Title: **Misuse of Private Information: A Legal Analysis of Privacy Precedent in Connection to Media Abuses in England and Wales**
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Source: *The King's Student Law Review*, Vol XIII, Issue II, pp1-21
Cite as: Soumia Landi (2023) *Misuse of Private Information: A Legal Analysis of Privacy Precedent in Connection to Media Abuses in England and Wales*. The King's Student Law Review, Vol XIII, Issue II, pp1-21

Published by: King's College London on behalf of The King's Student Law Review

Misuse of Private Information: A Legal Analysis of Privacy Precedent in Connection to Media Abuses in England and Wales

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Abstract

The courts have favoured freedom of expression as the pillar of democracy, whereas privacy rights have either been heavily neglected or inconsistently upheld, failing to protect the individuals whose privacy is breached. This paper will evaluate the traditional media's special position in society, owing to its social function and limits. It will contest that the principal tools used by courts to assess misuse of private information claims have accentuated the unjust equilibrium between press freedom and privacy rights. The two-part Campbell test, the rights of third parties, the protection of reputation, legal certainty, and the quality of the remedies available highlight some of the issues created in the attempt to reach a fair outcome in the misuse of private information claims. Lastly, this paper will advocate for the introduction of a general right to privacy in common law and increased regulation of the press to uphold privacy rights.

I. Introduction

The case law in England and Wales does not recognise a general right to privacy as a common law right, and relies, instead, on an incongruous thread of common law doctrines including libel, trespass to the person, breach of confidence and misuse of private information.[1] Originating from the equitable doctrine of breach of confidence and the Human Rights Act 1998,[2] the tort of misuse of private information is perhaps the strongest advocacy tool for general privacy rights in England and Wales, particularly relating to abuses perpetrated by the media. Supported by Section 6 of the Human Rights Act 1998, which was brought into British legislation to enact the European Convention of Human Rights (ECHR), and presented in *Campbell v MGN Ltd*,[3] misuse of private information emphasises the

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[1] Erin Delaney, 'Judiciary Rising: Constitutional Change in The United Kingdom' (2014) 108 (2) Northwestern University Law Review 543, 590.

[2] Robert Walker, 'The English Law of Privacy: An Evolving Human Right' (Speech at Owen Dixon Chambers, Melbourne, 25 August 2010) <https://www.supremecourt.uk/docs/speech_100825.pdf> accessed 24 November 2021.

[3] [2004] UKHL 22, [2004] 2 AC 457.

conflict between the qualified rights contained in Article 8 and Article 10 of the ECHR, respectively, the right to privacy and the freedom of expression.[4] Freedom of the press is tied to freedom of expression, or Article 10. The United Kingdom has a longstanding tradition of protecting press freedom; Milton famously argued against government censorship of the media,[5] and the case of *Entick v Carrington* was a crucial achievement in the effort to introduce a completely free press.[6]

The conflict between Article 8 and 10 of the ECHR is highlighted by a common perception of the democratic press as fulfilling its duty of uncovering the truth, sometimes at the expense of privacy rights. In the context of media law, a right to privacy is infringed where unwanted disclosures of information about an individual are made by the media.[7] Celebrities and public figures have generally suffered from media abuses at the expense of their privacy rights, and in the United Kingdom, the traditional press has a reputation for being particularly invasive. A series of criteria have been utilised over the years to deal with the complexity of misuse of private information claims relating to media abuses: the reasonable expectation of privacy test; the balancing act, the public interest test; the implementation of third-party rights; and the protection of reputation. However, the inconsistent guidelines and extensive application of these criteria have generated a legal precedent that lacks certainty. Further, self-regulation and independent regulation of the press has sometimes failed to punish abuses. The aim of this paper is to encourage a discussion on the need for stronger legal protections and ethical guidelines in the press industry, the introduction of a general right to privacy as a common law right, and overall stronger regulation of the media.

II. The Duty of the Press

Prior to the introduction of the tort of misuse of private information, the modern law of breach of confidence was developed by *Prince Albert v Strange*.[8] The court granted Prince Albert an injunction, preventing Strange from producing an article detailing Prince Albert's etchings – a notable judgement in privacy law. In *Kaye v Robertson*,[9] the courts expressed that a common law right to privacy does not exist.

[4] Human Rights Act 1998.
[5] John Milton, *Areopagitica* (first published 1644, Penguin 2016).
[6] (1765) 19 Howell's State Trials 1029, 95 ER 807.
[7] Jacob Rowbottom, *Media Law* (Hart Publishing 2018), 113.
[8] (1849) I H & TW 1, 47 ER 1302.
[9] [1991] FSR 62.

In 1972, the Younger Committee rejected the idea of a general right of privacy created by statute, as it concluded that it would burden the court "with controversial questions" of a social and political nature – outlining that a general right to privacy could not be introduced as a result of the difficulty it would represent to apply privacy equally on all people and its impact on freedom of the press.[10] The Data Protection Act 1984 was then introduced "to make provision for the regulation of the processing of information relating to individuals" put restrictions with respect to such information,[11] while the Access to Personal Files Act 1987 "provided access" to persons who wished to obtain copies of personal information maintained by certain authorities.[12] The Communications Act 2003 was also introduced to regulate "electronic communications networks and services" and to make provisions "about the regulation of broadcasting and of the provision of television and radio services".[13] However, no recommendations about invasions of privacy in the media were made.

The exit of the United Kingdom from the European Union (EU) signified that European law is no longer applicable. However, it is still important to consider European legislation when discussing privacy rights in the United Kingdom. The Human Rights Act 1998 was passed by the United Kingdom Parliament to incorporate into domestic law the rights set out in the ECHR, a Convention of the Council of Europe – an organisation distinct from the EU, but one that is at the core of the European promotion of human rights.[14] The Audiovisual Media Services Directive governs EU co-ordination of national legislation on all audio-visual media. The importance of freedom of expression in media is highlighted in the Directive, where it is called "a cornerstone of democratic systems".[15] The European Regulation 2016/679 outlines that the right to the protection of personal data "is not an absolute right".[16]

In *Sunday Times v United Kingdom*, the ECtHR held that an injunction restricting

[10] Younger Committee, *Privacy: Younger Committee's Report* (HL 1973, 104-343) para 653.
[11] Data Protection Act 1984, Introductory Text.
[12] Access to Personal Files Act 1987, Introductory Text.
[13] Communications Act 2003, Introductory Text.
[14] 'A Convention to protect your rights and liberties' (Council of Europe) <https://www.coe.int/en/web/human-rights-convention> accessed 10 July 2023.
[15] Council Directive 2018/1808 of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services (Audiovisual Media Services Directive) in view of changing market realities [2018] OJ L 303.
[16] Council Regulation (EC) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L 119.

the Sunday Times from publishing an article concerning a settlement violated its freedom of expression (Article 10 ECHR). Most importantly, the ECtHR highlighted that the right to freedom of expression assures not only the freedom of the press to inform the public but also the right of the public to be appropriately educated.[17] In the important case of *Von Hannover v Germany*, the ECtHR held that a real distinction must be made between facts relating to politicians capable of contributing to the public sphere and reporting details of the private life of an individual who does not hold office.[18] In democracies, those who put themselves forward for public office are expected to be exposed to general perusal and judgement.[19] An analysis of the European legislation and precedents reveals that the protection of the privacy rights of citizens has not been prioritised where the traditional press is the defendant, highlighting: the unfair power dynamics at hand; the precedence of freedom of expression over the right to privacy; and the risk of media abuse at the expense of individual citizens.

For the purpose of this article, the traditional media will be defined as "print and broadcast media", including the online press and televised news channels.[20] The traditional media enjoys rights and privileges that are not available to non-journalists exercising their right to freedom of speech,[21] and these rights may be necessary for it to perform its social function.[22] The theoretical foundations of free speech are founded on an overall quest for truth, self-fulfilment, citizen participation in a democracy, and government accountability.[23] Freedom of expression is representative of one of the indispensable substructures of a democratic society, or "one of the basic conditions for its progress and for the development of every man".[24] A free press is essential, implored to a "duty" that demands it to become a public "watchdog".[25] In *Cliff Richard v BBC*, Mann J reflects on whether this "duty" can even be considered such. Particularly, he maintains that the function of the free press and its "duty" do not aid the debate in favour of the media, and that "the balancing exercise invokes more

[17] *The Sunday Times v United Kingdom* (1979) 2 EHRR 245, paras 42-68.
[18] *Von Hannover v Germany* (2005) 40 EHRR 1, para 63.
[19] *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 135-140.
[20] 'Traditional Media', *Law Insider* <https://www.lawinsider.com/dictionary/traditional-media> accessed 10 July 2023.
[21] András Koltay, *New Media and Freedom of Expression: Rethinking the Constitutional Foundations of the Public Sphere* (Hart Publishing 2021) 8-64.
[22] Jacob Rowbottom, 'A landmark at a turning point: Campbell and the use of privacy law to constrain media power' (2015) 7(2) Journal of Media Law 170, 184.
[23] Koltay (n21) 8-64.
[24] *Handyside v the United Kingdom* (1976) 1 EHRR 737, para 49.
[25] *Axel Springer AG v Germany* (2012) 55 EHRR 6, para 79.

refined concepts than that", in reference to the concept of "duty".[26]

In *Campbell*, the introduction of a common law protection of privacy was discussed, justified by a disconcertment that the "power of the media to invade privacy is at least equal to that of the state".[27] The "quest for truth", which identifies free speech as an important condition for the attainment of truth,[28] is not uncomplicated when applied to the press. A free press cannot be stopped from freely deciding to communicate falsities or support corruption, as there is no underlying motivation to uphold the truth other than morality.[29] In a report written in 1890, Warren and Brandeis discuss the "obvious bounds of property and of decency" that the press seemed to be "overstepping", as well as the evolution of gossip from a pastime for the "vicious" to "a trade" which is pursued with impertinence.[30] Public figures (such as Prince Harry, the Duke of Sussex, who recently released a 55-page witness statement where he described that he has never been able to upkeep a relationship "without the tabloids getting involved and ultimately trying to ruin it using whatever unlawful means at their disposal") are often forced to forfeit their right to privacy due to their special position in society. Pictures published in the tabloid press are frequently taken in an approach that creates an uncomfortable sense of intrusion,[31] while more serious infringements include phone hacking and stalking.[32]

The array of decisions in breach of confidence and misuse of private information cases has exposed the press's privileged position not only in society, but also in the courts, demonstrated by uncertain precedent and civil procedures that resemble criminal trials. In *Gulati v MGN Ltd*, a new facet of case law that considered the intrusion of physical privacy by the media was introduced.[33] It was acknowledged that in instances of phone hacking (defined in *Gulati* as "mobile voice-message interception")[34], a victim may not be able to satisfy the requirement of reasonable

[26] *Sir Cliff Richard v The BBC & The Chief Constable of South Yorkshire Police* [2018] EWHC 1837, [2018] 3 WLR 1715 [274].
[27] Rowbottom (n22) 170.
[28] Koltay (n21) 8-64.
[29] Brian Leveson, *An Inquiry Into The Culture, Practices and Ethics of the Press*, vol 1 (The Leveson Inquiry, 2012).
[30] Samuel Warren and Louis D Brandeis, 'The Right of Privacy' (1890) 4 Harvard Law Review 193, 196.
[31] *Von Hannover* (n19).
[32] *Gulati v MGN Ltd* [2015] EWHC 1482, [2015] 5 WLUK 637.
[33] ibid.
[34] ibid [6].

expectation of privacy in relation to the imparted facts.[35] Nicklin J outlined that there is no expectation of privacy in the sole existence of a relationship between two people, and disagreed with the level of privacy requested to avoid the discovery of the relationship concerned. Nicklin J relied on *Trimingham v Associated Newspapers Ltd*.[36] In that case Tugendhat J said:

> While there will commonly be a reasonable expectation of privacy in respect of the details of a sexual or family relationship, the position is not the same in respect of the bare fact of a sexual relationship.

The move in *Gulati* is not supported by misuse of private information precedent, providing an example of legal uncertainty in the case law relating to privacy, and highlighting the need for the introduction of stronger guidelines to protect the right to privacy from media abuses.

The tort of misuse of private information, in harmony with the Defamation Act 2013, was introduced to protect citizens against the power of the press, safeguarding unfavourable and unjust changes to an individual's image and evaluation by society, while guaranteeing an exemption for allegations published on matters of public interest. Defining what information truly serves the public interest is an issue that makes regulating the press based on these guidelines difficult. In the *Cliff Richard* case, the South Yorkshire Police stated that they felt pressure to give information to the British Broadcasting Service (BBC) to avoid the journalist involved from compromising their search.[37] The BBC defended their decisions by alleging that making the identity of an individual who is "currently charged with the commission of a crime" is itself newsworthy because "it may legitimately put others on notice that the named individual is suspected of having committed a crime".[38] Sir Brian Leveson then addressed the importance of police investigations needing to remain private, stating that unless there is an "immediate risk to the public", the identities of individuals who have been arrested or are suspected of a crime should not be revealed.[39]

The excessive power given to the press is evident in this case, especially over governmental agencies, who feel they need to avoid tension with media outlets at all

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[35] Nicole Moreham, 'Liability for listening: why phone hacking is an actionable breach of privacy' (2015) 7(2) Journal of Media Law 155, 160.
[36] [2012] EWHC 1296, [2012] 4 All ER 757 [285].
[37] *Cliff Richard* (n26) [160].
[38] Eugene Volokh, 'Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking about You' (2000) 52(5) Stanford Law Review 1049, 35.
[39] Leveson (n29).

costs in order to complete investigations without interference. In 2011, Metropolitan Police Commissioner Sir Paul Stephenson resigned as a result of the phone hacking scandal, when he was criticised for hiring former News of the World executive Neil Wallis as an adviser.[40] This highlights the close relationship the police force and the traditional media have had. In a democratic society, media outlets should not hold enough power to negatively interfere with ongoing police investigations. The judicial precedent has failed to highlight the detriment caused by the traditional media if utilised in a manner that serves a financial benefit, without any real regard to personal privacy or other democratic rights. Media outlets are moderately regulated, precedent is inconsistently applied, and, as a result, the press has no real motivation to prioritise privacy rights or fair journalism over lucrative financial returns. The longevity of the business is dependent on investor approval. Publishers rely on advertisement revenue and premium subscriptions to drive profits,[41] creating a dependent relationship that obstructs the media's ability to make ethical decisions as it relates to general democratic rights.

In *Tchenguiz v Imerman*, Lord Neuberger MR highlighted that obtaining information a claimant reasonably believes to be private is a breach of confidence in itself.[42] The rationale for the decision in *Tchenguiz* is the essence of the breach of confidence doctrine, and it is applicable to information obtained by phone hacking as well as information obtained on a computer.[43] The action for breach of confidence is brought to life by a public interest test. It is submitted that the public interest test acts as a defence in that it operates to bar the enforcement of the right rather than to deny its existence.[44] It is admittedly unusual to cast the legal burden of disproving a defence in civil matters upon the claimant, unlike criminal evidence where this is the requirement. This highlights the importance given to free speech in English law, to the detriment of personal privacy.[45] While the public interest test provides a reasonable defence for the breach of privacy rights, the introduction of a general right to privacy and more stringent regulation would heavily deter the traditional media from committing privacy abuses and engaging in corruption, where there is no public

[40] 'Met Police Commissioner Sir Paul Stephenson quits' *BBC News* (London, 18 July 2011) <https://www.bbc.co.uk/news/uk-14180043> accessed 10 July 2023.
[41] Alex Williams, 'How digital subscriptions work at newspapers today' (*American Press Institute*, 29 February 2016) <https://www.americanpressinstitute.org/publications/reports/digital-subscriptions-today/> accessed July 10, 2023.
[42] [2010] EWCA Civ 908, [2011] WLR 592 [69].
[43] ibid.
[44] Raymond Wacks, *Privacy and Media Freedom* (Oxford University Press 2014) 130.
[45] Leveson (n29).

interest at stake by setting clear guidelines that are consistently applied.

Following the Leveson Inquiry 2012,[46] an effort was made by legislators to implement press regulation. As a result, the Independent Press Standards Organisation was set up as an independent regulator, ultimately created to ensure that the press could not be manipulated by the ruling government and to penalise the press when abuses occur.[47] Independent press regulation has mostly been unsuccessful in England and Wales – a fact encapsulated by its failure to protect the privacy of the families affected by Manchester Arena Terrorist Attack, as analysed in The Kerslake Report.[48] Ofcom (the regulator initially established by the Office of Communications Act 2002 which received its full authority from the Communications Act 2003) has successfully dealt with complaints related to inappropriate content and misinformation, but rarely deals with complaints related to intrusion of privacy.[49] The principle of self-regulation of the press was originally fuelled by a desire from the government to avoid a conflict with the press itself,[50] demonstrating the exorbitant power the press holds over its own regulation at a governmental level. In the *Cliff Richard* case, the editorial guidelines of the BBC (a form of self-regulation) provided that the BBC must consider the public interest in relation to the expectation of privacy of individuals. Any violation of an authorised expectation of privacy in the convocation of information must be justified as commensurable in the specific circumstances of the case.[51] This emphasises the two main issues with current regulations: (1) the inability of independent regulators to compete with the excessive power the press holds and (2) the traditional press's inability to provide a truly unbiased analysis of their own behaviour.

While the United Kingdom does not have a constitution that protects freedom of expression, the courts have historically supported press freedom over the privacy rights of individuals. As will be explored in this article, the current public interest test

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[46] ibid.

[47] Independent Press Standards Organisation, 'Vision, mission and values' (The Independent Press Standards Organisation CIC, 25 March 2020) <https://www.ipso.co.uk/what-we-do/vision-mission-and-values/> accessed 13 June 2022.

[48] Sir Bob Kerslake, 'The Kerslake Report' (2017) <https://www.kerslakearenareview.co.uk/media/1022/kerslake_arena_review_printed_final.pdf> accessed 10 June 2022.

[49] The Office of Communications, 'Consultations and statements' (The Office of Communications, 23 June 2023) <https://www.ofcom.org.uk/consultations-and-statements> accessed 13 June 2022.

[50] Rowbottom (n22) 174.

[51] BBC, 'BBC Editorial Guidelines' (2020) 1.3 <https://www.bbc.co.uk/editorialguidelines/guidelinespara> accessed 27 July 2023.

often used to assess misuse of private information cases is not always accurate in determining what facts genuinely contribute to the public sphere and what information is merely a gratuitous invasion of privacy of the people involved. The balance is largely in favour of protecting freedom of expression above all else, at the expense of the individuals affected. Press freedom in early breach of confidence and misuse of private information cases relied on an unfair advantage due to the media's special position in society as so-called bearers of truth. The lack of regulation and legal frameworks surrounding traditional media which has allowed for breaches of power that directly contradict key principles of democratic societies may be resolved by the introduction of a general right to privacy that can bring clarity to the legal framework.

III. Misuse of Private Information: A Pillar of Privacy

Instituted in *Campbell*, the two-part *Campbell* test is one of the main instruments used in misuse of private information cases to assess the validity of a privacy claim against the media. The name of the tort of misuse of private information is a "misnomer" in this context; misuse of private information is the action of taking information deemed as private and publishing it, rather than misusing it in a general sense.[52] The test first determines whether a claimant has a reasonable expectation of privacy. If that is found to be accurate, it subsequently assesses whether this privacy claim is more compelling than the rivalling freedom of expression claim.[53] The House of Lords held in *Campbell* that on some occasions the information is evidently private, such as a claimant's health status or personal relationships. Where it is not evident, the court will examine whether a reasonable person of typical sensitivities would find the divulgence objectionable if situated in a similar disposition as the claimant.[54]

Typical sensitivities can provide a great degree of flux; for example, lesbian, gay, bisexual, and transsexual individuals who are also racial/ethnic minorities (LGBT-POC) are subject to micro-aggressions associated with both racism and hetero-sexism,[55] meaning that divulgence of information that a reasonable person of typical sensitivities would not object may otherwise impact marginalised minorities disproportionately – including people who may suffer from mental impairment and

[52] Moreham (n35) 160.
[53] ibid.
[54] *Campbell* (n3).
[55] Kimberly Balsam, Yamile Molina, Blair Beadnell, Jane Simoni and Karina Walters, 'Measuring Multiple Minority Stress: The LGBT People of Color Microaggressions Scale' (2011) 17(2) Cultural Diversity and Ethnic Minority Psychology 163.

disabilities. The courts give further guidance, holding that a "broad" analysis of all the events is required to decide whether there is a reasonable expectation of privacy,[56] and that public figures are expected to embrace a vigorous and "realistic approach".[57] Public figures are expected to give up their privacy rights in relation to details of their lives that may negatively impact them, such as in the case of someone who suffers from an addiction and may become the target of unwarranted attacks as a result of the divulgence of that information. Introducing a general right to privacy in common law that takes this into account will allow for a set of guidelines that every individual can rely on equally.

The main limitation of the *Campbell* two-part test is its inconsistent application by the courts. Precedent clarifies that public figures ought to expect greater pressure on their privacy from the public, a direct result of their privileged position in society.[58] However, this was not reflected in *Campbell,* where the claimant was a prominent public figure who would suffer from limited access to privacy,[59] and it was held that Campbell's right to privacy superseded the defendant's right to freedom of expression. In *Campbell*, Baroness Hale highlighted that Campbell's health history should be regarded as private, however, the press had a right to report on it in order to provide truth to her statements about being anti-drugs.[60] Lord Hope noted that the publication of the photos would have a major impact on Campbell's treatment for her addiction, negatively affecting her life significantly, and her right to privacy was ultimately upheld.[61] As such, in assessing the strength of a misuse of private information claim, the second part of the two-part *Campbell* test, the balancing exercise involving Article 8 and Article 10, is arguably the most important indicator. The balancing test constitutes a recognition of the tension between Article 8 and Article 10 of the ECHR,[62] the outcome of which is sometimes deemed "controversial" in its fairness. [63]

[56] *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446, [2008] 3 WLR 1360 [36].
[57] *Ambrosiadou v Coward* [2011] EWCA Civ 409, [2011] 4 WLUK 265 [30].
[58] *Spelman v Express Newspapers (No 2)* [2012] EWHC 355, [2012] 2 WLUK 711 [49].
[59] *Campbell* (n3) [163].
[60] ibid [129].
[61] ibid [96]-[99].
[62] *In Re S (FC) (a child)* [2004] UKHL 47, [2005] 1 AC 593.
[63] Wacks (n44) 145.

IV. The Two-Part *Campbell* Test

The balance of the protection of private life against freedom of expression in *Campbell* relied on the perceived contribution that the published photographs and articles made to a debate of general interest, rather than a real public interest.[64] Lord Steyn identified four principles in *Campbell*: (1) neither Article should supersede the other; (2) where there is disagreement, an extreme pivot is required upon the relative significance of the specified rights; (3) the court has to assess the reasons for obstructing each right; and (4) the proportionality test has to be exercised.[65] Significant emphasis has been put on the concept of "public interest" in order to decide whether Article 8 or 10 takes precedence over the other. Article 10 will always have an advantage over Article 8 as long as the definition of "serving the public interest" remains broad. Wragg argues that "freedom of expression occupies a privileged position" in comparison to the competing privacy rights.[66] As proven by the case law discussed above, freedom of expression is vigorously protected in the United Kingdom.

Wragg argues that misuse of private information claims either fail because there is a public interest in the publication or they succeed because there is no such public interest at stake.[67] In *A v B plc*, Lord Woolf refused to ban the publication of so-called kiss and tell stories with no real public interest because the claimant was viewed as a "role model" for young adults, who were entitled to know the truth about his character.[68] A distinction was made about whether it was not in the "public interest" of the readers to dwell on the details of the claimant's personal life or whether it might simply be "interesting" for them.[69] In 2020, the Law Commission recommended removing the requirement of proof that the leak of private information "caused damage", instead requiring proof of a "culpable mental state", while a defence should be available to anyone if the disclosure was "in the public interest".[70] This highlights the importance of allowing information that can benefit the public into the public sphere. Mere gossip is not to be considered information of "real public interest",[71]

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[64] ibid.
[65] *In re S* (n62) [17].
[66] Paul Wragg, 'Protecting private information of public interest: Campbell's great promise unfulfilled' (2015) 7(2) Journal of Media Law 225, 227.
[67] ibid.
[68] [2002] EWCA Civ 337, [2002] 3 WLR 542 [11(xii)].
[69] *Campbell* (n3).
[70] Law Commission, *Protection of Official Data Report* (Law Com No 395, 2020) para 3.54.
[71] *Jameel and others v Wall Street Journal Europe* [2006] UKHL 44, [2007] 1 AC 359 [147].

however the lines remain blurred in assessing what information constitutes "mere gossip". In 2022, Andrew Hornery threatened to reveal the sexuality of Rebel Wilson before she had a chance to do so, subsequently putting her in a position where she could have become the target of harassment as a result of the sensitive information revealed.[72] It was not in the real interest of the public to dwell on details of Rebel Wilson's personal life, and the damage it might have caused could have been severe. The double entendre of what comprises information of "public interest" is a crucial distinction that was discussed in *Jameel and others v Wall Street Journal Europe*, where information of "real public interest" was separated from vapid details that aim to simply spark interest in the public.[73] However, this distinction is not consistently applied in case law, as highlighted by cases such as *A v B plc* and *Stoute v News Group Newspapers Limited*.[74]

In *Stoute v News Group Newspapers Limited*, the claimants made an application seeking an order to restrain publication of any information that might identify the claimants' second home or boat. An interim injunction was not granted, as Mr Justice Johnson reasoned that if "the court finds that the publication was lawful, then that will mean there has been a significant and unjustified interference with the defendant's right to freedom of expression".[75] Publishing photos of such nature clearly put the claimants at risk. The disclosure of the private information puts them at risk of unwanted attention and potential harassment at the hands of readers of the publication who may have ulterior motives, going beyond a purely journalistic scope. As per the authority of *Douglas v Hello! Ltd*, photographs can amount to an especially intrusive breach of privacy, "a picture a picture is worth a thousand words",[76] and as such it is difficult to justify not granting an injunction in this case, particularly taking into account that no public interest was at stake.

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[72] Jim Waterson, 'Columnist apologises after being accused of trying to out Rebel Wilson' *The Guardian* (Australia, 13 June 2022) <https://www.theguardian.com/media/2022/jun/13/columnist-apologises-accused-trying-to-out-rebel-wilson> accessed 10 July 2023.

[73] *Jameel* (n71) [147].

[74] *Stoute v News Group Newspapers Limited* [2023] EWHC 232, [2023] 1 WLUK 405; *A v B plc* (n68). In *A v B plc*, it was held that where a court is deciding whether to grant relief that may interfere with one party's right to freedom of expression, as protected by Article 10 of the ECHR, even where there is no public interest in the publication of the material in question the interference has to be justified. In *Stoute*, it was held that the information that may be construed by the publication of the photographs was information that any person present at the place in question would have been able to see, and as such it could not be deemed information that is inherently private.

[75] *Stoute* (n74) [40].

[76] *Douglas v Hello! Ltd* [2005] EWCA Civ 595, [2005] 3 WLR 881 [165].

Section 12 of the Human Rights Act provides that the claimant must show that the balance of convenience favours the grant of injunctive relief. In other words, the claimant must show that the risk of an injustice occasioned by refusing relief now if the claimants subsequently succeed at trial outweighs the risk of injustice occasioned by granting relief now if the claimants subsequently fail at trial.[77] In this case, the claimants were unable to do so. One must question whether the balance of convenience is a suitable test in the decision to grant an interim injunction (arguably the most effective remedy in privacy cases relating to the press). The "injustice" which would have taken place by granting the interim injunction relates to the defendant's inability to exercise their freedom of expression. It is unclear why this right should take precedence over the privacy rights of the claimants in this case, as the damage which might be caused by the publication of such photographs largely outweighs its potential benefits. By utilising the public interest test in a way that truly weighs the impact that the disclosure of the information would have on the public interest could mean that fairer outcomes could be achieved.

In *Murray v Big Pictures,* the respondent asked for either summary judgement under Civil Procedure Rules (CPR) 24 or an order striking out the claim under CPR 3.4. The judge dismissed the claim and found in favour of the respondent. The Court of Appeal granted permission on the grounds that the case involved an important issue between the rulings of the ECtHR in *Von Hannover* and the House of Lords in *Campbell*. The judge's conclusion that Article 8 was not engaged and that the respondent was permitted to publish or procure the publication of the photographs in the exercise of its right to freedom of expression under Article 10 was, at least partially, what caused him to initially reject the claimant's claim under the Data Protection Act 1998. In the end, the Court of Appeal held that the claimant at least had a reasonable expectation of privacy and that, while his parents are celebrities, a child may have a reasonable expectation of privacy in respect to his public appearance.[78] Ultimately, the contradicting precedent set by *Campbell* and *Von Hannover* meant that the Court of Appeal had to provide a judgement for the upholding of the claimant's privacy rights, despite a lower court having ruled to strike out the claim altogether. Introducing a general right to privacy would allow the courts to give judgements based on clear guidelines that take into account an accurate and consistent application of the public interest test.

[77] Human Rights Act 1998, s12.
[78] *Murray v Big Pictures* (n56) [3] and [62].

V. The Rights of Third Parties

In *Weller v Associated Newspapers*, the publication of photographs of celebrity children was held to be misuse of private information. The claim progressed on the premise that the children's faces should have been hidden. The claimant had been open about his family life in interviews and the eldest child had appeared in a magazine shoot. One of the reasons the court held in favour of the claimants was that the photographs depicted "a range of emotions".[79] Extending the rights conferred by Article 8 of the ECHR to the family members of those affected was also applied in *RocknRoll v News Group Newspapers,* where the right to privacy of the step-children of the claimant was taken into consideration in the balancing exercise.[80] Employing international human rights law and immigration case law to attain its outcome, the Court of Appeal clarified that the rights of children must be promoted extensively when determining whether to grant an injunction.[81] In *K v News Group Newspapers Ltd*, the Court of Appeal held that the Article 8 rights of the claimant's children were to be taken into account when discussing the balancing exercise. The judgment designated that when directing the balancing exercise, the court must take into account the "rights of any children likely to be affected by the publication", especially if the publication would harm their interests.[82] This is consistent with the general legal context on the rights of children. However, it creates another issue in relation to whether the rights extended to children should be extended to adults where publication of private information does not interfere with the public interest.

Bennett argues that the third-party approach adopted in *K v News Group Newspapers* "pulls away from the traditional bilateral structure of private law and into the realm of the all-encompassing assessment impact upon Convention rights associated with vertical, public law cases".[83] The inseparability theory dictates that family members will likely be considered relevant third parties in misuse of private information cases in order to allow the courts to compensate true loss suffered.[84] In the *Cliff Richard* case, there was a discussion which involved the issue of sexual abuse of children as a matter of public concern, especially abuse carried out by those in a

[79] *Weller v Associated Newspapers* [2014] EWHC 1163, [2014] 4 WLUK 657 [43].
[80] *RocknRoll v News Group Newspapers* [2013] EWHC 24, [2013] 1 WLUK 209.
[81] ibid [18]-[19].
[82] *K v News Group Newspapers Ltd* [2011] EWCA Civ 439, [2011] 1 WLR 1827 [19].
[83] Thomas Bennett, 'Privacy, third parties and judicial method: *Wainwright*'s legacy of uncertainty' (2015) 7(2) Journal of Media Law 251, 264.
[84] ibid.

public position who had contact with children while in that position of power.[85] Mann J acknowledged the existence of a public interest in this regard, however, he deemed revealing the names of the accused unnecessary.[86]

In the *Cliff Richard* case, it appears that the precedent is to protect the children of family members who rely on Article 8 rather than the rights of children as a whole.[87] Other relevant third parties, such as the parents of the children who were affected or those who could be affected, are disregarded in the decision made in *Cliff Richard*. This highlights a failure to respect the rights of third parties in freedom of expression against privacy claims. In this case, the seriousness of the allegations did not affect the ruling for the upkeep of Article 8, while in other cases, such *as A v b plc* and *Stoute v News Group Newspapers Limited*, where there was no real public interest in the information in question being disclosed, radically different rulings were given. In *Campbell*, the claimant objected to the photographs themselves and the disclosure of her support group location, which have implicated that other members of the group could have been identified. Baroness Hale highlighted that because the photographs showed her coming out of Narcotics Anonymous meetings, in the company of others, they would have been negatively affected by the publication of the photographs as well.[88] Showing where the meetings were taking place inevitably put other people at risk of being exposed, despite the nature of the group as anonymous. Campbell would have also been forced to leave the group following the publication of the photographs, which would have negatively impacted her recovery process.[89] The unclear guidelines set by inconsistent precedent are obvious in the cases outlined above, an issue that can only be solved in future rulings through the introduction of a general right to privacy that takes into account all the inconsistencies encountered thus far.

VI. The Protection of Reputation

The protection of reputation in misuse of private information cases involving celebrities is one that the courts have historically inconsistently upheld. In the *Cliff Richard* case, the Axel Springer factors took centre stage in the discussion of balancing personal privacy and freedom of press. The factors include whether the publication will lead to a contribution to a debate of general interest, the celebrity of the person

[85] *Cliff Richard* (n26) [279].
[86] ibid [317].
[87] ibid [343]-[345].
[88] *Campbell* (n3) [329].
[89] ibid.

and the subject of the report, prior conduct of the person concerned, method of obtaining the information, content and consequences of the publication; and lastly the severity of the sanctions imposed.[90] The celebrity status of the claimant and Cliff Richard's prior appreciable reputation were considered. The broadcasting of a police investigation was deemed "so damaging" to the claimant's reputation that it was believed to be "disproportionately disadvantageous to him", despite it relating to an important matter of public interest.[91]

In addition to these elements, Section 12 of the Human Rights Act 1998 requires the court to have regard to any relevant privacy code. In *Lonrho v Fayed*,[92] it was held that damage to reputation does not belong in loss of privacy cases, it must be brought forward in a defamation action, and any action based on a detriment to an individual's reputation must be based on a justifiable reputation. In *Gulati* and *Mosley v NGN*, loss of dignity is also thoroughly discussed,[93] while in *Hannon v News Group Newspapers*, the point made in *Lonrho* was rejected.[94] Mann J in *Gulati* reasoned that if the claimant has lost the right to disseminate information about his private life, then it is fair that the claimant be compensated for that loss.[95] Nicklin J acknowledged that reputation is part of a person's rights under Article 8, but noted that English law accommodates Article 8 through defamation law and the Data Protection Act, as well as the misuse of private information tort.[96] In *ZXC v Bloomberg LP*, Nicklin J explains the increasing concern about the detrimental effect on reputation caused by the publication of the arrest of an innocent person.[97] Rowbottom argues that people should have the right to negotiate their public profile, challenge claims made, and contextualise information.[98] Ultimately, a myriad of factors influences the reputation of a person, making it difficult to see how anyone could truly retain the right to influence their own. Public opinion is shaped by assumptions often made without the existence of any real evidence to support a claim. As such, it is difficult to justify the way the courts have attempted to uphold a subjective and broad concept without an objective test introduced through a general right to privacy that quantifies the damage that individual has suffered as a result of their reputational impairment.

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[90] *Cliff Richard* (n26) [276].
[91] ibid [286].
[92] [1993] 1 WLR 1489.
[93] *Gulati* (n32) [126]; *Mosley v News Group Newspapers* [2008] EWHC 1777, [2008] 7 WLUK 744 [216].
[94] [2014] EWHC 1580, [2015] EMLR 1.
[95] *Gulati* (n32) [111].
[96] *ZXC v Bloomberg LP* [2020] EWCA Civ 611, [2020] 3 WLR 838 [60].
[97] ibid [49].
[98] Rowbottom (n22) 180.

In the *Cliff Richard* case, the court found that the claimant had a reasonable expectation of privacy during the search warrant. The court was lenient in giving the claimant's right to privacy an importance that did not take into account his celebrity status to his detriment.[99] In *Duchess of Sussex v Associated Newspapers Ltd*,[100] the claimant had a reasonable expectation of privacy in relation to the contents of a private letter she had sent to her father detailing aspects of her personal life. The balancing act was necessary in determining that the invasion of privacy was serious enough to warrant protection.[101] The *Duchess of Sussex* case is a recent example where the courts protected the privacy rights of public figures.

In *A v B plc*, the claimant, a married Premier League football player, asked for an injunction to stop the first defendant, a newspaper, from revealing or publishing information about his relationships with the second defendant and another woman, as well as to prevent those women from disclosing anything related to the relationship with the intention of the information being shared in the media. An interim injunction was initially approved in response to the claimant's request. The judge denied the newspaper's subsequent request to overturn the injunction on the grounds that there should be equal protection under the law of confidentiality for relationships that take place outside of marriage and within marriage, and that the claimant was likely to prevail at trial in preventing publication of the information because there was no public interest in the information's publication.[102] The defendant filed an appeal. Even if there was no public interest in the material in question being published, the court had to consider whether to grant a relief that might interfere with the freedom of the press, which is protected by Article 10 of the ECHR. The appeal of the defendants was granted. This is because when one of the parties to a relationship wanted to share information about that relationship, it affected the other party's Article 8 right to privacy.[103] However, reputational damage was not considered in this case. Similar to the more recent decision in *Stoute,* a celebrity may not benefit from an expectation of privacy even where there is no public interest at stake and the reputational damage is clear.

[99] *Cliff Richard* (n26) [286].
[100] [2021] EWCA Civ 1810, [2022] 4 WLR 81 [128].
[101] ibid [48].
[102] *A v B plc* [2001] 1 WLR 2341.
[103] *A v B plc* (n68) [11(xi)].

VII. The Remedies

At present, the English approach is highly fact-sensitive, but as the volume of case law increases patterns of facts and practice are starting to emerge. *Gulati* is an important case that shows the recent shift in English common law to protect privacy rights. The claims in *Gulati* fell into three main categories: wrongfully listening to private or confidential information left by the claimants, wrongfully obtaining private information, and the publication of the stories based on that information. An additional sum was awarded for phone hacking which did not result in articles, which proved that that the mere action of obtaining private information without publishing could be punished.[104] Despite the information not being confidential in nature the claimants were said to have had their privacy infringed by the mere press intrusion in the phone calls.[105] The claimants were therefore entitled to compensation for disclosure of information obtained by hacking "even in the absence of any real privacy level in the information itself".[106] The information was communicated by private means, which is what made the messages private rather than the nature of the content. Compensation was, therefore, as much about the claimants' "horror" that "journalists have been listening, on a regular basis, to all sorts of aspects of their private lives".[107] Emotional distress in a privacy claim was discussed and given compensation,[108] a precedent that should be embedded in a future legal framework.

Equivalent remedies for breach of confidence and misuse of private information claims are available, namely an injunction, compensatory damages or account of profits, and destruction of offending material.[109] Obtaining an injunction to prevent publication is the remedy most claimants will be interested in. Section 12 of the Human Rights Act 1998 highlights that in granting an injunction the court "must have particular regard to the importance of the convention right to freedom of expression". The judge must also consider whether the material "has, or is about to, become available to the public" and whether it would be in the public interest to

[104] *Gulati* (n32).
[105] ibid [218].
[106] ibid [224].
[107] Moreham (n35) 16.
[108] Nicole Moreham and Jason Varuhas, *Remedies for Breach of Privacy* (Hart Publishing 2018) 125–142.
[109] Pinsent Masons, 'Misuse of private information' (2015) <https://www.pinsentmasons.com/out-law/guides/misuse-of-private-information> accessed 20 November 2021.

publish it.[110] Injunctions in privacy cases have many fallibilities. They may lead to greater publicity as a direct consequence of the request and the claimant may not be aware of the publication before broadcasting. Tugendhat J highlighted an important privacy issue relating to freedom of expression: journalists must be allowed to read the material before they can decide whether they should publish it or not; the reading of confidential information by journalists cannot in itself be a breach of confidence.[111] This implies that a claimant's privacy can never be completely guaranteed.

Journalists are given the power to decide what information should be published and what information should not, or the power to affect public opinion. Ultimately, this immense privilege is not proportionate to the regulatory and legal frameworks that have been put in place. A claimant may only rely on an injunction if the court has ascertained that "the applicant is likely to establish that publication should not be allowed",[112] a lengthy process that puts the burden of proof on the claimant. It appears then, that the most sought-after remedy in privacy cases is not successful in ensuring privacy rights are respected. This highlights another shortcoming to the current nature of privacy claims in England and Wales. In *Mosley*, Justice Eady observed:

> [I]t has to be accepted that an infringement of privacy cannot ever be effectively compensated by a monetary award. Judges cannot achieve what is, in the nature of things, impossible. That unpalatable fact cannot be mitigated by simply adding a few noughts to the number first thought of. Accordingly, it seems to me that the only realistic course is to select a figure which marks the fact that an unlawful intrusion has taken place while affording some degree of solatium to the injured party. That is all that can be done in circumstances where the traditional object of restitution is not available. At the same time, the figure selected should not be such that it could be interpreted as minimising the scale of the wrong done or the damage it has caused.[113]

Compensatory damages in *Gulati* ranged from £70,000 to £270,000, a notably higher sum compared to earlier cases.[114] In *Lloyd v Google*, the accuracy of the *Gulati* approach in calculating damages was not questioned,[115] meaning that compensation in privacy cases is fairly and consistently calculated. Moreham supports awards of

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[110] David Pallister, 'Right to know v prior restraints' *The Guardian* (London, 7 March 2007) <https://www.theguardian.com/media/2007/mar/07/pressandpublishing.partyfunding> accessed 19 November 2021.
[111] *Abbey v Gilligan* [2012] EWHC 3217, [2012] 11 WLUK 547 [63].
[112] Koltay (n21) 8-64.
[113] *Mosley* (n93).
[114] *Gulati* (n32).
[115] [2021] UKSC 50, [2021] 3 WLR 1268.

considerable damages in misuse of private information cases notwithstanding whether the claimant has endured distress or pecuniary losses.[116] However, Descheemaeker maintains that the contemporary method of calculating compensatory damages is notionally incoherent,[117] a pattern that plagues privacy law in England and Wales.

VIII. Conclusion

The Government recently introduced the Bill of Rights Bill which would repeal the Human Rights Act 1998 and replace it with a new framework to incorporate the ECHR into domestic law. The Bill has not yet had its second reading and no date is currently scheduled. The Government has showed hostility towards the Human Rights Act 1998 and the ECHR, criticising its effect on parliamentary sovereignty and its effect in introducing privacy rights in British legislation (which naturally conflicts with freedom of expression rights).[118] The introduction of the Bill may mean that the current criteria used by the courts to deal with the complexity of misuse of private information claims (namely the two-part *Campbell* test, the public interest test, the implementation of third-party rights, and the protection of reputation) may become obsolete if a general common law tort to privacy is not introduced. Additionally, the inconsistent guidelines and extensive application of the criteria already highlighted above have generated a legal precedent that lacks certainty. The introduction of legislation regulating the press is unlikely due to a rightful concern that it might deter the media from speaking freely, while self-regulation and independent regulation of the press has proved unsuccessful in punishing abuses at the expense of the individuals involved.

Legislation and case law must focus on implementing precedent and statutory instruments that are fair, consistently applied, and narrow, in order to stop privacy breaches and ultimately uphold the rights of the individuals involved. In 2021, the Law Commission recommended ensuring that the technological paradigm works effectively enough to protect people from "genuine harm and abuse" and simultaneously allows for a space that "does not disproportionately interfere in

[116] Moreham and Varuhas (n108) 125–142.
[117] Eric Descheemaeker, 'The harms of privacy' (2015) 7(2) Journal of Media Law 278, 290-306.
[118] Joanna Dawson, 'Human Rights Act Reform'(Research Briefing, House of Commons Library, 15 November 2022) <https://commonslibrary.parliament.uk/research-briefings/cbp-9581/> accessed 10 July 2023.

people's legitimate freedom of expression".[119] This signals a rise in instances of online abuse paired with a strong desire to continue protecting the right of free speech. Protecting the privacy rights of individuals is an increasingly important regulatory issue. The special position the press holds in society means that they should also be held accountable for abuses. Ultimately, a general right to privacy should be introduced, that takes into account what information will truly contribute to the public sphere through its disclosure, rather than allowing information about individuals to circulate and be obtained through intrusive means for no real benefit other than the upholding of free speech by virtue of it.

[119] Law Commission, *Modernising Communications Offences* (Law Com No 399, 2021) para 1.1.