

Privacy in Cyberworld: Why Lock the Gate After the Horse Has Bolted?

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Abstract

In this paper, the author sets out to critique the way in which the principles of off-line privacy protection apply in an on-line environment. The UK approach will be focused upon, the objective being to consider what (non-celebrity) on-line claimants might expect in bringing a privacy violation claim through the domestic courts. The essential characteristics of communicating on-line will be examined so as to explore the nature of an action in misuse of private information and the potential hurdles that require to be overcome before a claim in privacy violation can be remedied at common law. It will be argued that, whilst claims by private, unknown individuals against one another are likely to take up increased amounts of judicial time, the common law approach represents little more than a warning, and a tepid one at best, to on-line communicators about the dangers of publishing private information in on-line forums. Moreover, the derisory level of damages available for even the most deserving of claimants hardly makes the trip to court worthwhile. Whilst an alternative approach, based on the inclusion of discursive remedies, might make the derisory level of damages more palatable, the practical problems of such an approach mean that, for the time being at least, the taking of a privacy case to open court in exchange for only a limited remedy at common law, therefore, smacks of *locking the gate after the horse has bolted*.

1. Introduction - how privacy is protected in the UK [2]

In terms of the UK approach to privacy protection, it is by now well known that privacy is not afforded statutory protection as such, nor does it benefit from any specific UK 'privacy tort'. This, in combination with the fact that privacy is both ill-defined and, as with other rights, not absolute, puts the remit on domestic judges, following the enactment of the Human Rights Act, 1998, to interpret individual privacy parameters. [3] [4] [5] It is, consequently, left to the judiciary to undertake an ensuing balancing exercise between the essentially competing human rights of freedom of expression, as enshrined in Article 10 of the European Convention on Human Rights and Fundamental Freedoms (the Convention) and right to respect for private and family life, as enshrined in Article 8 of the Convention. When both these articles are engaged a difficult balancing exercise is often seen to arise and, since 2000, the interplay between these two specific articles has absorbed much judicial time, not least because principles of freedom of expression and privacy are often seen to be competing and thus judges must accommodate these, in the light of the circumstances pertaining. [6] This is no straightforward task, particularly since the enshrined rights contained in Articles 8 and 10 have the same structure, in so far as both rights are qualified and neither right can be said to take precedence over the other. Lord Nicholls of Birkenhead articulated the problem in *Campbell v Mirror Group Newspapers Ltd*:

'Both are vitally important rights. Neither has precedence over the other. The importance of freedom of expression has been stressed often and eloquently, the importance of privacy less so. But it, too, lies at the heart of liberty in a modern state. A proper degree of privacy is essential for the well being and development of an individual.' [7]

This is indeed true, but Article 8 does not enshrine a right to privacy per se, but rather a *right to respect* for privacy and freedom of expression, though of central importance, is not a right which must reign unfettered and unrestricted. [8]

Freedom of expression has traditionally been associated with freedom of the press or the rights of the print media to publish newsworthy items, but this is changing - most markedly on-line because essentially every individual that posts a comment on-line is akin to a publisher, or so-called 'citizen journalist'. [9] In this environment, new kinds of privacy invasion are possible, since the forum positively encourages users to communicate by uploading ever increasing amounts of information to the internet : for all to see, be it prospective employer, business partner, lover, friend, relative or, indeed, stranger : public consumption on-line knows no boundaries. Not only are such users free to publish the minutiae of their own lives, but they may comment on whomever they wish. Even where injunctions are in place prohibiting (traditional) media from publication, the 'citizen journalist' may feel that they need not comply with such a restriction, wrongly believing that they will not face prosecution on the basis of strength in numbers. This topic received increased impetus in the UK in May 2011 following the revelation on the social networking site, *Twitter*, of the identity of the anonymous applicant in the injunction awarded in *CTB v News Group Newspapers Ltd*. [10] Subsequently, the UK's Attorney General confirmed in a radio broadcast that users of the *Twitter* site who had breached the terms of the injunction could face legal action for contempt of court. [11] [12]. Thus, communicating in this cavalier way has consequences in terms of privacy protection: such individuals inevitably find that, since there is no precise definition of privacy, there is no definitive way of determining where freedom of expression begins and the right to respect for privacy ends. If they do overstep the mark, and end up having to defend their actions in court, a wide range of factors and circumstances will be taken into consideration by our domestic judiciary. The principles that will be applied have very much been determined at common law in the off-line environment, but are no less applicable to the on-line arena, not least because the UK privacy violation case law, to date, reveals in stark detail the burden of celebrity. The author argues that, in the on-line environment, where anything goes, and where there is extensive opportunity for dissemination of published information, coupled with a perception that there is complete freedom of expression, we are all celebrities - in cyberworld, we are all potentially interesting beings; despite not being labelled as such, we are all 'celebrities', potentially under surveillance all day long. [13] Thus, whilst the increasing number of potential on-line avenues by which information can be divulged effectively means that privacy is no longer the exclusive domain of the officially labelled 'celebrity', nonetheless, the predominantly celebrity-driven case law that we have in the UK can be applied, by analogy, to the on-line forum. [14]

To summarise the position, when considering whether the publication of information which is said to be private should be permitted, our domestic courts must first decide, in the absence of any definitive definition, whether the information in question is 'private', that is whether the claimant has a 'reasonable expectation' of privacy in respect of that information such that the claimant's rights to privacy are engaged. [15] If yes, the Court must then engage in the balancing exercise referred to above, weighing the Article 8 rights of the claimant against the Article 10 rights of the defendant, be they on- or off-line. Whilst there is no specific cause of action in invasion of privacy, our UK judiciary have latterly (post *Campbell*) stretched the traditional method of affording a remedy under breach of confidence to that of misuse of private information.

2. The experience of on-line privacy violation claimants

As alluded to above, privacy violation is arguably heightened on-line due to the nature of the forum itself and the corresponding expansion in the potential distribution channels by which private information can be divulged. Accordingly, the enforcement of privacy rights no longer rests exclusively in the domain of the celebrity and our courts are increasingly entertaining issues of individual on-line privacy. With this in mind, one may begin to consider what on-line claimants might expect in bringing a privacy violation claim through our domestic courts. They are met with an immediate problem as attempts to identify categories of inherently 'private information' are not straightforward. Moreham provides a useful example: it might be possible to say that *most* people would regard *most* of their medical information as private, but it is doubtful whether we can say that *all* medical information is *always* private. [16] Indeed, Baroness Hale acknowledged in *Campbell* that it is unlikely that we would regard disclosure of the fact that a public figure had a cold or a broken leg as a serious breach of privacy. [17]

Since individuals have very subjective interpretations about what they are prepared to write, and have written about them on-line, determining private information in such an arena is perhaps even more problematic where publication is far-reaching and immediate. It might, therefore, be argued that the 'reasonable expectation' approach to off-line privacy violation cases is an unreliable sounding board when transposed to the on-line environment and that its merit as a working formula for privacy protection is questionable due, *inter alia*, to the immediacy, universality and ineradicability of on-line communications. [18] Whilst debate continues to rage on this point, judicially the scene has been set. The European Court of Human Rights, specifically in relation to e-mail and internet usage, have confirmed in *Copland v United Kingdom* that a reasonable expectation of privacy was the standard to be applied to on-line communications. [19]

The situation is complicated by the fact that the nature of on-line communications, in so far as they are publicly accessible and form part of the public domain, may mean that they are not regarded as private. The relative ease with which such information could be located has been adopted non-judicially as the key parameter in determining whether or not such information is truly in the public domain, although the question of the extent to which on-line communications can be treated as private perhaps awaits a full judicial examination, as does the nature of any ensuing liability and, hence, remedy. [20]

3. Liability for on-line communications in breach of privacy parameters

The UK judiciary has suggested that on-line communicators can be held liable for what they say and do 'on-line', although all case law, to date, is first instance only and arguably represents little more than a warning, and a tepid one at best, about the dangers of publishing private information in on-line forums. [21] *Applause Store Productions Ltd, Matthew Firsht v Grant Raphael* is illustrative. [22] The case was the first (in English law) in which an internet user had been ordered to pay damages for libel and misuse of private information flowing from his actions (the creation of a false profile of the claimant) on the social networking site *Facebook*. [23] The false profile contained information as to the claimant's sexual orientation, relationship status, birthday, and his political and religious views over which the claimant was found to have a 'reasonable expectation of privacy'. This has aroused interest among commentators who have queried whether the judge took a particularly broad view that a person's date of birth and religious views are matters over which he would have a reasonable expectation of privacy. [24] This is an interesting stance, not least because recent European cases appear to suggest otherwise. In the French privacy case of *Omar S v Alexandre P*, for example, which similarly involving a false *Facebook* profile, it was judged that the applicant's full name and date of birth were 'elements of identity' which did not form part of his private life. [25]

It has been argued that the *Applause Stores* ruling could expand the range of material which may form the subject of a claim for misuse of private information in English law far beyond that which was envisaged in *Campbell*. [26] [27] It is clear that the case represented somewhat of a milestone in that it allowed a small scale, *individual* claimant to claim for misuse of private information, as opposed to 'the big media cases which are usually the only forum for it', thereby reinforcing the suggestion that privacy is no longer the exclusive domain of the celebrity claimant. [28] It is highly likely that privacy violation cases as between individuals who have a falling out on-line will occupy increasing amounts of judicial time and the *Applause Store* case marks something of a landmark in revealing to potential claimants that, in a jurisdiction where individuals regularly sue one another other for infliction of physical injuries, the law may offer some protection enabling the same type of claim for invasion of privacy as between individuals on-line.

However, the case left much to be considered. Indeed, it represented the first time, under the misuse of private information guise, that a public interest defence was not even evaluated: the judge did not consider that a public interest defence was available or that the information written about the claimant had any public interest merit to it. [29] In holding that the information was solely private, the claimant was found to have a reasonable expectation that it would remain so and the judge therefore dismissed the notion that there was any arguable defence to the claim at the outset. Clearly, cases such as this may well not contribute to a debate of general public interest, but they are important in revealing that, for the non-celebrity claimant seeking to redress on-line privacy violation, the common law is at least an available route. [30] Moreover, it is one in which the courts are likely to play an increasing role.

Nonetheless, gaps and inconsistencies remain. Whilst in the *Applause Stores* case the common law afforded legal protection to information such as address, physical health, sexual preferences and religion, the judiciary

have failed to provide the same degree of protection to the physical *identity* of a person making a communication through a blog post, as revealed in the *Author of a Blog* case. [31] Here, the court found that a claimant did not have a reasonable expectation of privacy over his anonymous on-line identity through which he posted blog communications. The blogger's case was that he had a reasonable expectation of privacy in respect of his identity as author of the blog and there was no countervailing public interest justification for its publication. The essence of the case was whether he had a reasonable expectation that his identity would not be revealed to the general public, even though this had already been deduced by legally permissible means. [32] The blogger, therefore, applied for an interim injunction to restrain publication of information that might lead to his identification as the person responsible for an anonymous blog. It was held that the claimant had no such expectation, since blogging was a public activity. However, the case was unique in that there was a strong public interest in revealing the identity of the blogger since he was a serving police officer whose blog posts revealed strong political opinions and criticisms of the conduct of the modern police force. Arguably, the case merely demonstrates that, where an anonymous blogger's privacy is engaged, his rights are trumped by the public's interest in knowing the identity of the person who was making serious criticisms of police conduct. [33] It has been argued that, in situations where there is no clear public interest in unmasking an anonymous on-line author, e.g. submissions to an on-line health forum, the courts may still be willing to restrain publication of an author's identity. [34] Thus, whilst the unique characteristics of the case meant that the public's right to know overrode the anonymous bloggers right to anonymity, it does not follow that the common law denies bloggers, or other on-line contributors, anonymity *per se*. Whilst, in the case, the judge may have determined that the information contained in the blog was not of a personal nature so far as the author was concerned, which meant that the claimant failed to have a reasonable expectation of privacy in relation to it, it does not follow that a reasonable expectation of privacy cannot ever arise in relation to the identity of an on-line communicator. Arguably, a court's approach would differ if revealing a blogger's identity in some way presented a threat to that individual's personal and civil liberties. [35] However, it is clear that a desire to remain anonymous is not in itself enough to be protected by law and on-line communicators need to be aware of this. [36] Their anonymity may be more difficult to protect than previously thought, particularly where the identity of an individual anonymous blogger has been deduced using publicly available resources. [37] Once identified, they may then find themselves liable for the content of their on-line communications. Those who post intimate, private information about others, particularly on social networking sites, may be doing so in breach of privacy rights to the extent that such rights can exist in England.

4. Anonymity, disclosure and matters of jurisdiction

It is by now well known that whilst on-line contributors may operate in an unfiltered and often anonymous environment, and with an uninhibited remit, they should not assume that this affords them protection at law. It does not and, thus, the cloak of anonymity is not impenetrable. [38] Procedures are available which may at least assist a claimant in the identification of parties who have posted information of a private nature anonymously. Such individuals will not be able to escape from the application of third party disclosure orders and then their anonymity will not guarantee them immunity from liability. Such orders are not as new as some media sources would have us believe. Procedurally, the jurisdiction to make third party disclosure orders received recognition in *Norwich Pharmacal v Customs & Excise Commissioners*. [39] Lord Reid described the principle as follows:

'... if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers... justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.' [40]

Whilst disclosure orders were not developed specifically with anonymous on-line communications in mind, they have been adapted with considerable success to the on-line environment. One can see the obvious attractiveness they offer to on-line claimants presented with face-less opponents who have misused private information about them. Such orders may facilitate the identification of a wrongdoer who may then ultimately be pursued through the courts, but they should not be undertaken lightly, particularly because revealing the details of an individual expecting to rely on the protection of anonymity clearly has major data protection issues, due to their intrusive nature. [41] Arguably, a *Norwich Pharmacal* order is a flexible remedy, capable of adaptation to new circumstances and, therefore, able to offer a welcome degree of assistance to on-line claimants. [42] In *G and G v Wikimedia Foundation Inc*, for example, an applicant mother and child sought

an anonymous internet user's details by way of a *Norwich Pharmacal* order so as to identify an individual who had anonymously posted private and confidential information about them. [43]

The *Wikimedia* case is hugely significant: firstly, because the disclosure order was made in the interests of invasion of privacy alone, whereas the tool had previously largely been used to identify, *inter alia*, anonymous defamatory postings and secondly, because the order was made against a service provider outside the jurisdiction of the domestic court. [44] The fact that the court lacked jurisdiction over a non-resident foreign entity was, however, not actively contested. Although *Wikipedia* recognised that '... no court in the United Kingdom has proper jurisdiction over us as a foreign entity...' they swiftly dropped this argument and indicated that they were 'willing to comply with a properly issued court order...' [45]

Such an order had been granted for the first time in *Applause Store Productions Ltd v Grant Raphael* against a non-UK domiciled service provider, the US social networking site, *Facebook*, in clear absence of any real consideration of matters of jurisdiction. [46] The only fleeting reference is at para. 10, which merely confirms that the order had previously been served on *Facebook* and was required for disclosure of registration data of the anonymous user responsible for creating false material pertaining to the claimant. [47] These cases, therefore, fail to provide any real clarity as to the circumstances under which a *Norwich Pharmacal* order could be imposed on on-line service providers outside the jurisdiction of the courts in the United Kingdom. This may provide some comfort to the many anonymous users of *Twitter* following the *CTB v News Group Newspapers Ltd* debacle alluded to above [48] [49] [50]. Judicially, however, it had been predicted that the jurisdiction to provide disclosure would widen as time and technological advancement necessitated:

'New situations are inevitably going to arise where it will be appropriate for the jurisdiction to be exercised where it has not been exercised previously. The limits which applied to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy.' [51]

However, it is perhaps the sheer number of commentators involved, as opposed to any jurisdictional hurdles, that will limit the liability of such individuals at law.

5. Are remedies for on-line privacy invasion adequate?

Given that procedures are in place in common law to aid deserving privacy-violation claimants, it is now important to consider whether the remedies available make the trip to court worthwhile. This is particularly true if private material is already on the web - i.e. in the public domain - as there is very little, other than possibly damages, that can be done to compensate. Whilst in the off-line environment, injunctions to restrain publication may well be the primary remedy or, indeed, the only effective remedy in respect of privacy violation, the same cannot be said in respect of the on-line environment, where publication is instantaneous and often distributed to a very wide audience. [52] This valuable remedying tool has little utility on-line, as was well illustrated in *Mosley*, with Eady J refusing to grant an injunction restraining the continuing broadcast on the Internet of part of the video tape of Mosley's activities on the grounds that it was so accessible that it would make very little practical difference: 'The dam has effectively burst' he said. [53]

Given the inappropriateness of the injunctive tool, the on-line claimant will be left pursuing a claim for common law damages. Even in the off-line environment, the level of damages awarded in privacy violation cases has been relatively low and arguably achieves little. The £60,000 awarded to Mosley represents the most any individual has received for breach of Article 8 in the UK to date. [54] The unsatisfactory nature of the award was highlighted by Eady J at 236 :

'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'. [55]

In the on-line environment, claimants have fared worse. In the *Applause Stores* case, whilst damages were forthcoming, those for privacy were lower than for defamation. [56] [57] In awarding damages at all, the judge focused his analysis almost entirely on the extent of on-line publication based on the nature and operation of *Facebook*, the length of time the information was available on the site and the ease of access to the information. Based on an extensive review of the nature of on-line publication and the methods for quantum of damages applied in *McKennitt and Campbell*, he concluded that a not insubstantial number of people were likely to have viewed the offending publication and awarded damages which were purely to compensate for the claimant's hurt feelings and distress caused by the misuse of their

information. [58] [59] In the case, it was considered that only the defamatory material had the potential to cause 'serious damage' - the misuse of private information causing mere 'shock and upset' to the claimant. [60][61] Bennett argues that, since the Convention right which is engaged is the same for both privacy and libel (Article 8), it is odd that the court seemed not to consider invasion of privacy to be as damaging as libel. [62]

The other noteworthy aspect of the award was that, despite the defendant's behaviour arguably being motivated by malice, having chosen to publish the information in a particularly diverse on-line forum and subsequently denying the allegations had been made by him, thereby 'rubbing salt in the wound', the judge was not prepared to award aggravated damages. [63] Whilst the judge referred to the successful award of aggravated damages in *Campbell*, he was not prepared to award damages of this nature in respect of the privacy claim. [64] In accepting that the defendant's conduct had caused increased injury to the claimant's feelings, the judge included an aggravation element within the libel damages. No mention was made of exemplary damages and these have not been forthcoming in any privacy violation cases: either on-or off-line. In the most in-depth exposition so far as to why a plea of exemplary damages was inadmissible in a claim for misuse of private information, Eady J in *Mosley* held that the award of exemplary damages would have imposed a quasi-criminal fine on the defendant, for which there was no 'pressing social need' and that '.... exemplary damages are not admissible in a claim for infringement of privacy, since there is no existing authority (whether statutory or at common law) to justify such an extension', and, moreover, that 'it would involve something of a departure for a judge now to hold that such damages are indeed available on the list of remedies for infringement of privacy'. [65] [66] [67] [68] Eady's analysis resoundingly focuses on the belief that an award of exemplary damages may only be made where an element of punishment is considered appropriate and the amount to be awarded by way of compensation is insufficient to serve a punitive as well as compensatory function. This, he determined, was not the objective of an award in damages in relation to privacy violation. However, having found against Mosley on that head of claim, Eady J indicated that one might speculate whether, in a hypothetical future, the House of Lords would regard invasion of privacy as a wrong to which exemplary damages should be extended. [69]

The *Mosley* case is particularly informative for suggesting that the deterrence of others is not a legitimate purpose of compensatory damages and that if an award were to be increased to deter others, it would fail the test of proportionality (presumably because the award would then have to be significantly increased). [70] The interpretation of this approach in the on-line environment will mean that the ensuing judgments will represent little more than a warning, and a tepid one at best, to internet users generally and members of social networking sites in particular that you can be held liable for what you say and do on-line. [71] However, there may be a way of making the meagre level of damages more palatable, particularly to on-line claimants: it is argued that the discursive remedies for defamation might usefully be extended to privacy violation cases in this forum, not least because, as detailed above, on-line privacy violation cases will often include a defamatory element. [72]

Elsewhere in Europe, such remedies are regularly available. In Germany, for example, the primary relief in respect of a claim in defamation is that of correction, in the form of reply and retraction, as opposed to damages, the latter being limited in amount given their subsidiarity to the discursive remedies available. [73] A retraction, in particular, is available for statements of fact made in public, whereas a rectification may be available where a publication is only partially untrue or has been proved to be false. [74] Rectification is often seen as less drastic than a retraction, although both approaches allow for a welcome degree of correction. [75] In the UK, alternative remedies such as these are less well developed, although the right to ask for a declaration of falsehood and an order that the defendant publish a correction and apology is available to claimants in defamation cases on a summary disposal under sections 8 - 10 of the Defamation Act, 1996. [76]

There is nothing similar in relation to a misuse of private information claim and it is questionable whether discursive remedies of this nature would be applicable in the absence of a defamation element. However, might it be feasible for discursive remedies to extend, not just to the untrue element contained in the defamation claim, but also to the privacy claim (whether true or not)? English common law has confirmed that a claim in misuse of private information may be brought in relation to information which purports to be private information about an individual, regardless of whether or not the information is true. [77] Thus, in *McKennitt v Ash* Longmore LJ said:

'The question in a case of misuse of private information is whether the information is private not whether it is true or false. The truth or falsity of the information is an irrelevant inquiry in deciding whether the information

is entitled to be protected and judges should be chary of becoming side-tracked into that irrelevant inquiry'. [78]

In the same case, it was judicially accepted that reputation was among the rights guaranteed by Article 8, which protected "reputation", broadly understood, the finding later being endorsed by the House of Lords in *re British Broadcasting Corporation* and the Supreme Court in *re Guardian News and Media Ltd & Others*. [79] [80] [81] There has also been broad acceptance of this approach within The European Court of Human Rights. [82] Given that there has been this extension of the English common law, it is argued that the alternative remedies highlighted above might find a place next to the more developed remedies affording to misuse of private information claims. Their relevance to the on-line environment is particularly apparent, given the strong association between misuse of private information and defamation in this arena. Thus, the development of the law in Germany in the way discussed may, following appropriate legislative measures, be directly transplantable into the English common law system, providing a welcoming sweetener to privacy violation claimants here in the face of derisory damages under the current system.

On a practical level, the requirement for legislative intervention is not the largest problem with such an approach. More fundamental, perhaps, is that a discursive remedy, if indeed it were available for privacy violation alone, would be perceived as a 'watered down' tool - a retraction, for example, in respect of a misuse of private information would fail to attract the same declaration of falsity as would be available in defamation. However, for privacy violation claimants, perhaps something is better than nothing at all

6. Conclusion

Given the above exposition, it appears that privacy-violation claimants, in reliance on the UK common law approach, fail to have an adequate remedy at law. Taking a privacy case to open court and exposing private material to an even wider public audience in exchange for only a limited remedy at common law, therefore, smacks of locking the gate after the horse has bolted. For such claimants, the requirement to apply off-line principles to on-line issues serves to complicate matters: not only is it more difficult to evaluate a reasonable expectation of privacy on-line, but claimants are immediately at a disadvantage because, as Lord Phillips has suggested, 'once information is in the public domain, it will no longer be confidential or entitled to the protection of the law of confidence'. [83] The added complexity of identifying the extent of on-line publication and the inappropriateness of an injunction combines to mean that the trip to court is an unpleasant and unsatisfactory one for the on-line claimant. Whilst the common law appears to have been stretched procedurally to remedy such claimants, there is arguably no *effective* remedy available for them. No amount of damages can erase information revealed from people's memories, nor can any court case ever restore privacy. [84] In an attempt to make the derisory level of damages more palatable to on-line claimants, it has been suggested that the inclusion of discursive remedies, akin to those prevalent in the German approach to the remedying of defamatory remarks, ought to be available in certain scenarios. However, this approach is not without its practical problems, meaning that, for the time being at least, the UK approach fails to give an adequate remedy to such claimants and represents little more than a warning, and a tepid one at best, to on-line communicators about the dangers of publishing private information in on-line forums.

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[2] The analysis focuses on English law

[3] There exists no unitary, single definition of privacy. Whilst the United Nations Universal Declaration of Human Rights at Article 12 states that every individual has 'a right to privacy', it fails to define the term.

[4] See Nicole Moreham, 'The right to respect for private life in the European Convention on Human Rights: a re-examination', *European Human Rights Law Review*, E.H.R.L.R. 2008, 1, 44-79, particularly page 45.

[5] The Human Rights Act, 1998, came into force in 2000 and effectively incorporated the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms into UK law

[6] With the coming in to force of the Human Rights Act, 1998

[7] *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, at 12

- [8] See *Privacy and freedom of expression - a delicate balance* - Speech by Lord Neuberger of Abbotsbury, Master of the Rolls, Eton, 28 April 2010. Available at <http://www.judiciary.gov.uk/media/speeches/2010/speech-lord-neuberger-29052010>.
- [9] The rise of 'citizen participatory journalism', as per Anne Cheung, 'Rethinking Public Privacy in the Internet Era: A Study of Virtual Persecution by the Internet Crowd', *Journal of Media Law*, JML 2009, 1(2), 191-217, at 192
- [10] *CTB v News Group Newspapers Ltd* [2011] EWHC 1232 (QB). The injunction restrained publication of the claimants' identity. Eady J later refused News Group Newspapers Ltd's application to vary the terms of the interim injunction and remove the anonymity granted to the claimant, despite the fact that the latter's identity had been revealed on the internet.
- [11] Remarks made by the UK's Attorney General in June 2011. See <http://www.guardian.co.uk/law/2011/jun/07/twitter-users-adhere-injunctions-attorney-general>
- [12] BBC Radio 4's *Law in Action*, Tuesday 7 June 2011, available at <http://www.bbc.co.uk/programmes/b006tgy1>.
- [13] Anne Cheung, 'Rethinking Public Privacy in the Internet Era: A Study of Virtual Persecution by the Internet Crowd', *Journal of Media Law*, JML 2009, 1(2), 191-217, at 192
- [14] See Simon Sellars, 'Online privacy: do we have it and do we want it? A review of the risks and UK case law', *European Intellectual Property Review*, 2011 E.I.P.R. 2011, 33(1), 9-17, at 13
- [15] See *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, at 21: 'essentially the touchstone of private life is whether, in respect of the disclosed facts, the person in question had a reasonable expectation of privacy'
- [16] N.A. Moreham, 'Privacy in the common law: a doctrinal and theoretical analysis', *Law Quarterly Review* 2005, 121(Oct), 628-656, at 642
- [17] *Campbell v MGN Ltd* [2004] 2 AC 457, at [157]
- [18] See, for example, Anne S.Y. Cheung, 'Rethinking Public Privacy in the Internet Era: A Study of Virtual Persecution by the Internet Crowd', *The Journal of Media Law*, Volume 1, Number 2, December 2009, pages 191-217
- [19] *Copland v United Kingdom* [2007] ECHR 62617/00, (2007) 45 E.H.R.R. 37, at 42 : the claimant had a reasonable expectation as to the privacy of her calls, email and internet usage
- [20] For non-judicial exploration, see Press Complaints Commission (PCC) adjudication (February 2011), available at <http://www.pcc.org.uk/news/index.html?article=NjkzNA==>), pertaining to a complaint brought by Ms Sarah Baskerville that an article published in the *Daily Mail* newspaper on 13 November 2010 intruded into her privacy because it reproduced material to a far broader audience than the c. 700 followers she had originally revealed it to on the social networking site, *Twitter*. The complaint was not upheld, the PCC having determined that the nature of the communications posted on to *Twitter* meant that they were publicly accessible and hence not private. The complainant did not, therefore, have a 'reasonable expectation' that her messages would be published only to her 700 or so followers on the site. The PCC, which came into existence in January 1991, is an independent newspaper self-regulatory body, which has two principal functions. It maintains and promotes a professional Code of Practice for journalists, and it deals with complaints from members of the public about possible breaches of the Code by newspapers and magazines.
- [21] See Brid Jordan, 'Case Comment : *Applause Store Productions Ltd v Grant Raphael*', *Entertainment Law Review* 2009, 20(2), 60-61
- [22] *Applause Store Productions Ltd, Matthew Firsh v Grant Raphael* [2008] EWHC 1781
- [23] The claimant had previously obtained a *Norwich Pharmacal Order* disclosing the registration data of the user responsible (see below)
- [24] See Thomas D.C. Bennett, 'Horizontality's new horizons - re-examining horizontal effect: privacy, defamation and the Human Rights Act: Part 1', *Entertainment Law Review*, 2010, 21(3), 96-104, at 103.
- [25] *Omar S v Alexandre P.* Heard 24th November, 2010; available at http://legalis.net/spip.php?page=jurisprudence-decision&id_article=3042, accessed 26 January 2011

- [26] Thomas D.C. Bennett, 'Horizontality's new horizons - re-examining horizontal effect: privacy, defamation and the Human Rights Act: Part 1', *Entertainment Law Review*, 2010, 21(3), 96-104, at 103.
- [27] *Campbell v Mirror Group Newspapers Limited* [2004] UKHL 22
- [28] Thomas D.C. Bennett, 'Horizontality's new horizons - re-examining horizontal effect: privacy, defamation and the Human Rights Act: Part 1', *Entertainment Law Review*, 2010, 21(3), 96-104, at 103.
- [29] Judge, Richard Parkes QC
- [30] For informative judicial analysis of public interest as a defence in law which may operate to override other rights which might otherwise prevail, see *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), at 131 and *Von Hannover v Germany* (2005) 40 E.H.R.R. 1., particularly at [60] and [76] in relation to debates of general interest
- [31] *The Author of a Blog v Times Newspapers Ltd* [2009] EWHC 1358 QB
- [32] The claimant's identity had been determined by a newspaper journalist using a process of deduction and detective work, mainly using publicly accessible information available on the internet.
- [33] Eric Barendt, 'Bad news for bloggers', *Journal of Media Law*, JML 2009, 1(2), 141-147, at 146
- [34] Kate Brimstead, Case Comment : *Author of a Blog v Times Newspapers Ltd*: privacy - blogging and anonymity, *European Intellectual Property Review*, 2009 E.I.P.R. 31(12), N86-87, at N86
- [35] Eleanor Steyn and Stephanie Harrower, 'Case Comment: *Author of a Blog v Times Newspapers Ltd*: Blogging - an end to anonymity?', *Entertainment Law Review*, 2009, Ent. L.R. 2009, 20(8), 298-299, at 299
- [36] Afua Hirsch, 'Publish and be named: Police blogger NightJack loses anonymity', *The Guardian*, 16 June 2009
- [37] Kate Brimstead, 'Case Comment : *Author of a Blog v Times Newspapers Ltd*: privacy - blogging and anonymity', *European Intellectual Property Review*, 2009 E.I.P.R. 31(12), N86-87, at N86
- [38] Brid Jordan, 'Case Comment : *Applause Store Productions Ltd v Grant Raphael*' *Entertainment Law Review*, 2009, Ent. L.R. 2009, 20(2), 60-61, at 61
- [39] *Norwich Pharmacal v Customs & Excise Commissioners* [1974] AC 133
- [40] *Norwich Pharmacal v Customs & Excise Commissioners* [1974] AC 133, at 175
- [41] See, further, Stuart Paterson and Anna Fitzherbert, 'From Guantanamo Bay to outer space: developments in *Norwich Pharmacal* relief', *Civil Justice Quarterly*, 2010, 29(1), 38-47. It should be noted that, in England, the Data Protection Act 1998 requires consideration of whether disclosure is justified having regard to the rights and freedoms or legitimate interests of the data subject. Whilst an exemption from non-disclosure is available under s. 35(2), where disclosure is 'required by or under any enactment, by any rule of law or by any order of a court', such an exemption does not, however, release a service provider from the contractual obligations owed to customers, including that of the preservation of anonymity. However, Paterson and Fitzherbert assert (page 45) that respondents would find it difficult to argue that the *Norwich Pharmacal* jurisdiction wrongly infringes any of their data protection rights.
- [42] See *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch); [2005] 3 All E.R. 511, at 19, 20
- [43] *G and G v Wikimedia Foundation Inc* [2009] EWHC 3148 (QB)
- [44] For press coverage of the case, see Andrew Pierce, 'Wikipedia ordered by judge to break confidentiality of contributor', *Daily Telegraph*, 2 December 2009.
- [45] *G and G v Wikimedia Foundation Inc* [2009] EWHC 3148 (QB), at 38
- [46] *Applause Store Productions Ltd v Grant Raphael* [2008] EWHC 1781
- [47] The case went to trial after the grant of a successful *Norwich Pharmacal* order against Facebook, which required the disclosure of the registration details, including the e-mail address(es), and the IP addresses for all computers used by the owner of the e-mail address(es) which had accessed Facebook.
- [48] See further, Anna Caddick and Hugh Tomlinson, 'An effective global remedy', *The New Law Journal*, 160 NLJ 211, Issue 7404, 12 February 2010, 211-212, at 211.

- [49] *CTB v News Group Newspapers Ltd* [2011] EWHC 1232 (QB)
- [50] However, for further jurisdictional guidance, see *Lockton Companies International & Others v Persons Unknown and Google Inc* [2009] EWHC 3423 (QB). Here, *Google Inc* agreed to comply with the requirements of the *Norwich Pharmacal* order, but did not accept the jurisdiction of the court. It was, however, held appropriate to grant permission to serve the order out of jurisdiction on the basis that *Norwich Pharmacal* relief was regarded as substantive relief and therefore the application to serve out did not, at [4], 'offend against the principle that one cannot assert jurisdiction against a party resident abroad purely for the purposes of disclosure of documents'.
- [51] *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29; [2002] 4 All E.R. 193 at [57] per Lord Woolf C.J
- [52] See Gavin Phillipson, 'Max Mosley goes to Strasbourg: Article 8, Claimant Notification and Interim Injunctions', *Journal of Media Law*, J.M.L. 2009, 1(1), 73-96
- [53] *Mosley v. News Group Newspapers Ltd.* (2008) EWHC 687 (QB), at 36
- [54] So impressed was he with the level of remedy, that Mosley claimed (unsuccessfully) that the UK was in breach of its Article 8 obligations because it imposed no legal requirement on newspapers to give advance notice to those whose privacy they are about to invade - see *Mosley v United Kingdom*, Application no. 48009/08, 11 January 2011. The application was rejected 10 May 2011 and the applicant sought in June 2011 to have the case referred to the Grand Chamber
- [55] *Mosley v. News Group Newspapers Ltd.* (2008) EWHC 687 (QB), at 236.
- [56] *Applause Store Productions Ltd, Matthew Firsht v Grant Raphael* [2008] EWHC 1781
- [57] £2000 was awarded in respect of misuse of private information and £20,000 for defamation
- [58] *McKennitt v Ash*, [2006] E.M.L.R. 10
- [59] *Campbell v Mirror Group Newspapers* [2002] EWHC 499 (QB)
- [60] *Applause Store Productions Limited, Matthew Firsht v Grant Raphael* [2008] EWHC 1781, at 69
- [61] *Applause Store Productions Limited, Matthew Firsht v Grant Raphael* [2008] EWHC 1781, at 80
- [61] Thomas D.C. Bennett, 'Horizontality's new horizons - re-examining horizontal effect: privacy, defamation and the Human Rights Act: Part 1' *Entertainment Law Review* 2010, 21(3), 96-104, at 103-104
- [62] As articulated by Eady J in *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), at 222, in considering the appropriateness of taking into account any aggravating conduct in privacy cases on the part of the defendant
- [63] *Campbell v Mirror Group Newspapers* [2002] EWHC 499 (QB), in which the claimant was awarded £1,000 in aggravated damages in addition to a compensatory element
- [65] *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB)
- [66] *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) at 173
- [67] *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) at 197
- [68] *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) at 186
- [69] *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), at 184
- [70] Keith Mathieson, *Misuse of Private Information*, in Keith Mathieson (ed), *Privacy Law Handbook*, The Law Society, 2010, page 59
- [71] See Brid Jordan, 'Case Comment : *Applause Store Productions Ltd v Grant Raphael*', *Entertainment Law Review* 2009, 20(2), 60-61
- [72] per *Applause Store Productions Limited, Matthew Firsht v Grant Raphael* [2008] EWHC 1781
- [73] Defamation is seen as a crime under §§185 ff of the German Criminal Code and a tort under § 823(2) of the Civil Code
- [74] Raymond Youngs, 'Should public bodies be allowed to sue in defamation?', *Communications Law*, 2011, 16 (1), pages 19-26, at 21

[75] Raymond Youngs, 'Should public bodies be allowed to sue in defamation?', *Communications Law*, 2011, 16 (1), pages 19-26, at 21, at 23

[76] Defamation Act, 1996, available at <http://www.legislation.gov.uk/ukpga/1996/31>, accessed October 2011. See also *Loutchansky v Times Newspapers Ltd and Others* (Nos 4 and 5) [2001] EWCA Civ 1805, [2002] QB 783 at 824: 'Summary disposal does of course give the claimant a right to ask for a declaration of falsity and an order that the defendant should publish an apology' per Lord Phillips of Worth Matravers MR

[77] See, further, Hugh Tomlinson QC, 'Opinion: 'Defamation and False Privacy'', available at <http://inform.wordpress.com/2010/12/14/opinion-defamation-and-false-privacy-hugh-tomlinson-qc/>, accessed October 2011

[78] *McKennitt v Ash* [2006] EWCA Civ 1714; [2008] QB 73, at [86]

[79] *McKennitt v Ash* [2006] EWCA Civ 1714; [2008] QB 73, at [80], per Buxton LJ

[80] *Attorney-General's Reference No. 3 of 1999: Application by the British Broadcasting corporation to set aside or vary a Reporting Restriction Order* [2010] 1 AC 145. See, in particular, the dictum of Lord Hope, who opined, at [22], that broadcasting information concerning an individual's reputation would, since it impacted 'the umbrella that protects his personal space from intrusion' clearly engage his rights under Article 8.

[81] *re Guardian News and Media Ltd & Others* [2010] UKSC 1; [2010] 2 WLR 325, paras 39-42

[82] Whilst the waters continue to be tested in Strasbourg, it appears that reputation will gain the protection of Art 8 where the gravity of the attack on reputation is sufficiently strong to prejudice the personal enjoyment of the right to respect for private life contained within it. See, for example, *Lindon v France* (2008) 46 EHRR 35, in which Judge Locaides, at O-I8, commented 'in recent years the Court has expressly recognised that protection of reputation is a right which is covered by the scope of the right to respect for one's private life under Art.8 (1) of the Convention, even though the relevant jurisprudence has not expanded on this novel approach...'

[83] *Douglas and others v Hello and others* [2005] EWCA Civ 595, at 105

[84] See, for example, Gavin Phillipson, 'Max Mosley goes to Strasbourg: Article 8, Claimant Notification and Interim Injunctions', *Journal of Media Law*, J.M.L. 2009, 1(1), 73-96, at page 75