

# Privacy, Misuse of Information and current issues

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# PARADOX: Streisand Effect



# The Nature of Privacy

## Something is private

- if a person has a desire for privacy in relation to it
- when a person wishes to be free from outside access when attending or undertaking it

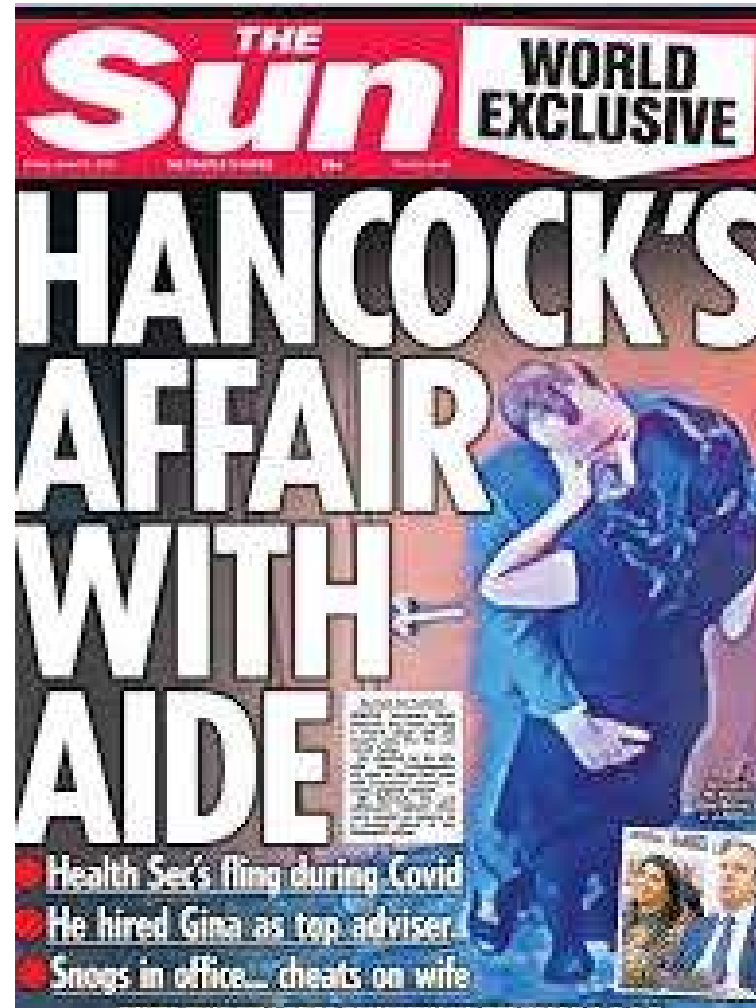
## Information is private

- if the individual does not want people to know about it

# Matt Hancock/Gina Coladangelo



# Matt Hancock/ Gina Coladangelo



# Huw Edwards: BBC Newsreader

**Arose out of a complaint to *The Sun* about the way in which a young person's parents had been treated by BBC Wales in Cardiff**

**Uncovered ring of pedophilic image/image sharing**



# Anatomy of a Privacy Case

***Alaedeen Sicri*** (Claimant)

v

***Associated Newspapers*** (Defendant)

Heard on 2, 3 and 6 November 2020

Judgment by Mr Justice Warby on 21 December 2020

Case Reference: **[2020] EWCA 3541 (QB)**

# Key Features

**I. Introduction**

**II. Issues**

**III. Trial**

**IV. Facts**

**V. Procedural History**

**VI. Liability**

**VII. Damages**

**VIII. Conclusions and Disposal**



# Introduction 1

## Privacy Remedies

- **Breach of Confidence**
- **Misuse of Private Information**
- Protection from Harassment 1997
- Malicious Prosecution
- **Data Protection Acts 1998 and 2018**
- Copyright and Image Rights
- Defamation: Libel + Slander

# Introduction 2

- European **Convention** on Human Rights (ECHR) 1953
  - Art 8 (private life) and Art 10 (freedom of speech)
  - Operative Court: ECtHR – Strasbourg (47 Council of Europe member states)
- In UK = Human Rights Act 1998 (HRA): domestic incorporation of ECHR into UK law

# Introduction 2 (a)

**Art 8 (private life) and Art 10 (freedom of speech)  
are *qualified* and not *absolute* rights**

Art 8 (or Art 10) can **ONLY** exist, and will *only* be judicially recognised, when the operation of the right in question is **necessary and proportionate in a democratic society**.

Those words are as important as the qualified rights that stand before them: privacy or free speech.

# Introduction 3

- **EU Charter** of Fundamental Rights (CFREU)
  - Art 7 (private life), Art 8 (protection of personal data), Art 11 (freedom of speech) and Art 42 (access to documents)
  - Operative Court: Court of Justice of the EU (CJEU) in Luxembourg (binding on all 27 EU States)

# Core Concept: Proportionality

*In re S (a Child FS)* [2004] UKHL 47

Lord Steyn

[17] “.... First, neither article [8 or 10] has such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test. This is how I will approach the present case.”

# Breach of Confidence 1

Origins in the law of Equity but now a Common Law tort (and may be a self-contained *sui generis* tort)

- ***Prince Albert v Strange*** (1849)
- ***Argyll v A*** [1967] Ch 302.

# Breach of Confidence 2

**Three key elements:**

- (1) information has necessary “*quality of confidence*”
- (2) information has “*obligation of confidence*”
- (3) *Risk* of unauthorised use or disclosure

# Breach of Confidence 3

## Alive....but #MeToo or not #MeToo?

- Can be Contractual: *McKennitt v Ash* [2006] EMLR 10 and *AG v Barker* [1990] 3 All ER 257
- ....and, more recently....
- [ABC v Telegraph](#) [2018] EWCA Civ 2329: Sir Philip Green and Non-Disclosure Agreements (NDAs)....the #MeToo link
- [Linklaters v Mellish](#) [2019] EWHC 177 (QB): contractual, to prevent former senior Human Resources consultant speaking about #MeToo-goings on at international law firm
- [Duchess of Sussex v Mail on Sunday](#) [2021] EWCA Civ 1810: Meghan Markle's battle about her father's interviews
- Prince Harry - ongoing: was Harry "hacked" in the phone-hacking scandal by MGN and/or NGN + recently against Associated Newspapers?



# Breach of Confidence 3

Equitable remedies

- **Protective**

- Injunction
- [Cream Holdings v Banerjee](#) [2003] EWCA Civ 103: standard is “more likely than not to succeed” rather than just “a real prospect of success”.
- [Venables v NGN](#) [2001] Fam 430: uniquely notorious, required comprehensive protection and issued *contra mundum*.
- [Bulger v Venables](#) [2019] EWHC (Fam) 494.
- Delivery Up and Destruction
- Account of Profits

# Breach of Confidence 3

Equitable remedies

## - **Compensatory**

- Damages
- [McKennitt v Ash](#) [2006] EWCA Civ 1714 : **£67,500** for “hurt feelings and distress”.
- [Mosley v NGN](#) [2008] EWHC 1777 QB: **£60,000** but no “exemplary” damages.
- Chancery “rates” .... [Representative Claimants v MGN](#) [2015] EWCA Civ 1291 affirming [Gulati v MGN](#) [2015] EWHC 1482 (Ch) “**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.****” Mann J [201].

## Damages claimed and awarded against MGN

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

# Defences

- Public interest (equitable)

- *AG v Guardian (No 2)* [1990] AC 109 (“Spycatcher”): “There is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure..”

- *McKennitt v Ash* [2006]: high threshold of misconduct required ~ Claimant’s smoking of cannabis did not meet it.

- *BKM Ltd v BBC* [2009] 3151 (Ch): covert filming in care home in Wales showing mistreatment of the elderly occupants.

- *Woodward v Hutchins* [1977] 2 All ER 751: “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.” Lord Denning MR at 754.

- *Lennon v NGN and Twist* [1978] FSR 573: “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.” Lord Denning MR at 575.

- Public interest (statutory):

- Public Interest Disclosure Act 1998 (for “whistle-blowing” employees).

# Confidence as Privacy?

- ***Kaye v Robertson*** [1991] FSR 62: no remedy against reporters who photographed and interviewed actor Gordon Kaye in hospital bed.
- ***Wainwright*** [2003] UKHL 53 and *Wainwright v United Kingdom* (2004): prison visit strip-search of young man: cerebral palsy + mental age of 12 = PTSD. HoL = no privacy breach. ECtHR: no Art 3 but ✓ Art 8 privacy breach + €3,000.
- ***Peck v UK*** (2003) 36 EHRR 4: no UK remedy for unauthorised disclosure of CCTV images to media and television. ECtHR = €11,800.

# Human Rights Act 1

- **HRA s.6** applies to public authorities (+ ECHR Article 6 fair trial/open justice): *R(Guardian Newspapers) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420 created common law principles of open justice off the back of s.78 FOIA. Court held that the Magistrates acted unlawfully in refusing to disclose the skeleton arguments, witness statements and other documents. “This decision breaks new ground in the application of the principle of open justice,” Toulson LJ. Where issues of public interest are raised, non-parties should be permitted access to documents referred to in any Tribunal exercising the judicial power of the state, unless good reasons can be shown.
- *Independent News v A* [2010] EWCA Civ 343: press can attend and report Court of Protection hearings with the Judge’s permission.
- *Appleton v Gallagher and Ors* [2015] EWHC 2689 (Fam) – celebrity divorces

# Human Rights Act 2

- S.12 (4) HRA: “The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to
  - (a) the extent to which—
    - (i) the material has, or is about to, become available to the public; or
    - (ii) it is, or would be, in the public interest for the material to be published;
  - (b) any relevant privacy code.
- ....so, does Article 10 get extra strength from this, what – now - is “any relevant privacy code” and what is the scope of Article 8 in terms of privacy?

# Human Rights Act 3

- Pre-HRA 1998 “privacy” was discussed- and avoided - in the two *Reports on the Committee on Privacy and Related Matters*: the Calcutt Reports of 1990 and 1993.
- ***Douglas v Hello! Ltd*** [2001] 2 All ER 289: “A development of the present frontiers of a breach of confidence action could fill the gap in English law which is filled by privacy law in other developed countries” Brooke LJ [61].
- ***Campbell v MGN*** [2004] 2 All ER 995: “widespread publication of the photograph of someone which reveals him to be in a situation of humiliation or severe embarrassment, even if taken in a public place, maybe an infringement of the privacy of his personal information.”
- ***Murray v Big Pictures*** [2008] EWCA Civ 446: 19-month-old baby “Harry Potter” gets damages for long-lens photography of him in a pushchair out and about with his parents.



# Campbell “methodology”

- Neither [Article 8 or Article 10] rights take precedence over one another.
- “Intense focus” on comparative importance in specific case.
- Take into account justifications for interfering and restricting: “I propose now to consider whether the decision to publish any or all of this material.... could be classified as one that could have been taken by a responsible journalist on the information available to him at that time.  
*Mosley v NGN* [143]: this reflects the concept of “responsible journalism” developed in *Reynolds v Times Newspapers* [2001] 2 AC 127, 205.
- Apply proportionality test to each.
- Lord Nicholl: “misuse of private information”.

# So, what – actually - is in the Balance?

## Article 8

- (1) Respect for private and family life, home and correspondence.
- (2) No interference save in accordance with the law and as is necessary in a democratic society in the interests of....

## Article 10

- (1) Freedom of expression: opinions/receiving information/ideas without interference.
- (2) Responsibilities may be subject to formalities, penalties, restrictions etc....

# Misuse of Private Information

## The New Tort

- Misuse of Private Information is **definitely** a new tort.
- ***Google v Vidal-Hall*** [2015] EWCA Civ 311.
- This was Google Inc's appeal from Tugendhat J's decision in *Vidal-Hall & Ors v Google* [2014] EWHC 13 (QB).
- Permission granted to Google for a Supreme Court hearing during May/June 2016 only on following two points:
  - (1) Whether the Court of Appeal was right to hold that section 13(2) of the Data Protection Act 1998 was incompatible with Article 23 of the Directive.
  - (2) Whether the Court of Appeal was right to disapply section 13(2) of the Data Protection Act 1998 on the grounds that it conflicts with the rights guaranteed by Articles 7 and 8 of the EU Charter of Fundamental Rights.

# Misuse of Private Information

## The Protected Right 1

- ***Campbell v MGN*** [2004] 2 All ER 995: “ 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 her think that she was being followed or betrayed, and deterring her from going back to the same place again.” Baroness Hale [155].
- ***Mosley v NGN*** [2008] EWHC 1777 (QB): “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.” Eady J [7].
- ***Von Hannover 1***(2005) 40 EHRR 1: ECtHR found a fundamental distinction between reporting facts – even controversial ones – which were capable of contributing to a debate in a 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.

# Misuse of Private Information The Protected Right 2

[Sir Cliff Richard v BBC](#) [2018] EWHC 1837 (Ch) Mr Justice Mann

Robin: [Inform](#) case comment

[ZXC v Bloomberg](#) [2020] EWCA Civ 611

[Alaedeem Sicri v Associated Newspapers](#) [2020] EWHC 3541 (QB) Mr Justice Warby (NB paras 139 – 150)

# Misuse of Private Information

## The Protected Right: CHILDREN 1

- ***Murray v Big Pictures*** [2007] EWHC 1908 (Ch): Struck out by Patton J because “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” but overturned by CoA [2008] EWCA Civ 446.
- ***ZN (Tanzania) v SSHD*** [2011] UKSC 4: the “best interests of the child must be a primary consideration. This means that they must be considered first” ~ Baroness Hale at [33], pointing out that children could not be blamed for the deficiencies of their parents.
- ***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.”
- ***Edward RockNRoll v NGN*** [2013] EWHC 24 (Ch) [43 - 46].

# Misuse of Private Information

## The Protected Right: CHILDREN 2

- ***AAA v Associated Newspapers*** [2013] EWCA Civ 554 [55]: Nicola Davies J awarded £15,000 damages for breach of the child’s right of privacy by the repeated publication of the photographs. On Boris 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].
- ***Dylan, John Paul and Bowie Weller v Associated Newspapers*** [2014] EWHC 1163 (QB) affirmed in [2015] EWCA Civ 1176. This case also raises Protection from Harassment issues and goes to the heart of when children are simply children or are – in their own right – celebrities who have no “out and about” expectation of privacy.

Robin: [Inform](#) comment on *Weller*

# Misuse of Private Information The Protected Right: CHILDREN 3

## *PJS v NGN* [2016] UKSC 26

<https://www.supremecourt.uk/cases/docs/uksc-2016-0080-judgment.pdf>

Robin: [Inform](#) comment on *PJS v NGN*



# Misuse of Private Information

## The Permitted Intrusion 1

- **LNS (John Terry) v Persons Unknown** [2010] EWHC 119 (QB)
- **CTB**
- **KGM v NGN** [2010] EWHC 3145 (QB) and *Hutcheson v NGN* [2011] EWCA Civ 808
- **AMM v HXW** [2010] EWHC 2457 (QB): ....injunctions don't work. You take out an injunction against somebody ....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” ~ Jeremy Clarkson

# Misuse of Private Information

## The Permitted Intrusion 2: ECtHR

- ***Axel Springer AG v Germany*** [2012] ECHR 227: Kriminalhauptkommissar Balko
- ***Von Hannover v Germany 2*** [2012] ECHR 228
- ***Von Hannover v Germany 3*** [2013] ECHR 264
- ***Lillo-Sternberg and Sæther v Norway*** [2014] ECHR 59
- ***Courdec and Hachette Filipacchi v France*** [2014] ECHR 604: Prince Albert II of Monaco and a *Paris-Match* interview with C, the mother of a son the Prince had fathered with her.

# Data Protection 1

- **Directive 95/46/EC on data protection**
  - Art. 9: processing “*solely for journalistic purposes* or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression’
- **Data Protection Acts 1998 + 2018**
  - ‘personal data’: makes an individual “identifiable directly or indirectly”
    - ‘sensitive data’, e.g. racial/ethnic origin, political opinions, religious or philosophical beliefs, data concerning health or sex life, criminal conviction data
  - processing for ‘special purposes’: JAL = journalism, artistic or literary purposes (s. 3) copied into GDPR-required DPA 2018

# Data Protection 2

- **Exemption** (s. 32 DPA): The JAL defence removes from data protection principles (e.g. lawful & fair processing), subject access, right to object, rectification, blocking, erasure or destruction
  - *but only if*
    - “with a view to publication”
    - data controller reasonably believes that “publication is in the public interest”
      - Designated codes of practice (SI 2000/1864): (NB: IPSO Code)
    - data controller reasonably believes that compliance is incompatible with the special purposes
- The Data Protection (Processing of Sensitive Personal Data) Order 2000 (SI No. 417), r. 3
  - in the substantial public interest
  - in connection with an unlawful act, dishonesty, malpractice or seriously improper conduct, mismanagement...
  - publication for ‘special purposes’

## Data Protection 3

- *Google Inc v Vidal-Hall* [2015]  
EWCA Civ 311: s.13 (2) DPA  
damages
- *Steinmetz v Global Witness* [2014]  
EWHC 1186 (Ch)
- *Google Spain v Mario Costeja  
González* (C –131/12)

# Closing Comments

Children's Rights and issues relating to online harm and the Online Safety Act 2023 (where the designated regulator is Ofcom).

In this digital age, how can you ever tell that a document – like proof of age - is genuine?

# Closing Comments

The Online Safety Act's provisions – in an area that has been an unmitigated mishmash of legal and political stop-start indecision for nearly 10 years – is likely to have a profound impact on the Technology, Media and Telecommunications area.

....and

thank you.

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