained of indicated, whether in general or specific terms, the basis of the opinion.

(4) The third condition is that an honest person could have held the opinion on the basis of—

(a) any fact which existed at the time the statement complained of was published;

(b) anything asserted to be a fact in a privileged statement published before the statement complained of.

(5) The defence is defeated if the claimant shows that the defendant did not hold the opinion.

(6) Subsection (5) does not apply in a case where the statement complained of was published by the defendant but made by another person ("the author"); and in such a case the defence is defeated if the claimant shows that the defendant knew or ought to have known that the author did not hold the opinion.

(7) For the purposes of subsection (4)(b) a statement is a "privileged statement" if the person responsible for its publication would have one or more of the following defences if an action for defamation were brought in respect of it—

(a) a defence under section 4 (publication on matter of public interest);

(b) a defence under section 6 (peer-reviewed statement in scientific or academic journal);

(c) a defence under section 14 of the Defamation Act 1996 (reports of court proceedings protected by absolute privilege);

(d) a defence under section 15 of that Act (other reports protected by qualified privilege).

(8) The common law defence of fair comment is abolished and, accordingly, section 6 of the Defamation Act 1952 (fair comment) is repealed.

Defences

4.— Publication on matter of public interest

(1) It is a defence to an action for defamation for the defendant to show that—

(a) the statement complained of was, or formed part of, a statement on a matter of public interest; and

(b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

(2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.

(3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.

(4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.

(5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.

(6) The common law defence known as the Reynolds defence is abolished.

Defences

5.— Operators of websites

(1) This section applies where an action for defamation is brought against the operator of a website in respect of a statement posted on the website.

(2) It is a defence for the operator to show that it was not the operator who posted the statement on the website.

(3) The defence is defeated if the claimant shows that—

(a) it was not possible for the claimant to identify the person who posted the statement,

(b) the claimant gave the operator a notice of complaint in relation to the statement, and

(c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.

(4) For the purposes of subsection (3)(a), it is possible for a claimant to "identify" a person only if the claimant has sufficient information to bring proceedings against the person.

(5) Regulations may—

(a) make provision as to the action required to be taken by an operator of a website in response to a notice of complaint (which may in particular include action relating to the identity or contact details of the person who posted the statement and action relating to its removal);

(b) make provision specifying a time limit for the taking of any such action;

(c) make provision conferring on the court a discretion to treat action taken after the expiry of a time limit as having been taken before the expiry;

(d) make any other provision for the purposes of this section.

(6) Subject to any provision made by virtue of subsection (7), a notice of complaint is a notice which—

(a) specifies the complainant's name,

(b) sets out the statement concerned and explains why it is defamatory of the complainant,

(c) specifies where on the website the statement was posted, and

(d) contains such other information as may be specified in regulations.

(7) Regulations may make provision about the circumstances in which a notice which is not a notice of complaint is to be treated as a notice of complaint for the purposes of this section or any provision made under it.

(8) Regulations under this section—

(a) may make different provision for different circumstances;

(b) are to be made by statutory instrument.

(9) A statutory instrument containing regulations under this section may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.

(10) In this section *"regulations"* means regulations made by the Secretary of State.

(11) The defence under this section is defeated if the claimant shows that the operator of the website has acted with malice in relation to the posting of the statement concerned.

(12) The defence under this section is not defeated by reason only of the fact that the operator of the website moderates the statements posted on it by others.

Defences

6.— Peer-reviewed statement in scientific or academic journal etc

(1) The publication of a statement in a scientific or academic journal (whether published in electronic form or otherwise) is privileged if the following conditions are met.

(2) The first condition is that the statement relates to a scientific or academic matter.

(3) The second condition is that before the statement was published in the journal an independent review of the statement's scientific or academic merit was carried out by—

(a) the editor of the journal, and

(b) one or more persons with expertise in the scientific or academic matter concerned.

(4) Where the publication of a statement in a scientific or academic journal is privileged by virtue of subsection (1), the publication in the same journal of any assessment of the statement's scientific or academic merit is also privileged if—

(a) the assessment was written by one or more of the persons who carried out the independent review of the statement; and

(b) the assessment was written in the course of that review.

(5) Where the publication of a statement or assessment is privileged by virtue of this section, the publication of a fair and accurate copy of, extract from or summary of the statement or assessment is also privileged.

(6) A publication is not privileged by virtue of this section if it is shown to be made with malice.

(7) Nothing in this section is to be construed—

(a) as protecting the publication of matter the publication of which is prohibited by law;

(b) as limiting any privilege subsisting apart from this section.

(8) The reference in subsection (3)(a) to *"the editor of the journal"* is to be read, in the case of a journal with more than one editor, as a reference to the editor or editors who were responsible for deciding to publish the statement concerned.

Defences

7.— Reports etc protected by privilege

(1) For subsection (3) of section 14 of the Defamation Act 1996 (reports of court proceedings absolutely privileged) substitute—

"(3) This section applies to—

(a) any court in the United Kingdom;

(b) any court established under the law of a country or territory outside the United Kingdom;

(c) any international court or tribunal established by the Security Council of the United Nations or by an international agreement;

and in paragraphs (a) and (b) *"court"* includes any tribunal or body exercising the judicial power of the State."

(2) In subsection (3) of section 15 of that Act (qualified privilege) for "public concern" substitute "public interest".

(3) Schedule 1 to that Act (qualified privilege) is amended as follows.

(4) For paragraphs 9 and 10 substitute—

"9.—

(1) A fair and accurate copy of, extract from or summary of a notice or other matter issued for the information of the public by or on behalf of—

(a) a legislature or government anywhere in the world;

(b) an authority anywhere in the world performing governmental functions;

(c) an international organisation or international conference.

(2) In this paragraph *"governmental functions"* includes police functions.

10.

A fair and accurate copy of, extract from or summary of a document made available by a court anywhere in the world, or by a judge or officer of such a court."

(5) After paragraph 11 insert—

"11A.

A fair and accurate report of proceedings at a press conference held anywhere in the world for the discussion of a matter of public interest."

(6) In paragraph 12 (report of proceedings at public meetings)—

(a) in sub-paragraph (1) for "in a member State" substitute "anywhere in the world";

(b) in sub-paragraph (2) for "public concern" substitute "public interest".

(7) In paragraph 13 (report of proceedings at meetings of public company)—

(a) in sub-paragraph (1), for "UK public company" substitute "listed company";

(b) for sub-paragraphs (2) to (5) substitute—

"(2) A fair and accurate copy of, extract from or summary of any document circulated to members of a listed company—

(a) by or with the authority of the board of directors of the company,

(b) by the auditors of the company, or

(c) by any member of the company in pursuance of a right conferred by any statutory provision.

(3) A fair and accurate copy of, extract from or summary of any document circulated to members of a listed company which relates to the appointment, resignation, retirement or dismissal of directors of the company or its auditors.

(4) In this paragraph *"listed company"* has the same meaning as in Part 12 of the Corporation Tax Act 2009 (see section 1005 of that Act)."

(8) In paragraph 14 (report of finding or decision of certain kinds of associations) in the words before paragraph (a), for "in the United Kingdom or another member State" substitute "anywhere in the world".

(9) After paragraph 14 insert—

"14A.—

A fair and accurate—

(a) report of proceedings of a scientific or academic conference held anywhere in the world, or

(b) copy of, extract from or summary of matter published by such a conference."

(10) For paragraph 15 (report of statements etc by a person designated by the Lord Chancellor for the purposes of the paragraph) substitute—

"15.—

(1) A fair and accurate report or summary of, copy of or extract from, any adjudication, report, statement or notice issued by a body, officer or other person designated for the purposes of this paragraph by order of the Lord Chancellor.

(2) An order under this paragraph shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament."

(11) For paragraphs 16 and 17 (general provision) substitute—

"16.

In this Schedule—

"court" includes—

(a) any tribunal or body established under the law of any country or territory exercising the judicial power of the State;

(b) any international tribunal established by the Security Council of the United Nations or by an international agreement;

(c) any international tribunal deciding matters in dispute between States;

"international conference" means a conference attended by representatives of two or more governments;
"international organisation" means an organisation of which two or more governments are members, and includes any committee or other subordinate body of such an organisation;
"legislature" includes a local legislature; and
"member State" includes any European dependent territory of a member State."

Single publication rule

8.— Single publication rule

(1) This section applies if a person—

(a) publishes a statement to the public ("the first publication"), and

(b) subsequently publishes (whether or not to the public) that statement or a statement which is substantially the same.

(2) In subsection (1) *"publication to the public"* includes publication to a section of the public.

(3) For the purposes of section 4A of the Limitation Act 1980 (time limit for actions for defamation etc) any cause of action against the person for defamation in respect of the subsequent publication is to be treated as having accrued on the date of the first publication.

(4) This section does not apply in relation to the subsequent publication if the manner of that publication is materially different from the manner of the first publication.

(5) In determining whether the manner of a subsequent publication is materially different from the manner of the first publication, the matters to which the court may have regard include (amongst other matters)—

(a) the level of prominence that a statement is given;

(b) the extent of the subsequent publication.

(6) Where this section applies—

(a) it does not affect the court's discretion under section 32A of the Limitation Act 1980 (discretionary exclusion of time limit for actions for defamation etc), and

(b) the reference in subsection (1)(a) of that section to the operation of section 4A of that Act is a reference to the operation of section 4A together with this section.

Jurisdiction

9.— Action against a person not domiciled in the UK or a Member State etc

(1) This section applies to an action for defamation against a person who is not domiciled—

(a) in the United Kingdom;

(b) in another Member State; or

(c) in a state which is for the time being a contracting party to the Lugano Convention.

(2) A court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.

(3) The references in subsection (2) to the statement complained of include references to any statement which conveys the same, or substantially the same, imputation as the statement complained of.

(4) For the purposes of this section—

(a) a person is domiciled in the United Kingdom or in another Member State if the person is domiciled there for the purposes of the Brussels Regulation;

(b) a person is domiciled in a state which is a contracting party to the Lugano Convention if the person is domiciled in the state for the purposes of that Convention.

(5) In this section—

"the Brussels Regulation" means [Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), as amended from time to time and as applied by virtue of the Agreement made on 19 October 2005 between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ No L 299, 16.11.2005, p62; OJ No L79, 21.3.2013, p4)];

"the Lugano Convention" means the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, between the European Community and the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Kingdom of Denmark signed on behalf of the European Community on 30th October 2007.

Jurisdiction

10.— Action against a person who was not the author, editor etc

(1) A court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher.

(2) In this section *"author"*, *"editor"* and *"publisher"* have the same meaning as in section 1 of the Defamation Act 1996.

Trial by jury

11.— Trial to be without a jury unless the court orders otherwise

(1) In section 69(1) of the Senior Courts Act 1981 (certain actions in the Queen's Bench Division to be tried with a jury unless the trial requires

prolonged examination of documents etc) in paragraph (b) omit "libel, slander,".

(2) In section 66(3) of the County Courts Act 1984 (certain actions in the county court to be tried with a jury unless the trial requires prolonged examination of documents etc) in paragraph (b) omit "libel, slander,".

Summary of court judgment

12.— Power of court to order a summary of its judgment to be published

(1) Where a court gives judgment for the claimant in an action for defamation the court may order the defendant to publish a summary of the judgment.

(2) The wording of any summary and the time, manner, form and place of its publication are to be for the parties to agree.

(3) If the parties cannot agree on the wording, the wording is to be settled by the court.

(4) If the parties cannot agree on the time, manner, form or place of publication, the court may give such directions as to those matters as it considers reasonable and practicable in the circumstances.

(5) This section does not apply where the court gives judgment for the claimant under section 8(3) of the Defamation Act 1996 (summary disposal of claims).

Removal, etc of statements

13.— Order to remove statement or cease distribution etc

(1) Where a court gives judgment for the claimant in an action for defamation the court may order—

(a) the operator of a website on which the defamatory statement is posted to remove the statement, or

(b) any person who was not the author, editor or publisher of the defamatory statement to stop distributing, selling or exhibiting material containing the statement.

(2) In this section *"author"*, *"editor"* and *"publisher"* have the same meaning as in section 1 of the Defamation Act 1996.

(3) Subsection (1) does not affect the power of the court apart from that subsection.

Slander

14.— Special damage

(1) The Slander of Women Act 1891 is repealed.

(2) The publication of a statement that conveys the imputation that a person has a contagious or infectious disease does not give rise to a cause of action for slander unless the publication causes the person special damage.

General provisions

15. Meaning of "publish" and "statement"

In this Act—

"publish" and *"publication"*, in relation to a statement, have the meaning they have for the purposes of the law of defamation generally;

"statement" means words, pictures, visual images, gestures or any other method of signifying meaning.

General provisions

16.— Consequential amendments and savings etc

(1) Section 8 of the Rehabilitation of Offenders Act 1974 (defamation actions) is amended in accordance with subsections (2) and (3).

(2) In subsection (3) for "of justification or fair comment or" substitute "under section 2 or 3 of the Defamation Act 2013 which is available to him or any defence".

(3) In subsection (5) for "the defence of justification" substitute "a defence under section 2 of the Defamation Act 2013".

(4) Nothing in section 1 or 14 affects any cause of action accrued before the commencement of the section in question.

(5) Nothing in sections 2 to 7 or 10 has effect in relation to an action for defamation if the cause of action accrued before the commencement of the section in question.

(6) In determining whether section 8 applies, no account is to be taken of any publication made before the commencement of the section.

(7) Nothing in section 9 or 11 has effect in relation to an action for defamation begun before the commencement of the section in question.

(8) In determining for the purposes of subsection (7)(a) of section 3 whether a person would have a defence under section 4 to any action for defamation, the operation of subsection (5) of this section is to be ignored.

General provisions

17.— Short title, extent and commencement

(1) This Act may be cited as the Defamation Act 2013.

(2) Subject to subsection (3), this Act extends to England and Wales only.

(3) The following provisions also extend to Scotland—

(a) section 6;
(b) section 7(9);
(c) section 15;
(d) section 16(5) (in so far as it relates to sections 6 and 7(9));
(e) this section.

(4) Subject to subsections (5) and (6), the provisions of this Act come into force on such day as the Secretary of State may by order made by statutory instrument appoint.

(5) Sections 6 and 7(9) come into force in so far as they extend to Scotland on such day as the Scottish Ministers may by order appoint.

(6) Section 15, subsections (4) to (8) of section 16 and this section come into force on the day on which this Act is passed.

Explanatory Note

INTRODUCTION

1. These explanatory notes relate to the Defamation Act 2013, which received Royal Assent on 25 April 2013. They have been prepared by the Ministry of Justice in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.

2. The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given.

SUMMARY

3. The Defamation Act 2013 reforms aspects of the law of defamation. The civil law on defamation has developed through the common law over a number of years, periodically being supplemented by statute, most recently the Defamation Act 1952 ("the 1952 Act") and the Defamation Act 1996 ("the 1996 Act").

BACKGROUND

4. The Government's Coalition Agreement gave a commitment to review the law of defamation, and on 9 July 2010 the Government announced its intention to publish a draft Defamation Bill. The *Draft Defamation Bill* (Cm 8020) was published for full public consultation and pre-legislative scrutiny on 15 March 2011.

5. The public consultation closed on 10 June 2011. The Ministry of Justice received 129 responses from a range of interested parties. A comprehensive summary of the responses received was published on 24 November 2011 *(Draft Defamation Bill Summary of Responses to Consultation CP(R) 3/11)*. In addition to the Government consultation, pre-legislative scrutiny of the draft Bill was undertaken by a Parliamentary Joint Committee. The committee held oral evidence sessions between April and July 2011 and its final report was published on 19 October 2011 (*The Joint Committee on the Draft Defamation Bill Report* Session 2010-2012, HL 203, HC 930-I).

6. The Government response to the Joint Committee's report was published on 29 February 2012 (*The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill Cm 8295*) and set out the Government's conclusions including on certain matters raised in the public consultation but not specifically addressed in the Committee's report.

TERRITORIAL EXTENT AND APPLICATION

7. Most of the Act's provisions extend to England and Wales only, but certain provisions also extend to Scotland:

- Section 6 relates to the publication of peer-reviewed statements in scientific or academic journals.
- Section 7(9) extends qualified privilege to fair and accurate reports of proceedings of a scientific or academic conference.
- Section 15 defines the terms "publish" and "statement".
- Section 16(5) is a saving provision which relates in part to sections 6 and 7(9).
- Section 17 determines the extent and commencement of the Act.

8. In relation to Wales, the Act does not relate to devolved matters or confer functions on the Welsh Ministers.

9. The Act amends a number of enactments which extend to Scotland and Northern Ireland as well as to England and Wales. These amendments, apart from that made by section 7(9) which extends to Scotland, will extend to England and Wales only.

COMMENTARY ON SECTIONS

Section 1: **Serious harm**

10. Subsection (1) of this section provides that a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant. The provision extends to situations where publication is likely to cause serious harm in order to cover situations where the harm has not yet occurred at the time the action for defamation is commenced. Subsection (2) indicates that for the purposes of the section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss.

11. The section builds on the consideration given by the courts in a series of cases to the question of what is sufficient to establish that a statement is defamatory. A recent example is *Thornton v Telegraph Media Group Ltd* [1] in which a decision of the House of Lords in *Sim v Stretch* was identified as authority for the existence of a "threshold of seriousness" in what is defamatory. There is also currently potential for trivial cases to be struck out on the basis that they are an abuse of process because so little is at stake. In *Jameel v Dow Jones & Co* it was established that there needs to be a real and substantial tort. The section raises the bar for bringing a claim so that only cases involving serious harm to the claimant's reputation can be brought.

12. Subsection (2) reflects the fact that bodies trading for profit are already prevented from claiming damages for certain types of harm such as injury to feelings, and are in practice likely to have to show actual or likely financial loss. The requirement that this be serious is consistent with the new serious harm test in subsection (1).

Section 2**: Truth**

13. This section replaces the common law defence of justification with a new statutory defence of truth. The section is intended broadly to reflect the current law while simplifying and clarifying certain elements.

14. Subsection (1) provides for the new defence to apply where the defendant can show that the imputation conveyed by the statement complained of is substantially true. This subsection reflects the current law as established in the case of *Chase v News Group Newspapers Ltd*, where the Court of Appeal indicated that in order for the defence of justification to be available "the defendant does not have to prove that every word he or she published was true. He or she has to establish the "essential" or "substantial" truth of the sting of the libel".

15. There is a long-standing common law rule that it is no defence to an action for defamation for the defendant to prove that he or she was only repeating what someone else had said (known as the *"repetition rule"*). Subsection (1) focuses on the imputation conveyed by the statement in order to incorporate this rule.

16. In any case where the defence of truth is raised, there will be two issues: i) what imputation (or imputations) are actually conveyed by the statement; and ii) whether the imputation (or imputations) conveyed are substantially true. The defence will apply where the imputation is one of fact.

17. Subsections (2) and (3) replace section 5 of the 1952 Act (the only significant element of the defence of justification which is currently in statute). Their effect is that where the statement complained of contains two or more distinct imputations, the defence does not fail if, having regard to the imputations which are shown to be substantially true, those which are not shown to be substantially true do not seriously harm the claimant's reputation. These provisions are intended to have the same effect as those in section 5 of the 1952 Act, but are expressed in more modern terminology. The phrase "materially injure" used in the 1952 Act is replaced by "seriously harm" to ensure consistency with the test in section 1 of the Act.

18. Subsection (4) abolishes the common law defence of justification and repeals section 5 of the 1952 Act. This means that where a defendant wishes to rely on the new statutory defence the court would be required to apply the words used in the statute, not the current case law. In cases where uncertainty arises the current case law would constitute a helpful but not binding guide to interpreting how the new statutory defence should be applied.

Section 3**: Honest opinion**

19. This section replaces the common law defence of fair comment with a new defence of honest opinion. The section broadly reflects the current law while simplifying and clarifying certain elements, but does not include the current requirement for the opinion to be on a matter of public interest.

20. Subsections (1) to (4) provide for the defence to apply where the defendant can show that three conditions are met. These are condition 1: that the statement complained of was a statement of opinion; condition 2: that the statement complained of indicated, whether in general or specific

terms, the basis of the opinion; and condition 3: that an honest person could have held the opinion on the basis of any fact which existed at the time the statement complained of was published or anything asserted to be a fact in a privileged statement published before the statement complained of.

21. Condition 1 (in subsection (2)) is intended to reflect the current law and embraces the requirement established in *Cheng v Tse Wai Chun Paul* that the statement must be recognisable as comment as distinct from an imputation of fact. It is implicit in condition 1 that the assessment is on the basis of how the ordinary person would understand it. As an inference of fact is a form of opinion, this would be encompassed by the defence.

22. Condition 2 (in subsection (3)), reflects the test approved by the Supreme Court in *Joseph v Spiller* that "the comment must explicitly or implicitly indicate, at least in general terms, the facts on which it is based". Condition 2 and Condition 3 (in subsection (4)) aim to simplify the law by providing a clear and straightforward test. This is intended to retain the broad principles of the current common law defence as to the necessary basis for the opinion expressed but avoid the complexities which have arisen in case law, in particular over the extent to which the opinion must be based on facts which are sufficiently true and as to the extent to which the statement must explicitly or implicitly indicate the facts on which the opinion is based. These are areas where the common law has become increasingly complicated and technical, and where case law has sometimes struggled to articulate with clarity how the law should apply in particular circumstances. For example, the facts that may need to be demonstrated in relation to an article expressing an opinion on a political issue, comments made on a social network, a view about a contractual dispute, or a review of a restaurant or play will differ substantially.

23. Condition 3 is an objective test and consists of two elements. It is enough for one to be satisfied. The first is whether an honest person could have held the opinion on the basis of any fact which existed at the time the statement was published (in subsection (4)(a)). The subsection refers to *"any fact"* so that any relevant fact or facts will be enough. The existing case law on the sufficiency of the factual basis is covered by the requirement that "an honest person" must have been able to hold the opinion. If the fact was not a sufficient basis for the opinion, an honest person would not have been able to hold it.

24. The second element of condition 3 (in subsection (4)(b)) is whether an honest person could have formed the opinion on the basis of anything asserted to be a fact in a "privileged statement" which was published before the statement complained of. For this purpose, a statement is a "privileged statement" if the person responsible for its publication would have one of the defences listed in subsection (7) of the section if an action was brought in respect of that statement. The defences listed are the defence of absolute privilege under section 14 of the 1996 Act; the defence of qualified privilege under section 15 of that Act; and the defences in sections 4 and 6 of the Act relating to publication on a matter of public interest and peer-reviewed statements in a scientific or academic journal.

25. Subsection (5) provides for the defence to be defeated if the claimant shows that the defendant did not hold the opinion. This is a subjective test.

This reflects the current law whereby the defence of fair comment will fail if the claimant can show that the statement was actuated by malice.

26. Subsection (6) makes provision for situations where the defendant is not the author of the statement (for example where an action is brought against a newspaper editor in respect of a comment piece rather than against the person who wrote it). In these circumstances the defence is defeated if the claimant can show that the defendant knew or ought to have known that the author did not hold the opinion.

27. Subsection (8) abolishes the common law defence of fair comment. Although this means that the defendant can no longer rely on the common law defence, in cases where uncertainty arises in the interpretation of section 3, case law would constitute a helpful but not binding guide to interpreting how the new statutory defence should be applied.

28. Subsection (8) also repeals section 6 of the 1952 Act. Section 6 provides that in an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved. This provision is no longer necessary in light of the new approach set out in subsection (4). A defendant will be able to show that conditions 1, 2 and 3 are met without needing to prove the truth of every single allegation of fact relevant to the statement complained of.

Section 4**: Publication on matter of public interest**

29. This section creates a new defence to an action for defamation of publication on a matter of public interest. It is based on the existing common law defence established in *Reynolds v Times Newspapers* and is intended to reflect the principles established in that case and in subsequent case law. Subsection (1) provides for the defence to be available in circumstances where the defendant can show that the statement complained of was, or formed part of, a statement on a matter of public interest and that he reasonably believed that publishing the statement complained of was in the public interest. The intention in this provision is to reflect the existing common law as most recently set out in *Flood v Times Newspapers*. It reflects the fact that the common law test contained both a subjective element — what the defendant believed was in the public interest at the time of publication — and an objective element — whether the belief was a reasonable one for the defendant to hold in all the circumstances.

30. In relation to the first limb of this test, the section does not attempt to define what is meant by *"the public interest"*. However, this is a concept which is well-established in the English common law. It is made clear that the defence applies if the statement complained of "was, *or formed part of*, a statement on a matter of public interest" to ensure that either the words complained of may be on a matter of public interest, or that a holistic view may be taken of the statement in the wider context of the document, article etc in which it is contained in order to decide if overall this is on a matter of public interest.

31. Subsection (2) requires the court, subject to subsections (3) and (4), to have regard to all the circumstances of the case in determining whether the defendant has shown the matters set out in subsection (1).

32. Subsection (3) is intended to encapsulate the core of the common law doctrine of "reportage" (which has been described by the courts as "a convenient word to describe the neutral reporting of attributed allegations rather than their adoption by the newspaper"). In instances where this doctrine applies, the defendant does not need to have verified the information reported before publication because the way that the report is presented gives a balanced picture. In determining whether for the purposes of the section it was reasonable for the defendant to believe that publishing the statement was in the public interest, the court should disregard any failure on the part of a defendant to take steps to verify the truth of the imputation conveyed by the publication (which would include any failure of the defendant to seek the claimant's views on the statement). This means that a defendant newspaper for example would not be prejudiced for a failure to verify where subsection (3) applies.

33. Subsection (4) requires the court, in considering whether the defendant's belief was reasonable, to make such allowance for editorial judgement as it considers appropriate. This expressly recognises the discretion given to editors in judgments such as that of *Flood*, but is not limited to editors in the media context.

34. Subsection (5) makes clear for the avoidance of doubt that the defence provided by this section may be relied on irrespective of whether the statement complained of is one of fact or opinion.

35. Subsection (6) abolishes the common law defence known as the Reynolds defence. This is because the statutory defence is intended essentially to codify the common law defence. While abolishing the common law defence means that the courts would be required to apply the words used in the statute, the current case law would constitute a helpful (albeit not binding) guide to interpreting how the new statutory defence should be applied. It is expected the courts would take the existing case law into consideration where appropriate.

Section 5**: Operators of websites**

36. This section creates a new defence for the operators of websites where a defamation action is brought against them in respect of a statement posted on the website.

37. Subsection (2) provides for the defence to apply if the operator can show that they did not post the statement on the website. Subsection (3) provides for the defence to be defeated if the claimant can show that it was not possible for him or her to identify the person who posted the statement; that they gave the operator a notice of complaint in relation to the statement; and that the operator failed to respond to that notice in accordance with provision contained in regulations to be made by the Secretary of State. Subsection (4) interprets subsection (3)(a) and explains that it is possible for a claimant to "identify" a person for the purposes of that subsection only if the claimant has sufficient information to bring proceedings against the person.

38. Subsection (5) provides details of provision that may be included in regulations. This includes provision as to the action which an operator must take in response to a notice (which in particular may include action relating to the identity or contact details of the person who posted the statement and action relating to the removal of the post); provision specifying a time limit for the taking of any such action and for conferring a discretion on the court to treat action taken after the expiry of a time limit as having been taken before that expiry. This would allow for provision to be made enabling a court to waive or retrospectively extend a time limit as appropriate. The subsection also permits regulations to make any other provision for the purposes of this section.

39. Subsection (6) sets out certain specific information which must be included in a notice of complaint. The notice must specify the complainant's name, set out the statement concerned and where on the website the statement was posted and explain why it is defamatory of the complainant. Regulations may specify what other information must be included in a notice of complaint.

40. Subsection (7) permits regulations to make provision about the circumstances in which a notice which is not a notice of complaint is to be treated as a notice of complaint for the purpose of the section or any provision made under it.

41. Subsection (8) permits regulations under this section to make different provision for different circumstances.

42. Subsection (11) provides for the defence to be defeated if the claimant shows that the website operator has acted with malice in relation to the posting of the statement concerned. This might arise where, for example, the website operator had incited the poster to make the posting or had otherwise colluded with the poster.

43. Subsection (12) explains that the defence available to a website operator is not defeated by reason only of the fact that the operator moderates the statements posted on it by others

Section 6**: Peer-reviewed statement in scientific or academic journal etc**

44. This section creates a new defence of qualified privilege relating to peer-reviewed material in scientific or academic journals (whether published in electronic form or otherwise). The term *"scientific journal"* would include medical and engineering journals.

45. Subsections (1) to (3) provide for the defence to apply where two conditions are met. These are condition 1: that the statement relates to a scientific or academic matter; and condition 2: that before the statement was published in the journal an independent review of the statement's scientific or academic merit was carried out by the editor of the journal and one or more persons with expertise in the scientific or academic matter concerned. The requirements in condition 2 are intended to reflect the core aspects of a responsible peer-review process. Subsection (8) provides that the reference to *"the editor of the journal"* is to be read, in the case of a journal with more than one editor, as a reference to the editor or editors who were responsible for deciding to publish the statement concerned. This may be relevant where a board of editors is responsible for decision-making.

46. Subsection (4) extends the protection offered by the defence to publica-

tions in the same journal of any assessment of the scientific or academic merit of a peer-reviewed statement, provided the assessment was written by one or more of the persons who carried out the independent review of the statement, and the assessment was written in the course of that review. This is intended to ensure that the privilege is available not only to the author of the peer-reviewed statement, but also to those who have conducted the independent review who will need to assess, for example, the papers originally submitted by the author and may need to comment.

47. Subsection (5) provides that the privilege given by the section to peer-reviewed statements and related assessments also extends to the publication of a fair and accurate copy of, extract from or summary of the statement or assessment concerned.

48. By subsection (6) the privilege given by the section is lost if the publication is shown to be made with malice. This reflects the condition attaching to other forms of qualified privilege. Subsection (7)(b) has been included to ensure that the new section is not read as preventing a person who publishes a statement in a scientific or academic journal from relying on other forms of privilege, such as the privilege conferred under section 7(9) to fair and accurate reports etc of proceedings at a scientific or academic conference.

Section 7**: Reports etc protected by privilege**

49. This section amends the provisions contained in the 1996 Act relating to the defences of absolute and qualified privilege to extend the circumstances in which these defences can be used.

50. Subsection (1) replaces subsection (3) of section 14 of the 1996 Act, which concerns the absolute privilege applying to fair and accurate contemporaneous reports of court proceedings. Subsection (3) of section 14 currently provides for absolute privilege to apply to fair and accurate reports of proceedings in public before any court in the UK; the European Court of Justice or any court attached to that court; the European Court of Human Rights; and any international criminal tribunal established by the Security Council of the United Nations or by an international agreement to which the UK is a party. Subsection (1) replaces this with a new subsection, which extends the scope of the defence so that it also covers proceedings in any court established under the law of a country or territory outside the United Kingdom, and any international court or tribunal established by the Security Council of the United Nations or by an international agreement.

51. Subsection (2) amends section 15(3) of the 1996 Act by substituting the phrase "public interest" for "public concern", so that the subsection reads "This section does not apply to the publication to the public, or a section of the public, of matter which is not of public interest and the publication of which is not for the public benefit". This is intended to prevent any confusion arising from the use of two different terms with equivalent meaning in this Act and in the 1996 Act. Subsection (6)(b) makes the same amendment to paragraph 12(2) of Schedule 1 to the 1996 Act in relation to the privilege extended to fair and accurate reports etc of public meetings.

52. Subsections (3) to (10) make amendments to Part 2 of Schedule 1 to

the 1996 Act in a number of areas so as to extend the circumstances in which the defence of qualified privilege is available. Section 15 of and Schedule 1 to the 1996 Act currently provide for qualified privilege to apply to various types of report or statement, provided the report or statement is fair and accurate, on a matter of public concern, and that publication is for the public benefit and made without malice. Part 1 of Schedule 1 sets out categories of publication which attract qualified privilege without explanation or contradiction. These include fair and accurate reports of proceedings in public, anywhere in the world, of legislatures (both national and local), courts, public inquiries, and international organisations or conferences, and documents, notices and other matter published by these bodies.

53. Part 2 of Schedule 1 sets out categories of publication which have the protection of qualified privilege unless the publisher refuses or neglects to publish, in a suitable manner, a reasonable letter or statement by way of explanation or correction when requested to do so. These include copies of or extracts from information for the public published by government or authorities performing governmental functions (such as the police) or by courts; reports of proceedings at a range of public meetings (e.g. of local authorities) general meetings of UK public companies; and reports of findings or decisions by a range of associations formed in the UK or the European Union (such as associations relating to art, science, religion or learning, trade associations, sports associations and charitable associations).

54. In addition to the protection already offered to fair and accurate copies of or extracts from the different types of publication to which the defence is extended, amendments are made by subsections (4), (7)(b) and (10) of the section to extend the scope of qualified privilege to cover fair and accurate summaries of the material. For example, subsection (4) extends the defence to summaries of notices or other matter issued for the information of the public by a number of governmental bodies, and to summaries of documents made available by the courts.

55. Currently qualified privilege under Part 1 of Schedule 1 extends to fair and accurate reports of proceedings in public of a legislature; before a court; and in a number of other forums anywhere in the world. However, qualified privilege under Part 2 only applies to publications arising in the UK and EU member states. Subsections (4), (6)(a), (7), and (8) extend the scope of the defence to cover the different types of publication to which the defence extends anywhere in the world. For example, subsection (6) does this for reports of proceedings at public meetings, and subsection (8) for reports of certain kinds of associations.

56. Subsection (5) provides for qualified privilege to extend to a fair and accurate report of proceedings at a press conference held anywhere in the world for the discussion of a matter of public interest. Under the current law as articulated in the case of *McCartan Turkington Breen v Times Newspapers Ltd*, it appears that a press conference would fall within the scope of a "public meeting" under paragraph 12 of Schedule 1 to the 1996 Act. This provision has been included in the Act to clarify the position.

57. Currently Part 2 qualified privilege extends only to fair and accurate reports of proceedings at general meetings and documents circulated by UK

public companies (paragraph 13). Subsection (7) of the section extends this to reports relating to public companies elsewhere in the world. It achieves this by extending the provision to *"listed companies"* within the meaning of Part 12 of the Corporation Tax Act 2009 with a view to ensuring that broadly the same types of companies are covered by the provision in the UK and abroad. It also extends a provision in the 1996 Act (which provides for qualified privilege to be available in respect of a fair and accurate copy etc of material circulated to members of a listed company relating to the appointment, resignation, retirement or dismissal of directors of the company) to such material relating to the company's auditors.

58. Subsection (9) inserts a new paragraph into Schedule 1 to the 1996 Act to extend Part 2 qualified privilege to fair and accurate reports of proceedings of a scientific or academic conference, and to copies, extracts and summaries of matter published by such conferences. It is possible in certain circumstances that Part 2 qualified privilege may already apply to academic and scientific conferences (either where they fall within the description of a public meeting in paragraph 12, or where findings or decisions are published by a scientific or academic association (paragraph 14)). The amendments made by subsection (9) will however ensure that there is not a gap.

59. Subsection (11) substitutes new general provisions in Schedule 1 to reflect the changes that have been made to the substance of the Schedule. It also removes provisions allowing for orders to be made by the Lord Chancellor identifying "corresponding proceedings" for the purposes of paragraph 11(3) of the Schedule, and "corresponding meetings and documents" for the purposes of paragraph 13(5). The provision relating to paragraph 13(5) no longer has any application in the light of the amendments made to that paragraph by subsection (7), while the power in relation to paragraph 11(3) has never been exercised and the amendment leaves the provision to take its natural meaning.

Section 8**: Single publication rule**

60. This section introduces a single publication rule to prevent an action being brought in relation to publication of the same material by the same publisher after a one year limitation period from the date of the first publication of that material to the public or a section of the public. This replaces the longstanding principle that each publication of defamatory material gives rise to a separate cause of action which is subject to its own limitation period (the "multiple publication rule").

61. Subsection (1) indicates that the provisions apply where a person publishes a statement to the public (defined in subsection (2) as including publication to a section of the public), and subsequently publishes that statement or a statement which is substantially the same. The aim is to ensure that the provisions catch publications which have the same content or content which has changed very little so that the essence of the defamatory statement is not substantially different from that contained in the earlier publication. Publication to the public has been selected as the trigger point because it is from this point on that problems are generally encountered with internet publications and in order to stop the new provision catching limited publications leading up to

publication to the public at large. The definition in subsection (2) is intended to ensure that publications to a limited number of people are covered (for example where a blog has a small group of subscribers or followers).

62. Subsection (3) has the effect of ensuring that the limitation period in relation to any cause of action brought in respect of a subsequent publication within scope of the section is treated as having started to run on the date of the first publication.

63. Subsection (4) provides that the single publication rule does not apply where the manner of the subsequent publication of the statement is "materially different" from the manner of the first publication. Subsection (5) provides that in deciding this issue the matters to which the court may have regard include the level of prominence given to the statement and the extent of the subsequent publication. A possible example of this could be where a story has first appeared relatively obscurely in a section of a website where several clicks need to be gone through to access it, but has subsequently been promoted to a position where it can be directly accessed from the home page of the site, thereby increasing considerably the number of hits it receives.

64. Subsection (6) confirms that the section does not affect the court's discretion under section 32A of the Limitation Act 1980 to allow a defamation action to proceed outside the one year limitation period where it is equitable to do so. It also ensures that the reference in subsection (1)(a) of section 32A to the operation of section 4A of the 1980 Act (section 4A concerns the time limit applicable for defamation actions) is interpreted as a reference to the operation of section 4A together with section 8. Section 32A provides a broad discretion which requires the court to have regard to all the circumstances of the case, and it is envisaged that this will provide a safeguard against injustice in relation to the application of any limitation issue arising under this section.

Section 9**: Action against a person not domiciled in the UK or a Member State etc**

65. This section aims to address the issue of "libel tourism" (a term which is used to apply where cases with a tenuous link to England and Wales are brought in this jurisdiction). Subsection (1) focuses the provision on cases where an action is brought against a person who is not domiciled in the UK, an EU Member State or a state which is a party to the Lugano Convention. This is in order to avoid conflict with European jurisdictional rules (in particular the Brussels Regulation on jurisdictional matters).

66. Subsection (2) provides that a court does not have jurisdiction to hear and determine an action to which the section applies unless it is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement. This means that in cases where a statement has been published in this jurisdiction and also abroad the court will be required to consider the overall global picture to consider where it would be most appropriate for a claim to be heard. It is intended that this will overcome the problem of courts readily accepting jurisdiction simply because a claimant frames their claim so as to focus on damage which has occurred in this juris-

diction only. This would mean that, for example, if a statement was published 100,000 times in Australia and only 5,000 times in England that would be a good basis on which to conclude that the most appropriate jurisdiction in which to bring an action in respect of the statement was Australia rather than England. There will however be a range of factors which the court may wish to take into account including, for example, the amount of damage to the claimant's reputation in this jurisdiction compared to elsewhere, the extent to which the publication was targeted at a readership in this jurisdiction compared to elsewhere, and whether there is reason to think that the claimant would not receive a fair hearing elsewhere.

67. Subsection (3) provides that the references in subsection (2) to the statement complained of include references to any statement which conveys the same, or substantially the same, imputation as the statement complained of. This addresses the situation where a statement is published in a number of countries but is not exactly the same in all of them, and will ensure that a court is not impeded in deciding whether England and Wales is the most appropriate place to bring the claim by arguments that statements elsewhere should be regarded as different publications even when they are substantially the same. It is the intention that this new rule will be capable of being applied within the existing procedural framework for defamation claims.

Section 10**: Action against a person who was not the author, editor etc**

68. This section limits the circumstances in which an action for defamation can be brought against someone who is not the primary publisher of an allegedly defamatory statement.

69. Subsection (1) provides that a court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of unless it is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher.

70. Subsection (2) confirms that the terms *"author"*, *"editor"* and *"publisher"* are to have the same meaning as in section 1 of the 1996 Act. By subsection (2) of that Act, *"author"* means the originator of the statement, but does not include a person who did not intend that his statement be published at all; *"editor"* means a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it; and *"publisher"* means a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business. Examples of persons who are not to be considered the author, editor or publisher are contained in subsection (3) of section 1 of the 1996 Act.

Section 11**: Trial to be without a jury unless the court orders otherwise**

71. This section removes the presumption in favour of jury trial in defamation cases.

72. Currently section 69 of the Senior Courts Act 1981 and section 66 of the

County Courts Act 1984 provide for a right to trial with a jury in certain civil proceedings (namely malicious prosecution, false imprisonment, fraud, libel and slander) on the application of any party, "unless the court considers that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury".

73. Subsection (1) and subsection (2) respectively amend the 1981 and 1984 Acts to remove libel and slander from the list of proceedings where a right to jury trial exists. The result will be that defamation cases will be tried without a jury unless a court orders otherwise.

Section 12**: Power of court to order a summary of its judgment to be published**

74. In summary disposal proceedings under section 8 of the 1996 Act the court has power to order an unsuccessful defendant to publish a summary of its judgment where the parties cannot agree the content of any correction or apology. The section gives the court power to order a summary of its judgment to be published in defamation proceedings more generally.

75. Subsection (1) enables the court when giving judgment for the claimant in a defamation action to order the defendant to publish a summary of the judgment. Subsection (2) provides that the wording of any summary and the time, manner, form and place of its publication are matters for the parties to agree. Where the parties are unable to agree, subsections (3) and (4) respectively provide for the court to settle the wording, and enable it to give such directions in relation to the time, manner, form or place of publication as it considers reasonable and practicable. Subsection (5) disapplies the section where the court gives judgment for the claimant under section 8(3) of the 1996 Act. The summary disposal procedure is a separate procedure which can continue to be used where this is appropriate.

Section 13**: Order to remove statement or cease distribution etc**

76. This section relates to situations where an author may not always be in a position to remove or prevent further dissemination of material which has been found to be defamatory. Subsection (1) provides that where a court gives judgment for the claimant in an action for defamation, it may order the operator of a website on which a defamatory statement is posted to remove the statement, or require any person who was not the author, editor or publisher of the statement but is distributing, selling or exhibiting the material to cease disseminating it. This will enable an order for removal of the material to be made during or shortly after the conclusion of proceedings.

77. Subsection (3) ensures that the provision does not have any wider effect on the jurisdiction of the court to grant injunctive relief.

Section 14**: Actions for slander: special damage**

78. This section repeals the Slander of Women Act 1891 and overturns a common law rule relating to special damage.

79. In relation to slander, some special damage must be proved to flow from the statement complained of unless the publication falls into certain specific categories. These include a provision in the 1891 Act which provides that "words spoken and published. . . which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable". Subsection (1) repeals the Act, so that these circumstances are not exempted from the requirement for special damage.

80. Subsection (2) abolishes the common law rule which provides an exemption from the requirement for special damage where the imputation conveyed by the statement complained of is that the claimant has a contagious or infectious disease. In case law dating from the nineteenth century and earlier, the exemption has been held to apply in the case of imputations of leprosy, venereal disease and the plague.

Section 15**: Meaning of "publish" and "statement"**

81. This section sets out definitions of the terms *"publish"*, *"publication"* and *"statement"* for the purposes of the Act. Broad definitions are used to ensure that the provisions of the Act cover a wide range of publications in any medium, reflecting the current law.

Section 16**: Consequential amendments and savings etc**

82. Subsections (1) to (3) make consequential amendments to section 8 of the Rehabilitation of Offenders Act 1974 to reflect the new defences of truth and honest opinion. Section 8 of the 1974 Act applies to actions for libel or slander brought by a rehabilitated person based on statements made about offences which were the subject of a spent conviction.

83. Subsections (4) to (8) contain savings and interpretative provisions.

Section 17**: Short title, extent and commencement**

84. This section sets out the territorial extent of the provisions and makes provision for commencement.

COMMENCEMENT

85. Section 15, the savings related provisions in subsections (4) to (8) of section 16 and section 17 (short title, commencement and extent) come into force on the day on which the Act is passed. Otherwise, the Act will come into force on such day as the Secretary of State may specify by order (section 17(4)) or, in so far as provisions extend to Scotland, on such day as the Scottish Ministers may by order appoint (section 17 (5)).

HANSARD REFERENCES

86. The following table sets out the dates and Hansard references for each stage of the Act's passage through Parliament.

Stage	Date	Hansard reference
House of Commons		
Introduction	10 May 2012	Vol. 545 Col. 164
		http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120510/debtext/120510-0001.htm#12051029000012
Second Reading	12 June 2012	Vol. 546 Cols. 177–267
		http://www.publications.parliament.uk/pa/cm201213/cmhansrd/
		cm120612/debtext/120612-0001.htm#12061240000002
Committee	19 June 2012	Public Bill Committee: Defamation Bill
	21 June 2012	
	26 June 2012	
Report and Third Reading	12 September 2012	Vol. 505 Cols. 309–381
		http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120912/debtext/120912-0002.htm#12091223000002
House of Lords		
Introduction	8 October 2012	Vol. 739 Col. 828
		http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/121008-0001.htm#1210084000451
Second Reading	9 October 2012	Vol. 739 Cols. 932–986
		http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/121009-0001.htm#12100930000316
Committee	17 December 2012	Vol. 741 Cols. GC413–GC468

	19 December 2012	Vol. 741 Cols. GC521–GC578
	15 January 2013	Vol. 742 Cols. GC181–GC240
	17 January 2013	Vol. 742 Cols. GC307–GC372
Report	5 February 2013	Vol. 743 Cols. 140–254
		http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/130205-0001.htm#13020546001351
Third Reading	25 February 2013	Vol. 743 Cols. 848–852
		http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/130225-0001.htm#13022512000429
Ping Pong		
Commons Consideration of Lords Amendments	16 April 2013	Commons: Vol. 561 Cols. 266–288
		http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130416/debtext/130416-0003.htm#13041655000001
Lords Consideration of Commons Reasons	23 April 2013	Lords: Vol. 744 Cols. 1362–1387
		http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/130423-0001.htm#13042379000292
Consideration of Lords message	24 April 2013	Vol. 561 Cols. 913–923
		http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130424/debtext/130424-0002.htm#13042446000003
Royal Assent	25 April 2013	http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/130425-0001.htm#13042554000435

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EDITORS' CODE OF PRACTICE

The Independent Press Standards Organisation (IPSO), as Regulator, is charged with enforcing the following Code of Practice, which was framed by the Editors' Code of Practice Committee and is enshrined in the contractual agreement between IPSO and newspaper, magazine and electronic news publishers. Click here to download an A4 version of the Code.

The Code

All members of the press have a duty to maintain the highest professional standards. The Code, which includes this preamble and the public interest exceptions below, sets the benchmark for those ethical standards, protecting both the rights of the individual and the public's right to know. It is the cornerstone of the system of self-regulation to which the industry has made a binding commitment.

It is essential that an agreed code be honoured not only to the letter but in the full spirit. It should not be interpreted so narrowly as to compromise its commitment to respect the rights of the individual, nor so broadly that it constitutes an unnecessary interference with freedom of expression or prevents publication in the public interest.

It is the responsibility of editors and publishers to apply the Code to editorial material in both printed and online versions of publications. They should take care to ensure it is observed rigorously by all editorial staff and external contributors, including non-journalists, in printed and online versions of publications.

Editors should co-operate swiftly with the Independent Press Standards Organisation CIC (the 'Regulator') in the resolution of complaints. Any publication judged to have breached the Code must publish the adjudication in full and with due prominence agreed by the Regulator, including headline reference to the Regulator.

Clause 1 Accuracy

i) The Press must take care not to publish inaccurate, misleading or distorted information, including pictures.

ii) A significant inaccuracy, misleading statement or distortion once recognised must be corrected, promptly and with due prominence, and – where appropriate – an apology published. In cases involving the Regulator, prominence should be agreed with the Regulator in advance.

iii) The Press, whilst free to be partisan, must distinguish clearly between comment, conjecture and fact.

iv) A publication must report fairly and accurately the outcome of an action for defamation to which it has been a party, unless an agreed settlement states otherwise, or an agreed statement is published.

Clause 2 Opportunity to reply

A fair opportunity for reply to inaccuracies must be given when reasonably called for.

***Clause 3 Privacy**

i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications.

ii) Editors will be expected to justify intrusions into any individual's private life without consent. Account will be taken of the complainant's own public disclosures of information.

iii) It is unacceptable to photograph individuals in private places without their consent. Note – Private places are public or private property where there is a reasonable expectation of privacy.

***Clause 4 Harassment**

i) Journalists must not engage in intimidation, harassment or persistent pursuit.

ii) They must not persist in questioning, telephoning, pursuing or photographing individuals once asked to desist; nor remain on their property when asked to leave and must not follow them. If requested, they must identify themselves and whom they represent.

iii) Editors must ensure these principles are observed by those working for them and take care not to use non-compliant material from other sources.

Clause 5 Intrusion into grief or shock

i) In cases involving personal grief or shock, enquiries and approaches must be made with sympathy and discretion and publication handled sensitively. This should not restrict the right to report legal proceedings, such as inquests.

*ii) When reporting suicide, care should be taken to avoid excessive detail about the method used.

***Clause 6 Children**

i) Young people should be free to complete their time at school without unnecessary intrusion.

ii) A child under 16 must not be interviewed or photographed on issues involving their own or another child's welfare unless a custodial parent or similarly responsible adult consents.

iii) Pupils must not be approached or photographed at school without the permission of the school authorities.

iv) Minors must not be paid for material involving children's welfare, nor parents or guardians for material about their children or wards, unless it is clearly in the child's interest.

v) Editors must not use the fame, notoriety or position of a parent or guardian as sole justification for publishing details of a child's private life.

***Clause 7 Children in sex cases**

1. The press must not, even if legally free to do so, identify children under 16 who are victims or witnesses in cases involving sex offences.
2. In any press report of a case involving a sexual offence against a child -
   i) The child must not be identified.
   ii) The adult may be identified.
   iii) The word "incest" must not be used where a child victim might be identified.
   iv) Care must be taken that nothing in the report implies the relationship between the accused and the child.

***Clause 8 Hospitals**

i) Journalists must identify themselves and obtain permission from a responsible executive before entering non-public areas of hospitals or similar institutions to pursue enquiries.

ii) The restrictions on intruding into privacy are particularly relevant to enquiries about individuals in hospitals or similar institutions.

***Clause 9 Reporting of crime**

(i) Relatives or friends of persons convicted or accused of crime should not generally be identified without their consent, unless they are genuinely relevant to the story.

(ii) Particular regard should be paid to the potentially vulnerable position of children who witness, or are victims of, crime. This should not restrict the right to report legal proceedings.

***Clause 10 Clandestine devices and subterfuge**

i) The press must not seek to obtain or publish material acquired by using hidden cameras or clandestine listening devices; or by intercepting private or mobile telephone calls, messages or emails; or by the unauthorised removal of documents or photographs; or by accessing digitally-held private information without consent.

ii) Engaging in misrepresentation or subterfuge, including by agents or intermediaries, can generally be justified only in the public interest and then only when the material cannot be obtained by other means.

Clause 11 Victims of sexual assault

The press must not identify victims of sexual assault or publish material likely to contribute to such identification unless there is adequate justification and they are legally free to do so.

Clause 12 Discrimination

i) The press must avoid prejudicial or pejorative reference to an individual's race, colour, religion, gender, sexual orientation or to any physical or mental illness or disability.

ii) Details of an individual's race, colour, religion, sexual orientation, physical or mental illness or disability must be avoided unless genuinely relevant to the story.

Clause 13 Financial journalism

i) Even where the law does not prohibit it, journalists must not use for their own profit financial information they receive in advance of its general publication, nor should they pass such information to others.

ii) They must not write about shares or securities in whose performance they know that they or their close families have a significant financial interest without disclosing the interest to the editor or financial editor.

iii) They must not buy or sell, either directly or through nominees or agents, shares or securities about which they have written recently or about which they intend to write in the near future.

Clause 14 Confidential sources

Journalists have a moral obligation to protect confidential sources of information.

Clause 15 Witness payments in criminal trials

i) No payment or offer of payment to a witness – or any person who may reasonably be expected to be called as a witness – should be made in any case once proceedings are active as defined by the Contempt of Court Act 1981.

This prohibition lasts until the suspect has been freed unconditionally by police without charge or bail or the proceedings are otherwise discontinued; or has entered a guilty plea to the court; or, in the event of a not guilty plea, the court has announced its verdict.

*ii) Where proceedings are not yet active but are likely and foreseeable, editors must not make or offer payment to any person who may reasonably be expected to be called as a witness, unless the information concerned ought demonstrably to be published in the public interest and there is an over-riding need to make or promise payment for this to be done; and all reasonable steps have been taken to ensure no financial dealings influence the evidence those witnesses give. In no circumstances should such payment be conditional on the outcome of a trial.

*iii) Any payment or offer of payment made to a person later cited to give evidence in proceedings must be disclosed to the prosecution and defence. The witness must be advised of this requirement.

***Clause 16 Payment to criminals**

i) Payment or offers of payment for stories, pictures or information, which seek to exploit a particular crime or to glorify or glamorise crime in general, must not be made directly or via agents to convicted or confessed criminals or to their associates – who may include family, friends and colleagues.

ii) Editors invoking the public interest to justify payment or offers would need to demonstrate that there was good reason to believe the public interest would be served. If, despite payment, no public interest emerged, then the material should not be published.

The public interest

There may be exceptions to the clauses marked * where they can be demonstrated to be in the public interest.

1. The public interest includes, but is not confined to:
   - i) Detecting or exposing crime or serious impropriety.
   - ii) Protecting public health and safety.
   - iii) Preventing the public from being misled by an action or statement of an individual or organisation.
2. There is a public interest in freedom of expression itself.
3. Whenever the public interest is invoked, the Regulator will require editors to demonstrate fully that they reasonably believed that publication, or journalistic activity undertaken with a view to publication, would be in the public interest and how, and with whom, that was established at the time.
4. The Regulator will consider the extent to which material is already in the public domain, or will become so.
5. In cases involving children under 16, editors must demonstrate an exceptional public interest to over-ride the normally paramount interest of the child.

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000

on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the Economic and Social Committee(2),

Acting in accordance with the procedure laid down in Article 251 of the Treaty(3),

Whereas:

(1) The European Union is seeking to forge ever closer links between the States and peoples of Europe, to ensure economic and social progress; in accordance with Article 14(2) of the Treaty, the internal market comprises an area without internal frontiers in which the free movements of goods, services and the freedom of establishment are ensured; the development of information society services within the area without internal frontiers is vital to eliminating the barriers which divide the European peoples.

(2) The development of electronic commerce within the information society offers significant employment opportunities in the Community, particularly in small and medium-sized enterprises, and will stimulate economic growth and investment in innovation by European companies, and can also enhance the competitiveness of European industry, provided that everyone has access to the Internet.

(3) Community law and the characteristics of the Community legal order are a vital asset to enable European citizens and operators to take full advantage, without consideration of borders, of the opportunities afforded by electronic commerce; this Directive therefore has the purpose of ensuring a high level of Community legal integration in order to establish a real area without internal borders for information society services.

(4) It is important to ensure that electronic commerce could fully benefit from the internal market and therefore that, as with Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities(4), a high level of Community integration is achieved.

(5) The development of information society services within the Community is hampered by a number of legal obstacles to the proper functioning of the internal market which make less attractive the exercise of the freedom of establishment and the freedom to provide services; these obstacles arise from divergences in legislation and from the legal uncertainty as to which national rules apply to such services; in the absence of coordination and adjustment of legislation in the relevant areas, obstacles might be justified in the light of the case-law of the Court of Justice of the European Communities; legal uncertainty exists with regard to the extent to which Member States may control services originating from another Member State.

(6) In the light of Community objectives, of Articles 43 and 49 of the Treaty and of secondary Community law, these obstacles should be eliminated by coordinating certain national laws and by clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the internal market; by dealing only with certain specific matters which give rise to problems for the internal market, this Directive is fully consistent with the need to respect the principle of subsidiarity as set out in Article 5 of the Treaty.

(7) In order to ensure legal certainty and consumer confidence, this Directive must lay down a clear and general framework to cover certain legal aspects of electronic commerce in the internal market.

(8) The objective of this Directive is to create a legal framework to ensure the free movement of information society services between Member States and not to harmonise the field of criminal law as such.

(9) The free movement of information society services can in many cases be a specific reflection in Community law of a more general principle, namely freedom of expression as enshrined in Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, which has been ratified by all the Member States; for this reason, directives covering the supply of information society services must ensure that this activity may be engaged in freely in the light of that Article, subject only to the restrictions laid down in paragraph 2 of that Article and in Article 46(1) of the Treaty; this Directive is not intended to affect national fundamental rules and principles relating to freedom of expression.

(10) In accordance with the principle of proportionality, the measures provided for in this Directive are strictly limited to the minimum needed to achieve the objective of the proper functioning of the internal market; where action at Community level is necessary, and in order to guarantee an area which is truly without internal frontiers as far as electronic commerce is concerned, the Directive must ensure a high level of protection of objectives of general interest, in particular the protection of minors and human dignity, consumer protection and the protection of public health; according to Article 152 of the Treaty, the protection of public health is an essential component of other Community policies.

(11) This Directive is without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts; amongst others, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts(5) and Directive 97/7/EC of the European

Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts(6) form a vital element for protecting consumers in contractual matters; those Directives also apply in their entirety to information society services; that same Community acquis, which is fully applicable to information society services, also embraces in particular Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising(7), Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit(8), Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field(9), Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours(10), Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer production in the indication of prices of products offered to consumers(11), Council Directive 92/59/EEC of 29 June 1992 on general product safety(12), Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects on contracts relating to the purchase of the right to use immovable properties on a timeshare basis(13), Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests(14), Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions concerning liability for defective products(15), Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees(16), the future Directive of the European Parliament and of the Council concerning the distance marketing of consumer financial services and Council Directive 92/28/EEC of 31 March 1992 on the advertising of medicinal products(17); this Directive should be without prejudice to Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products(18) adopted within the framework of the internal market, or to directives on the protection of public health; this Directive complements information requirements established by the abovementioned Directives and in particular Directive 97/7/EC.

(12) It is necessary to exclude certain activities from the scope of this Directive, on the grounds that the freedom to provide services in these fields cannot, at this stage, be guaranteed under the Treaty or existing secondary legislation; excluding these activities does not preclude any instruments which might prove necessary for the proper functioning of the internal market; taxation, particularly value added tax imposed on a large number of the services covered by this Directive, must be excluded form the scope of this Directive.

(13) This Directive does not aim to establish rules on fiscal obligations nor does it pre-empt the drawing up of Community instruments concerning fiscal aspects of electronic commerce.

(14) The protection of individuals with regard to the processing of personal data is solely governed by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard

to the processing of personal data and on the free movement of such data(19) and Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector(20) which are fully applicable to information society services; these Directives already establish a Community legal framework in the field of personal data and therefore it is not necessary to cover this issue in this Directive in order to ensure the smooth functioning of the internal market, in particular the free movement of personal data between Member States; the implementation and application of this Directive should be made in full compliance with the principles relating to the protection of personal data, in particular as regards unsolicited commercial communication and the liability of intermediaries; this Directive cannot prevent the anonymous use of open networks such as the Internet.

(15) The confidentiality of communications is guaranteed by Article 5 Directive 97/66/EC; in accordance with that Directive, Member States must prohibit any kind of interception or surveillance of such communications by others than the senders and receivers, except when legally authorised.

(16) The exclusion of gambling activities from the scope of application of this Directive covers only games of chance, lotteries and betting transactions, which involve wagering a stake with monetary value; this does not cover promotional competitions or games where the purpose is to encourage the sale of goods or services and where payments, if they arise, serve only to acquire the promoted goods or services.

(17) The definition of information society services already exists in Community law in Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services(21) and in Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access(22); this definition covers any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service; those services referred to in the indicative list in Annex V to Directive 98/34/EC which do not imply data processing and storage are not covered by this definition.

(18) Information society services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line; activities such as the delivery of goods as such or the provision of services off-line are not covered; information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data; information society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service; television broadcasting within the meaning

of Directive EEC/89/552 and radio broadcasting are not information society services because they are not provided at individual request; by contrast, services which are transmitted point to point, such as video-on-demand or the provision of commercial communications by electronic mail are information society services; the use of electronic mail or equivalent individual communications for instance by natural persons acting outside their trade, business or profession including their use for the conclusion of contracts between such persons is not an information society service; the contractual relationship between an employee and his employer is not an information society service; activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient are not information society services.

(19) The place at which a service provider is established should be determined in conformity with the case-law of the Court of Justice according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period; this requirement is also fulfilled where a company is constituted for a given period; the place of establishment of a company providing services via an Internet website is not the place at which the technology supporting its website is located or the place at which its website is accessible but the place where it pursues its economic activity; in cases where a provider has several places of establishment it is important to determine from which place of establishment the service concerned is provided; in cases where it is difficult to determine from which of several places of establishment a given service is provided, this is the place where the provider has the centre of his activities relating to this particular service.

(20) The definition of "recipient of a service" covers all types of usage of information society services, both by persons who provide information on open networks such as the Internet and by persons who seek information on the Internet for private or professional reasons.

(21) The scope of the coordinated field is without prejudice to future Community harmonisation relating to information society services and to future legislation adopted at national level in accordance with Community law; the coordinated field covers only requirements relating to on-line activities such as on-line information, on-line advertising, on-line shopping, on-line contracting and does not concern Member States' legal requirements relating to goods such as safety standards, labelling obligations, or liability for goods, or Member States' requirements relating to the delivery or the transport of goods, including the distribution of medicinal products; the coordinated field does not cover the exercise of rights of pre-emption by public authorities concerning certain goods such as works of art.

(22) Information society services should be supervised at the source of the activity, in order to ensure an effective protection of public interest objectives; to that end, it is necessary to ensure that the competent authority provides such protection not only for the citizens of its own country but for all Community citizens; in order to improve mutual trust between Member States, it is essential to state clearly this responsibility on the part of the Member State where

the services originate; moreover, in order to effectively guarantee freedom to provide services and legal certainty for suppliers and recipients of services, such information society services should in principle be subject to the law of the Member State in which the service provider is established.

(23) This Directive neither aims to establish additional rules on private international law relating to conflicts of law nor does it deal with the jurisdiction of Courts; provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide information society services as established in this Directive.

(24) In the context of this Directive, notwithstanding the rule on the control at source of information society services, it is legitimate under the conditions established in this Directive for Member States to take measures to restrict the free movement of information society services.

(25) National courts, including civil courts, dealing with private law disputes can take measures to derogate from the freedom to provide information society services in conformity with conditions established in this Directive.

(26) Member States, in conformity with conditions established in this Directive, may apply their national rules on criminal law and criminal proceedings with a view to taking all investigative and other measures necessary for the detection and prosecution of criminal offences, without there being a need to notify such measures to the Commission.

(27) This Directive, together with the future Directive of the European Parliament and of the Council concerning the distance marketing of consumer financial services, contributes to the creating of a legal framework for the on-line provision of financial services; this Directive does not pre-empt future initiatives in the area of financial services in particular with regard to the harmonisation of rules of conduct in this field; the possibility for Member States, established in this Directive, under certain circumstances of restricting the freedom to provide information society services in order to protect consumers also covers measures in the area of financial services in particular measures aiming at protecting investors.

(28) The Member States' obligation not to subject access to the activity of an information society service provider to prior authorisation does not concern postal services covered by Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service(23) consisting of the physical delivery of a printed electronic mail message and does not affect voluntary accreditation systems, in particular for providers of electronic signature certification service.

(29) Commercial communications are essential for the financing of information society services and for developing a wide variety of new, charge-free services; in the interests of consumer protection and fair trading, commercial communications, including discounts, promotional offers and promotional competitions or games, must meet a number of transparency requirements; these requirements are without prejudice to Directive 97/7/EC; this Directive should not affect existing Directives on commercial communications, in particular Directive 98/43/EC.

(30) The sending of unsolicited commercial communications by electronic mail may be undesirable for consumers and information society service providers and may disrupt the smooth functioning of interactive networks; the question of consent by recipient of certain forms of unsolicited commercial communications is not addressed by this Directive, but has already been addressed, in particular, by Directive 97/7/EC and by Directive 97/66/EC; in Member States which authorise unsolicited commercial communications by electronic mail, the setting up of appropriate industry filtering initiatives should be encouraged and facilitated; in addition it is necessary that in any event unsolicited commercial communities are clearly identifiable as such in order to improve transparency and to facilitate the functioning of such industry initiatives; unsolicited commercial communications by electronic mail should not result in additional communication costs for the recipient.

(31) Member States which allow the sending of unsolicited commercial communications by electronic mail without prior consent of the recipient by service providers established in their territory have to ensure that the service providers consult regularly and respect the opt-out registers in which natural persons not wishing to receive such commercial communications can register themselves.

(32) In order to remove barriers to the development of cross-border services within the Community which members of the regulated professions might offer on the Internet, it is necessary that compliance be guaranteed at Community level with professional rules aiming, in particular, to protect consumers or public health; codes of conduct at Community level would be the best means of determining the rules on professional ethics applicable to commercial communication; the drawing-up or, where appropriate, the adaptation of such rules should be encouraged without prejudice to the autonomy of professional bodies and associations.

(33) This Directive complements Community law and national law relating to regulated professions maintaining a coherent set of applicable rules in this field.

(34) Each Member State is to amend its legislation containing requirements, and in particular requirements as to form, which are likely to curb the use of contracts by electronic means; the examination of the legislation requiring such adjustment should be systematic and should cover all the necessary stages and acts of the contractual process, including the filing of the contract; the result of this amendment should be to make contracts concluded electronically workable; the legal effect of electronic signatures is dealt with by Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures(24); the acknowledgement of receipt by a service provider may take the form of the on-line provision of the service paid for.

(35) This Directive does not affect Member States' possibility of maintaining or establishing general or specific legal requirements for contracts which can be fulfilled by electronic means, in particular requirements concerning secure electronic signatures.

(36) Member States may maintain restrictions for the use of electronic contracts with regard to contracts requiring by law the involvement of courts,

public authorities, or professions exercising public authority; this possibility also covers contracts which require the involvement of courts, public authorities, or professions exercising public authority in order to have an effect with regard to third parties as well as contracts requiring by law certification or attestation by a notary.

(37) Member States' obligation to remove obstacles to the use of electronic contracts concerns only obstacles resulting from legal requirements and not practical obstacles resulting from the impossibility of using electronic means in certain cases.

(38) Member States' obligation to remove obstacles to the use of electronic contracts is to be implemented in conformity with legal requirements for contracts enshrined in Community law.

(39) The exceptions to the provisions concerning the contracts concluded exclusively by electronic mail or by equivalent individual communications provided for by this Directive, in relation to information to be provided and the placing of orders, should not enable, as a result, the by-passing of those provisions by providers of information society services.

(40) Both existing and emerging disparities in Member States' legislation and case-law concerning liability of service providers acting as intermediaries prevent the smooth functioning of the internal market, in particular by impairing the development of cross-border services and producing distortions of competition; service providers have a duty to act, under certain circumstances, with a view to preventing or stopping illegal activities; this Directive should constitute the appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information; such mechanisms could be developed on the basis of voluntary agreements between all parties concerned and should be encouraged by Member States; it is in the interest of all parties involved in the provision of information society services to adopt and implement such procedures; the provisions of this Directive relating to liability should not preclude the development and effective operation, by the different interested parties, of technical systems of protection and identification and of technical surveillance instruments made possible by digital technology within the limits laid down by Directives 95/46/EC and 97/66/EC.

(41) This Directive strikes a balance between the different interests at stake and establishes principles upon which industry agreements and standards can be based.

(42) The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.

(43) A service provider can benefit from the exemptions for "mere conduit" and for "caching" when he is in no way involved with the information transmitted; this requires among other things that he does not modify the

information that he transmits; this requirement does not cover manipulations of a technical nature which take place in the course of the transmission as they do not alter the integrity of the information contained in the transmission.

(44) A service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts goes beyond the activities of "mere conduit" or "caching" and as a result cannot benefit from the liability exemptions established for these activities.

(45) The limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.

(46) In order to benefit from a limitation of liability, the provider of an information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level; this Directive does not affect Member States' possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information.

(47) Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.

(48) This Directive does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities.

(49) Member States and the Commission are to encourage the drawing-up of codes of conduct; this is not to impair the voluntary nature of such codes and the possibility for interested parties of deciding freely whether to adhere to such codes.

(50) It is important that the proposed directive on the harmonisation of certain aspects of copyright and related rights in the information society and this Directive come into force within a similar time scale with a view to establishing a clear framework of rules relevant to the issue of liability of intermediaries for copyright and relating rights infringements at Community level.

(51) Each Member State should be required, where necessary, to amend any legislation which is liable to hamper the use of schemes for the out-of-court settlement of disputes through electronic channels; the result of this amendment must be to make the functioning of such schemes genuinely and effectively possible in law and in practice, even across borders.

(52) The effective exercise of the freedoms of the internal market makes it necessary to guarantee victims effective access to means of settling disputes;

damage which may arise in connection with information society services is characterised both by its rapidity and by its geographical extent; in view of this specific character and the need to ensure that national authorities do not endanger the mutual confidence which they should have in one another, this Directive requests Member States to ensure that appropriate court actions are available; Member States should examine the need to provide access to judicial procedures by appropriate electronic means.

(53) Directive 98/27/EC, which is applicable to information society services, provides a mechanism relating to actions for an injunction aimed at the protection of the collective interests of consumers; this mechanism will contribute to the free movement of information society services by ensuring a high level of consumer protection.

(54) The sanctions provided for under this Directive are without prejudice to any other sanction or remedy provided under national law; Member States are not obliged to provide criminal sanctions for infringement of national provisions adopted pursuant to this Directive.

(55) This Directive does not affect the law applicable to contractual obligations relating to consumer contracts; accordingly, this Directive cannot have the result of depriving the consumer of the protection afforded to him by the mandatory rules relating to contractual obligations of the law of the Member State in which he has his habitual residence.

(56) As regards the derogation contained in this Directive regarding contractual obligations concerning contracts concluded by consumers, those obligations should be interpreted as including information on the essential elements of the content of the contract, including consumer rights, which have a determining influence on the decision to contract.

(57) The Court of Justice has consistently held that a Member State retains the right to take measures against a service provider that is established in another Member State but directs all or most of his activity to the territory of the first Member State if the choice of establishment was made with a view to evading the legislation that would have applied to the provider had he been established on the territory of the first Member State.

(58) This Directive should not apply to services supplied by service providers established in a third country; in view of the global dimension of electronic commerce, it is, however, appropriate to ensure that the Community rules are consistent with international rules; this Directive is without prejudice to the results of discussions within international organisations (amongst others WTO, OECD, Uncitral) on legal issues.

(59) Despite the global nature of electronic communications, coordination of national regulatory measures at European Union level is necessary in order to avoid fragmentation of the internal market, and for the establishment of an appropriate European regulatory framework; such coordination should also contribute to the establishment of a common and strong negotiating position in international forums.

(60) In order to allow the unhampered development of electronic commerce, the legal framework must be clear and simple, predictable and consistent with the rules applicable at international level so that it does not adversely affect the competitiveness of European industry or impede innovation in that sector.

(61) If the market is actually to operate by electronic means in the context of globalisation, the European Union and the major non-European areas need to consult each other with a view to making laws and procedures compatible.

(62) Cooperation with third countries should be strengthened in the area of electronic commerce, in particular with applicant countries, the developing countries and the European Union's other trading partners.

(63) The adoption of this Directive will not prevent the Member States from taking into account the various social, societal and cultural implications which are inherent in the advent of the information society; in particular it should not hinder measures which Member States might adopt in conformity with Community law to achieve social, cultural and democratic goals taking into account their linguistic diversity, national and regional specificities as well as their cultural heritage, and to ensure and maintain public access to the widest possible range of information society services; in any case, the development of the information society is to ensure that Community citizens can have access to the cultural European heritage provided in the digital environment.

(64) Electronic communication offers the Member States an excellent means of providing public services in the cultural, educational and linguistic fields.

(65) The Council, in its resolution of 19 January 1999 on the consumer dimension of the information society(25), stressed that the protection of consumers deserved special attention in this field; the Commission will examine the degree to which existing consumer protection rules provide insufficient protection in the context of the information society and will identify, where necessary, the deficiencies of this legislation and those issues which could require additional measures; if need be, the Commission should make specific additional proposals to resolve such deficiencies that will thereby have been identified,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1
Objective and scope

1. This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.

2. This Directive approximates, to the extent necessary for the achievement of the objective set out in paragraph 1, certain national provisions on information society services relating to the internal market, the establishment of service providers, commercial communications, electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions and cooperation between Member States.

3. This Directive complements Community law applicable to information

society services without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts and national legislation implementing them in so far as this does not restrict the freedom to provide information society services.

4. This Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts.

5. This Directive shall not apply to:

(a) the field of taxation;

(b) questions relating to information society services covered by Directives 95/46/EC and 97/66/EC;

(c) questions relating to agreements or practices governed by cartel law;

(d) the following activities of information society services:

– the activities of notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority,

– the representation of a client and defence of his interests before the courts,

– gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions.

6. This Directive does not affect measures taken at Community or national level, in the respect of Community law, in order to promote cultural and linguistic diversity and to ensure the defence of pluralism.

Article 2

Definitions

For the purpose of this Directive, the following terms shall bear the following meanings:

(a) "information society services": services within the meaning of Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC;

(b) "service provider": any natural or legal person providing an information society service;

(c) "established service provider": a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period. The presence and use of the technical means and technologies required to provide the service do not, in themselves, constitute an establishment of the provider;

(d) "recipient of the service": any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible;

(e) "consumer": any natural person who is acting for purposes which are outside his or her trade, business or profession;

(f) "commercial communication": any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession. The following do not in themselves constitute commercial communications:

- information allowing direct access to the activity of the company, organisation or person, in particular a domain name or an electronic-mail address,
- communications relating to the goods, services or image of the company, organisation or person compiled in an independent manner, particularly when this is without financial consideration;

(g) "regulated profession": any profession within the meaning of either Article 1(d) of Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three-years' duration(26) or of Article 1(f) of Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC(27);

(h) "coordinated field": requirements laid down in Member States' legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them.

(i) The coordinated field concerns requirements with which the service provider has to comply in respect of:
   – the taking up of the activity of an information society service, such as requirements concerning qualifications, authorisation or notification,
   – the pursuit of the activity of an information society service, such as requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider;

(ii) The coordinated field does not cover requirements such as:
   – requirements applicable to goods as such,
   – requirements applicable to the delivery of goods,
   – requirements applicable to services not provided by electronic means.

Article 3

Internal market

1. Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.

2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

3. Paragraphs 1 and 2 shall not apply to the fields referred to in the Annex.

4. Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:

(a) the measures shall be:

(i) necessary for one of the following reasons:

- public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,
- the protection of public health,
- public security, including the safeguarding of national security and defence,
- the protection of consumers, including investors;

(ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;

(iii) proportionate to those objectives;

(b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:

- asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate,
- notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.

5. Member States may, in the case of urgency, derogate from the conditions stipulated in paragraph 4(b). Where this is the case, the measures shall be notified in the shortest possible time to the Commission and to the Member State referred to in paragraph 1, indicating the reasons for which the Member State considers that there is urgency.

6. Without prejudice to the Member State's possibility of proceeding with the measures in question, the Commission shall examine the compatibility of the notified measures with Community law in the shortest possible time; where it comes to the conclusion that the measure is incompatible with Community law, the Commission shall ask the Member State in question to refrain from taking any proposed measures or urgently to put an end to the measures in question.

CHAPTER II

PRINCIPLES

Section 1: Establishment and information requirements

Article 4

Principle excluding prior authorisation

1. Member States shall ensure that the taking up and pursuit of the activity of an information society service provider may not be made subject to prior authorisation or any other requirement having equivalent effect.

2. Paragraph 1 shall be without prejudice to authorisation schemes which are not specifically and exclusively targeted at information society services,

or which are covered by Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services(28).

Article 5
General information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure that the service provider shall render easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information:

(a) the name of the service provider;
(b) the geographic address at which the service provider is established;
(c) the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner;
(d) where the service provider is registered in a trade or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register;
(e) where the activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority;
(f) as concerns the regulated professions:
    - any professional body or similar institution with which the service provider is registered,
    - the professional title and the Member State where it has been granted,
    - a reference to the applicable professional rules in the Member State of establishment and the means to access them;
(g) where the service provider undertakes an activity that is subject to VAT, the identification number referred to in Article 22(1) of the sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment(29).

2. In addition to other information requirements established by Community law, Member States shall at least ensure that, where information society services refer to prices, these are to be indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs.

Section 2: Commercial communications

Article 6
Information to be provided

In addition to other information requirements established by Community law, Member States shall ensure that commercial communications which are part of, or constitute, an information society service comply at least with the following conditions:

(a) the commercial communication shall be clearly identifiable as such;

(b) the natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable;
(c) promotional offers, such as discounts, premiums and gifts, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions which are to be met to qualify for them shall be easily accessible and be presented clearly and unambiguously;
(d) promotional competitions or games, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously.

Article 7
Unsolicited commercial communication

1. In addition to other requirements established by Community law, Member States which permit unsolicited commercial communication by electronic mail shall ensure that such commercial communication by a service provider established in their territory shall be identifiable clearly and unambiguously as such as soon as it is received by the recipient.

2. Without prejudice to Directive 97/7/EC and Directive 97/66/EC, Member States shall take measures to ensure that service providers undertaking unsolicited commercial communications by electronic mail consult regularly and respect the opt-out registers in which natural persons not wishing to receive such commercial communications can register themselves.

Article 8
Regulated professions

1. Member States shall ensure that the use of commercial communications which are part of, or constitute, an information society service provided by a member of a regulated profession is permitted subject to compliance with the professional rules regarding, in particular, the independence, dignity and honour of the profession, professional secrecy and fairness towards clients and other members of the profession.

2. Without prejudice to the autonomy of professional bodies and associations, Member States and the Commission shall encourage professional associations and bodies to establish codes of conduct at Community level in order to determine the types of information that can be given for the purposes of commercial communication in conformity with the rules referred to in paragraph 1

3. When drawing up proposals for Community initiatives which may become necessary to ensure the proper functioning of the Internal Market with regard to the information referred to in paragraph 2, the Commission shall take due account of codes of conduct applicable at Community level and shall act in close cooperation with the relevant professional associations and bodies.

4. This Directive shall apply in addition to Community Directives concerning access to, and the exercise of, activities of the regulated professions.

Section 3: Contracts concluded by electronic means

Article 9
Treatment of contracts

1. Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.

2. Member States may lay down that paragraph 1 shall not apply to all or certain contracts falling into one of the following categories:

(a) contracts that create or transfer rights in real estate, except for rental rights;
(b) contracts requiring by law the involvement of courts, public authorities or professions exercising public authority;
(c) contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession;
(d) contracts governed by family law or by the law of succession.

3. Member States shall indicate to the Commission the categories referred to in paragraph 2 to which they do not apply paragraph 1. Member States shall submit to the Commission every five years a report on the application of paragraph 2 explaining the reasons why they consider it necessary to maintain the category referred to in paragraph 2(b) to which they do not apply paragraph 1.

Article 10
Information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service:

(a) the different technical steps to follow to conclude the contract;
(b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;
(c) the technical means for identifying and correcting input errors prior to the placing of the order;
(d) the languages offered for the conclusion of the contract.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider indicates any relevant codes of conduct to which he subscribes and information on how those codes can be consulted electronically.

3. Contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them.

4. Paragraphs 1 and 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Article 11
Placing of the order

1. Member States shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where the recipient of the service places his order through technological means, the following principles apply:

- the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means,
- the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order.

3. Paragraph 1, first indent, and paragraph 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Section 4: Liability of intermediary service providers

Article 12
"Mere conduit"

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

(a) does not initiate the transmission;
(b) does not select the receiver of the transmission; and
(c) does not select or modify the information contained in the transmission.

2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

Article 13
"Caching"

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that

information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:

(a) the provider does not modify the information;
(b) the provider complies with conditions on access to the information;
(c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;
(d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and
(e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

2. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

Article 14
Hosting

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

Article 15
No general obligation to monitor

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their

request, information enabling the identification of recipients of their service with whom they have storage agreements.

CHAPTER III

IMPLEMENTATION

Article 16
Codes of conduct

1. Member States and the Commission shall encourage:

(a) the drawing up of codes of conduct at Community level, by trade, professional and consumer associations or organisations, designed to contribute to the proper implementation of Articles 5 to 15;

(b) the voluntary transmission of draft codes of conduct at national or Community level to the Commission;

(c) the accessibility of these codes of conduct in the Community languages by electronic means;

(d) the communication to the Member States and the Commission, by trade, professional and consumer associations or organisations, of their assessment of the application of their codes of conduct and their impact upon practices, habits or customs relating to electronic commerce;

(e) the drawing up of codes of conduct regarding the protection of minors and human dignity.

2. Member States and the Commission shall encourage the involvement of associations or organisations representing consumers in the drafting and implementation of codes of conduct affecting their interests and drawn up in accordance with paragraph 1(a). Where appropriate, to take account of their specific needs, associations representing the visually impaired and disabled should be consulted.

Article 17
Out-of-court dispute settlement

1. Member States shall ensure that, in the event of disagreement between an information society service provider and the recipient of the service, their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means.

2. Member States shall encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned.

3. Member States shall encourage bodies responsible for out-of-court dispute settlement to inform the Commission of the significant decisions they take regarding information society services and to transmit any other information on the practices, usages or customs relating to electronic commerce.

Article 18
Court actions

1. Member States shall ensure that court actions available under national law concerning information society services' activities allow for the rapid

adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.

2. The Annex to Directive 98/27/EC shall be supplemented as follows:

"11. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects on information society services, in particular electronic commerce, in the internal market (Directive on electronic commerce) (OJ L 178, 17.7.2000, p. 1)."

Article 19

Cooperation

1. Member States shall have adequate means of supervision and investigation necessary to implement this Directive effectively and shall ensure that service providers supply them with the requisite information.

2. Member States shall cooperate with other Member States; they shall, to that end, appoint one or several contact points, whose details they shall communicate to the other Member States and to the Commission.

3. Member States shall, as quickly as possible, and in conformity with national law, provide the assistance and information requested by other Member States or by the Commission, including by appropriate electronic means.

4. Member States shall establish contact points which shall be accessible at least by electronic means and from which recipients and service providers may:

(a) obtain general information on contractual rights and obligations as well as on the complaint and redress mechanisms available in the event of disputes, including practical aspects involved in the use of such mechanisms;

(b) obtain the details of authorities, associations or organisations from which they may obtain further information or practical assistance.

5. Member States shall encourage the communication to the Commission of any significant administrative or judicial decisions taken in their territory regarding disputes relating to information society services and practices, usages and customs relating to electronic commerce. The Commission shall communicate these decisions to the other Member States.

Article 20

Sanctions

Member States shall determine the sanctions applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are enforced. The sanctions they provide for shall be effective, proportionate and dissuasive.

CHAPTER IV

FINAL PROVISIONS

Article 21

Re-examination

1. Before 17 July 2003, and thereafter every two years, the Commission shall submit to the European Parliament, the Council and the Economic and

Social Committee a report on the application of this Directive, accompanied, where necessary, by proposals for adapting it to legal, technical and economic developments in the field of information society services, in particular with respect to crime prevention, the protection of minors, consumer protection and to the proper functioning of the internal market.

2. In examining the need for an adaptation of this Directive, the report shall in particular analyse the need for proposals concerning the liability of providers of hyperlinks and location tool services, "notice and take down" procedures and the attribution of liability following the taking down of content. The report shall also analyse the need for additional conditions for the exemption from liability, provided for in Articles 12 and 13, in the light of technical developments, and the possibility of applying the internal market principles to unsolicited commercial communications by electronic mail.

Article 22

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 17 January 2002. They shall forthwith inform the Commission thereof.

2. When Member States adopt the measures referred to in paragraph 1, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The methods of making such reference shall be laid down by Member States.

Article 23

Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 24

Addressees

This Directive is addressed to the Member States.

Done at Luxemburg, 8 June 2000.

For the European Parliament

The President

N. Fontaine

For the Council

The President

G. d'Oliveira Martins

(1) OJ C 30, 5.2.1999, p. 4.

(2) OJ C 169, 16.6.1999, p. 36.

(3) Opinion of the European Parliament of 6 May 1999 (OJ C 279, 1.10.1999, p. 389), Council common position of 28 February 2000 (OJ C 128, 8.5.2000, p. 32) and Decision of the European Parliament of 4 May 2000 (not yet published in the Official Journal).

(4) OJ L 298, 17.10.1989, p. 23. Directive as amended by Directive 97/36/EC of the European Parliament and of the Council (OJ L 202, 30.7.1997, p. 60).

(5) OJ L 95, 21.4.1993, p. 29.

(6) OJ L 144, 4.6.1999, p. 19.

(7) OJ L 250, 19.9.1984, p. 17. Directive as amended by Directive 97/55/EC of the European Parliament and of the Council (OJ L 290, 23.10.1997, p. 18).

(8) OJ L 42, 12.2.1987, p. 48. Directive as last amended by Directive 98/7/EC of the European Parliament and of the Council (OJ L 101, 1.4.1998, p. 17).

(9) OJ L 141, 11.6.1993, p. 27. Directive as last amended by Directive 97/9/EC of the European Parliament and of the Council (OJ L 84, 26.3.1997, p. 22).

(10) OJ L 158, 23.6.1990, p. 59.

(11) OJ L 80, 18.3.1998, p. 27.

(12) OJ L 228, 11.8.1992, p. 24.

(13) OJ L 280, 29.10.1994, p. 83.

(14) OJ L 166, 11.6.1998, p. 51. Directive as amended by Directive 1999/44/EC (OJ L 171, 7.7.1999, p. 12).

(15) OJ L 210, 7.8.1985, p. 29. Directive as amended by Directive 1999/34/EC (OJ L 141, 4.6.1999, p. 20).

(16) OJ L 171, 7.7.1999, p. 12.

(17) OJ L 113, 30.4.1992, p. 13.

(18) OJ L 213, 30.7.1998, p. 9.

(19) OJ L 281, 23.11.1995, p. 31.

(20) OJ L 24, 30.1.1998, p. 1.

(21) OJ L 204, 21.7.1998, p. 37. Directive as amended by Directive 98/48/EC (OJ L 217, 5.8.1998, p. 18).

(22) OJ L 320, 28.11.1998, p. 54.

(23) OJ L 15, 21.1.1998, p. 14.

(24) OJ L 13, 19.1.2000, p. 12.

(25) OJ C 23, 28.1.1999, p. 1.

(26) OJ L 19, 24.1.1989, p. 16.

(27) OJ L 209, 24.7.1992, p. 25. Directive as last amended by Commission Directive 97/38/EC (OJ L 184, 12.7.1997, p. 31).

(28) OJ L 117, 7.5.1997, p. 15.

(29) OJ L 145, 13.6.1977, p. 1. Directive as last amended by Directive 1999/85/EC (OJ L 277, 28.10.1999, p. 34).

ANNEX

DEROGATIONS FROM ARTICLE 3

As provided for in Article 3(3), Article 3(1) and (2) do not apply to:

- copyright, neighbouring rights, rights referred to in Directive 87/54/EEC(1) and Directive 96/9/EC(2) as well as industrial property rights,
- the emission of electronic money by institutions in respect of which Member States have applied one of the derogations provided for in Article 8(1) of Directive 2000/46/EC(3),
- Article 44(2) of Directive 85/611/EEC(4),
- Article 30 and Title IV of Directive 92/49/EEC(5), Title IV of Directive 92/96/EEC(6), Articles 7 and 8 of Directive 88/357/EEC(7) and Article 4 of Directive 90/619/EEC(8),

– the freedom of the parties to choose the law applicable to their contract,
– contractual obligations concerning consumer contacts,
– formal validity of contracts creating or transferring rights in real estate where such contracts are subject to mandatory formal requirements of the law of the Member State where the real estate is situated,
– the permissibility of unsolicited commercial communications by electronic mail.

(1) OJ L 24, 27.1.1987, p. 36.

(2) OJ L 77, 27.3.1996, p. 20.

(3) Not yet published in the Official Journal.

(4) OJ L 375, 31.12.1985, p. 3. Directive as last amended by Directive 95/26/EC (OJ L 168, 18.7.1995, p. 7).

(5) OJ L 228, 11.8.1992, p. 1. Directive as last amended by Directive 95/26/EC.

(6) OJ L 360, 9.12.1992, p. 2. Directive as last amended by Directive 95/26/EC.

(7) OJ L 172, 4.7.1988, p. 1. Directive as last amended by Directive 92/49/EC.

(8) OJ L 330, 29.11.1990, p. 50. Directive as last amended by Directive 92/96/EC.

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