INTRODUCTION

Where an infringement of C’s private space or private information has occurred, various causes of action have been traditionally available to C – principally, that of breach of confidence. However, no free-standing ‘tort of privacy’ has yet been developed in English law, although a new cause of action has emerged, *viz*, the misuse of private information.

The law has developed relatively speedily in this area. In *Rocknroll v News Group Newspapers Ltd*, it was held that the tort of misuse of private information was governed by ‘relatively new but well-settled principles’,¹ while courts in Northern Ireland have described the English law of privacy as being ‘the subject of substantial and rapid development over recent years’,² and ‘a developing tort of comparatively recent emergence’.³ Recently, in *Gulati v MGN Ltd*⁴ (the phone-hacking case involving three national newspapers), the court noted that these are ‘relatively early days in claims for compensation for infringement of privacy rights, and there is, as yet, no large body of case law which gives clear guidance as to how compensation should be awarded’ in them.

The tort of misuse of private information has developed, largely courtesy of litigation by movie and television stars, high-profile sports people, and politicians, who have objected to information about their activities being published by, or infringed by, the media. The fact that the tort has developed relatively quickly is perhaps testament to the financial resources which such litigants can devote to the litigation!

The framework

C’s claim for a remedy in tort, where a privacy infringement is alleged, has the following framework:

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² *Ewing v Times Newspapers Ltd* [2010] NIQB 7, [16].
³ *McGaughey v Sunday Newspapers Ltd* [2010] NICh 7, [8].
⁴ [2015] EWHC 1482 (Ch) [167].
A range of potential causes of action
Apart from the tort of misuse of private information, C's right to be ‘left alone', or to seek redress for unauthorised disclosures of his private information, may possibly be protected by any of the following: injurious falsehood; defamation; passing-off; conspiracy; the intentional infliction of harm to the individual; the statutory tort of harassment; private nuisance; negligence; trespass to the person (say, assault or battery); trespass to goods; the equitable action for breach of confidence; and breach of copyright.

Is it a tort?
The progenitor of the cause of action for misuse of private information arose out of breach of confidence, an equitable cause of action (it ‘derives historically from equitable principles', said Eady J in Mosley v News Group Newspapers Ltd). Nevertheless, the action for misuse of private information has been treated as a tort in several judgments – by the House of Lords (in Campbell v MGN Ltd; by the Court of Appeal (e.g., in Ash v McKennitt; and in Tchenguiz v Imerman); and by the High Court (e.g., in Rocknroll v NGN Ltd; in British Union for the Abolition of Vivisection v Sec of State for the Home Dept; and in Applause Store Productions Ltd v Raphael). According to Sir Anthony Clarke in Murray v Express Newspapers plc, ‘[a]lthough the origin of the cause of action relied upon is breach of confidence ... the more
natural description of the position today is that such information is private, and the essence of the tort is better encapsulated now as misuse of private information.\(^\text{15}\)

However, some doubts have emerged about the issue. In *Mosley*,\(^\text{16}\) Eady J noted the dilemma, when stating that, ‘[i]t can only be a matter for speculation’ as to whether an invasion of privacy should be classified as a tort or as an equitable cause of action. Recently, in *Vidal-Hall v Google Inc*,\(^\text{17}\) both Tugendhat J and the Court of Appeal favoured the view that misuse of private information should be recognised as a tort for the defined purpose of determining service out of the jurisdiction (but without having to decide the wider implications of whether it was a tort for other purposes too).

The issue is particularly relevant to the remedies available for privacy infringements, discussed later in the chapter.\(^\text{18}\) However, given the numerous judicial statements which have cited ‘the tort of misuse of private information’, the subject matter falls appropriately within the covers of this book.

Before turning to the framework of analysis, it is necessary to set the backdrop and context to the development of this tort – so as to show the ‘hole’ which the tort was judicially created to fill.

**SETTING THE CONTEXT**

There are three important points to make at the outset of this chapter. *First*, there is no generalised, wide-ranging tort of privacy in English law – the tort of misuse of private information protects a sub-set of privacy interests only. *Secondly*, the implementation of the Human Rights Act 1998 (HRA 1998) has driven the development of the aforementioned tort, given that the ECHR obliges English law to protect individuals from unjustified invasions of their privacy by other individuals because of their right to respect for private and family life enjoyed under Art 8; and it also requires that an individual’s right to freedom of expression under Art 10 be protected. These considerations form part and parcel of the analysis which is now required. *Thirdly*, another ‘driver’ for the tort’s development has been the unsatisfactory attempts to ‘shoe-horn’ privacy infringements into the equitable cause of action, breach of confidence. The extent to which that action has been stretched to breaking point has troubled many judges, to the point where a new cause of action was not only inevitable, but highly necessary, if legal doctrine was to maintain any semblance of rational precedent.

Some elucidation of these points will set the context for the discussion which follows in the chapter.

**No generalised tort of privacy**

The lack of any general tort of privacy had generated judicial division of opinion in English law over a long period of time. A number of judges countenanced that the invasion of C’s privacy rights deserved the law’s protection to a greater extent than the common law then

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\(^{15}\) [2008] EWCA Civ 446, [2008] 3 WLR 1360, [24] (Sir Anthony Clarke MR) (emphasis added). The defendant was named as Big Pictures (UK) Ltd in the appeal.

\(^{16}\) [2008] EWHC 1777 (QB) [184].

\(^{17}\) [2014] EWHC 13 (QB) [68], [70], aff’d: [2015] EWCA Civ 311, [51], citing many of the authorities noted in the text, and also see: *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB) [24].

\(^{18}\) Cross cite pp 368–82.
provided – from the early case of *Prince Albert v Strange* (1849), where Lord Cottenham LC referred to privacy as ‘the right invaded’;\(^ {19}\) to the subsequent pre-HRA 1998 cases of *R v Khan (Sultan)* (1997);\(^ {20}\) *Morris v Beadmore* (1981);\(^ {21}\) *Schering Chemicals Ltd v Falkman Ltd* (1982);\(^ {22}\) and *AG v Guardian Newspapers Ltd* (1990).\(^ {23}\) However, and obversely, several English authorities reiterated that there was no need for the recognition in English law of a free-standing cause of action for breach of privacy, e.g., *Malone v Metropolitan Police Commr* (1979);\(^ {24}\) *Kaye v Robertson* (1991);\(^ {25}\) and *Khorasandjian v Bush* (1993),\(^ {26}\) to cite a few.

For those who advocate a broad-based tort of privacy, there are three distinct privacy interests which such a law may seek to protect (this tri-partite classification is derived from several international sources\(^ {27}\)), as the following group of English cases demonstrates:

- **privacy of space** – meaning that C has a ‘physical domain’ within which he is entitled to be ‘left alone’, free from spying, trespassers, and unwanted infringements of his personal space:

  In *Kaye v Robertson*, Gorden Kaye, C, was an actor, well-known for his role in the TV series, ‘Allo ‘Allo. He suffered severe head injuries during a freak accident, and was treated in intensive care. D, a journalist/photographer employed by *Sunday Sport*, gained access to C’s hospital ward, took a photograph of him and purported to interview him (albeit that his doctors gave evidence that he would not have been fully aware of the events of the interview), and then sought to publish the interview in that newspaper. Held: malicious falsehood successfully proven. An injunction was granted to prevent publication of the story in any way that implied that C had consented to the interview. Notably, trespass to person was not available, as C had not been threatened or touched; and trespass to land was not available, as C was not the owner or occupier of the hospital room.

- **privacy of the person** – meaning that C is surrounded by a ‘personal bubble’ of space which should protect him from physical touching and harassment, so as to protect his person and/or human dignity, quite apart from any such infringement which might otherwise amount to a battery or an unlawful search. Unlike the previous category, this category has no such physical ‘walls’ or ‘fences’:

  In *Wainwright v Home Office*,\(^ {28}\) a mother and her disabled son Alan, C, suffered humiliation and distress upon being unlawfully strip-searched for drugs on a prison visit, when they were visiting the mother’s other son. Held: one instance of battery by the prison officers against Alan, the son, was conceded by the Home Office. Otherwise, no cause of action arose on the facts. D’s wilfully causing a person to do something to himself which infringed his right to privacy (being required to take off his clothes) could not constitute a tort of trespass, and a ‘right to privacy’ was not recognised by English law.

\(^ {19}\) [1849] 1 HiTw 1 (Ch) 23, 47 ER 1302, 1312. \(^ {20}\) [1997] AC 558 (HL) 558–59, 577–78.  
\(^ {27}\) e.g., *Hosking v Ranting* [2004] NZCA 34, [2005] 1 NZLR 1, [198] (Keith J) (‘[e]veryone is entitled to privacy of person, space and personal information’); in the Canadian Depts of Communications and Justice report, *Privacy and Computers* (Information Canada, Ottawa, 1972) 13–14; and in ALRC, *Privacy* (Rep 22, 1983) vol 1, [47]. It also bears some resemblance to the oft-cited ‘Prosser classification’, which recognises four different ways in which the right of privacy can be invaded, namely: intrusion upon seclusion, appropriation of name or likeness, publicity given to private life, and publicity placing persons in false light: W Prosser, ‘Privacy’ (1960) 48 California L Rev 383, 389, and with the classification adopted in the US *Restatement (Second)* of *Torts*,§652B–§652E, respectively.  
privacy of information – meaning that personal information about C is for C to disseminate, or to hide or retain, as he sees fit (other than disclosures to public authorities, etc, which may be compelled by law). C has the right to control access to, and disclosure of, personal information about him, and his dignity and personal interests could be harmed by an unauthorised publication or disclosure of that information:

In Douglas v Hello! Ltd,[29] Mr Michael Douglas and Ms Catherine Zeta-Jones, C, granted the magazine OK! the exclusive right to publish photographs from their wedding at Plaza Hotel, New York City, for a fee of £1 million. Under the agreement, C contracted to take all reasonable measures to ensure that no other photographs would be taken of the wedding. Guests were asked not to take photographs or videos by means of both a separate note with the wedding invitation and a notice posted at the entrance; they were ‘discreetly’ checked for camera equipment, any visible items of which were confiscated; and they were visually observed by security staff throughout the hotel. All employees were required to sign confidentiality agreements, and were checked by security guards before entering the venue. However, despite all this, unauthorised photographs of relatively poor quality were taken by a paparazzi photographer, and subsequently purchased by OK!’s competitor Hello!, D, for publication. C sought an injunction, which they obtained at trial,[30] but which was discharged upon appeal,[31] leaving them to claim in damages. The result was that Hello! published the unauthorised photographs on the same day that OK! published parts of the authorised photograph portfolio. Held: C succeeded for breach of confidence, and for breach of the Data Protection Act 1998. In Campbell v MGN Ltd,[32] supermodel Naomi Campbell, C, complained about the publication of photographs of her attendance at Narcotics Anonymous meetings, but the newspaper went beyond what was reasonable, by publishing additional details of her treatment at those meetings. Held: (3:2): C succeeded for breach of confidence. The photograph contained private information, and was superfluous to the exposure of C’s dishonesty about drugs, plus its publication was potentially harmful to her rehabilitation and recovery. In addition, the photograph of her on the steps of a building added nothing to the credibility of the story, because the reader depended on the newspaper to explain what the picture showed.

Of the trio of abovementioned privacy interests, it is only the third – privacy of information – which has attracted protection under the tort of misuse of private information. This is perhaps understandable, given that information acquired as a result of D’s intrusions into C’s physical or personal space is frequently then published or disclosed by D – but not always, as the facts of Wainwright aptly demonstrate. Sometimes, intrusion is C’s sole grievance, and for that, English law offers very patchy (and possibly no) redress.

To reiterate, there is no one cause of action in English law – whether in tort or elsewhere – which protects all three types of privacy infringements. Differently-constituted House of Lords benches have confirmed this, twice, in recent years, with neither favouring the development of any freestanding and new cause of action for breach of privacy. In Wainwright,[33] Lord Hoffmann (with whom all other members of the court agreed) did not consider that it was appropriate...
for the English common law to engage in the ‘creation of a high-level principle of invasion of privacy’, preferring to leave that to the legislature. He added that, ‘I would reject the invitation to declare that, since at the latest 1950, there has been a previously unknown tort of invasion of privacy’. (In the Court of Appeal below, Mummery LJ had put it rather more bluntly: ‘I foresee serious definitional difficulties and conceptual problems in the judicial development of a “blockbuster” tort of privacy.’) A year later, in Campbell v MGN Ltd, Lord Nicholls endorsed the view that, ‘in this country, unlike the United States of America, there is no over-arching, all-embracing, cause of action for “invasion of privacy”.’ Indeed, ever since Campbell’s case, there has been a bulwark against any recognition of a general tort of privacy. For example, in Ash v McKennitt, the Court of Appeal reiterated that ‘there is no English domestic law tort of invasion of privacy’, while recently, in Weller v Associated Newspapers Ltd, it was reiterated that, whatever other jurisdictions may hold, there is no general tort of privacy here, and ‘that remains the law’. Hence, the tort of misuse of private information is a purely informational tort, in that it protects ‘the right to control the dissemination of information about one’s private life’ (per Lord Hoffmann in Campbell).

The impact of the HRA 1998

Prior to the development of the tort of misuse of private information, some claimants were simply unable to find any cause of action to plead in domestic law, and taking their claim to the European Court of Human Rights was their only alternative.

In Peck v UK D published footage of Mr Peck, C, filmed on CCTV, showing C walking down a street in the centre of Brentwood late at night with a kitchen knife in his hand, and which footage was subsequently broadcast in other media in order to showcase the ‘benefits of CCTV in the fight against crime’. Actually, C had used the knife for the purposes of a suicide attempt, cutting his wrists, following personal and family difficulties. The actual suicide attempt was not broadcast, but footage of C in the aftermath was recognised by his family, friends and colleagues as being of him. In Earl Spencer v UK, C complained of covert camera surveillance while he was being treated in the grounds of a private medical clinic. In Malone v UK, C, an antiques dealer, was suspected of handling stolen goods, and his telephone lines were tapped under lawful warrant, and then the information used in police investigations and prosecutions (which ultimately failed). C complained that the tapping of his telephone lines, even under warrant, breached his Convention rights. Held: for each C, D’s activities constituted a disproportionate and unjustified interference with Cs’ private lives, and a violation of Art 8 of the ECHR.

The struggle to bring these and like cases under then-existing domestic jurisprudence was acute.

However, once enacted, the Human Rights Act 1998, s 6, required the court, as a public authority, to act compatibly with Convention Rights. Although Art 8 seems to be directed towards interferences by the State in a person’s private life (i.e., the ‘vertical effect’), it has been

judicially confirmed (e.g., in Ferdinand v MGN Ltd) to be ‘now beyond argument that [Art 8] also encompasses a positive obligation to put in place a system to protect an individual’s private life from interference by non-state entities such as the media’. This invokes the ‘horizontal effect’ of regulating the activities of entities and individuals which interfere with a person’s private life. In modern parlance, both Art 8 and Art 10 (the latter protecting the right to freedom of expression) apply just as much to disputes between individuals to privacy disputes, or between an individual and a non-governmental entity such as a newspaper, as they do to disputes between individuals and a public authority (per Murray v Express Newspapers plc). Hence, where newspapers publish information about C, they may be liable to C under the tort of misuse of private information, even though Art 8 is being invoked outside its usual scenario. This had already been stated by the Council of Europe in 1998 – that Art 8 should protect individuals, not only ‘against interference by public authorities, but also against interference by private persons or institutions, including the mass media’.

There was a great deal of judicial division of opinion – following the enactment of the HRA – as to what effect that statute should have on the development of a free-standing tort of privacy in English law, when one had not existed until then. Nowhere was this division better illustrated than in the litigation arising out of the spectacular ‘showbiz wedding of the year’ between Michael Douglas and Catherine Zeta-Jones in 2000. (How ironic, then, that more than a century earlier, a famous 1890 article by Warren and Brandeis, noting the ‘idle gossip’ surrounding a wedding, prompted the well-known call for privacy in United States law.)

Douglas v Hello! Ltd: A vignette of judicial division of opinion

In the injunction hearing (CA level, 2001):

Sedley LJ remarked that ‘we have reached a point at which it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy’, but that the recognition of a privacy right was not a new development: ‘[it] is in my belief to say little, save by way of a label, that our courts have not said already over the years’, under the breach of confidence action.

However, Sedley LJ acknowledged that, if privacy could not be equated with a duty of confidence, then a legal innovation it must be – but that the introduction of the ECHR fully countenanced, and indeed required, that common law development: ‘the courts of this country must not only take into account jurisprudence of both the Commission and the European Court of Human Rights which points to a positive institutional obligation to respect privacy; they must themselves act compatibly with that and the other Convention rights. This ... arguably gives the final impetus to the recognition of a right of privacy in English law’. These views were explicitly supported in some later cases (e.g., in Mills v NGN Ltd, and in H (a healthcare worker) v Associated Newspapers Ltd, noting a need for ‘the development of the law of privacy, under the stimulus of the HRA 1998’). As
Buxton LJ later noted in *Wainwright v Home Office*, Sedley LJ saw the development of a tort of privacy as part of the judicial common law development in England, 'with the ECHR serving as, at most, a catalyst for that development'.

**Re the trial before Lindsay J (2003).**
Lindsay J, however, emphatically rejected any notion that there was an existing cause of action for breach of privacy in England, and considered that, whilst a 'powerful case' for its existence had been articulated by Sedley LJ, another persuasive view (per Buxton LJ in *Wainwright (CA)*) was that an effective barrier to the recognition of a tort of breach of privacy had already been erected in England by earlier authorities (e.g., *Kaye v Robertson*).

**Re Lindsay J’s costs judgment (2004).**
Lindsay J remarked that it was ‘not wrong or unreasonable’ for the celebrity couple to have claimed in privacy, ‘in the face of the Human Rights Act and real doubts as to our domestic law on the subject’, but that it was ‘a subject which did not require to be dealt with because of the Claimants’ victory under the law as to confidence’.

**On appeal from Lindsay J’s judgment (CA, 2005).**
While the part of Lindsay J’s judgment about breach of confidence was upheld on appeal, the Court of Appeal rejected the sentiments which Sedley LJ had expressed about the availability, post-HRA, of a separate right of privacy. No such freestanding tort could, or should, be recognised.

The law has clarified since. There is still no freestanding tort of privacy. As Lord Neuberger MR explained, in written evidence submitted to a Parliamentary Select Committee in 2010, ‘[w]hatever else can be said, it is clear beyond any doubt that the English courts have not, since the enactment of the 1998 Act, used Art 8 of the Convention as a vehicle to introduce into English law a general law of privacy ... and which would apply generally’. However, there is a developing tort of misuse of private information, and it requires both the existence of private (rather than confidential) information; and a balancing of the rights specified by Arts 8 and 10 of the ECHR. These are now to be treated as essential elements of the tort. The fact that balancing the values enshrined in Arts 8 and 10 is part and parcel of the action was confirmed in *McKennis v Ash*, where Buxton LJ said that, ‘in order to find the rules of the English law of breach of confidence, we now have to look in the jurisprudence of Arts 8 and 10. Those articles are now not merely of persuasive or parallel affect but ...[they] are the very content of the domestic tort that the English court has to enforce.’ That balancing exercise forms the second element of the tort (discussed shortly).

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49 [2001] EWCA Civ 2081, [2002] QB 1334 (CA) [96], with Sedley LJ’s judgment also considered restrictively in the HL, e.g.: [2003] UKHL 53, [2004] 2 AC 406 (HL) [30]–[33] (Lord Hoffmann).
50 [2003] EWHC 786 (Ch), [2003] EMLR 31, [229].
52 [2004] EWHC 63 (Ch) [18].
53 [2005] EWCA Civ 595, [2006] QB 125 (CA) [37].
54 ‘Written Evidence Submitted by the Master of the Rolls’, submitted to the Dept of Culture, Media and Sport Select Committee, in its investigation into *Press Standards, Privacy and Libel* (23 Feb 2010) [27] (emphasis added) [available at: http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/9051902.htm].
Breach of confidence action – stretched to breaking point?

The requirements of the traditional equitable cause of action for breach of confidence were set by Megarry J in *Coco v AN Clark (Engineers) Ltd*. 37

### The original (equitable) cause of action for breach of confidence required proof of three elements:

(i) the information itself must have the necessary quality of confidence about it;
(ii) that information must have been imparted in circumstances importing an obligation of confidence; and
(iii) there must be an unauthorised use (or threatened use) of that information, to the detriment of the party communicating it.

However, each element has undergone considerable (and sometimes strained) expansion of interpretation in the decided case law.

The equitable duty of confidence is subject to three limiting principles, per *Spycatcher (A-G v Guardian Newspapers Ltd (No 2))*:

1. information in the public domain will no longer be confidential;
2. the duty to maintain a confidence does not apply to useless information or trivia; and
3. the public interest in maintaining confidence may be outweighed by a public interest in disclosure.

However, it is the extensions of the cause of action which have been of most interest. Each of the elements has undergone fairly radical changes, given the changes in society, technology and business practice, and given the ‘shift in the centre of gravity’ since the introduction of HRA (per Lord Hoffmann in *Campbell v MGN Ltd*). The principal extensions are described below:

- **Confidential information**: information need not be confidential, but only private, and can still be covered by the breach of confidence action. Private information can be in the public domain in some cases (as discussed later in the chapter), whereas confidential information, strictly construed, is usually more inaccessible. Documents, plans and drawings may contain confidential information, for the purposes of the breach of confidence action. More controversially, so may photographs.

  In *Creation Records Ltd v NGN Ltd*, photographs to be used for the sleeve of an upcoming record by the Oasis group contained ‘confidential information.’ So did photos of C in the ballroom at the Grand Hotel, New York in *Douglas v Hello! Ltd* and of C on the steps of a building in *Campbell v MGN Ltd*.

Although early cases in breach of confidence concerned confidential commercial information, the cause of action was extended to confidential personal information about C, as various cases have demonstrated, albeit sometimes with judicial notations that the cause of action was rather strained in doing so:

In *Argyll v Argyll*, the Duke of Argyll, D, threatened to publish secrets about his former wife, the Duchess of Argyll, C, in relation to her private life which were disclosed during their marriage. In *Campbell*, the information related to C’s drug addiction and treatment, and the court admitted that,

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40 Cross cite pp 346–48.

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‘[i]nformation about an individual’s private life would not, in ordinary usage, be called “confidential”’.\(^63\) In *Mills v NGN Ltd*,\(^64\) where Heather Mills, C, objected to the publication of her address, the court conceded that, ‘it may be somewhat artificial to classify the address of a person as confidential information’, but it was nevertheless held to be so. In *Archer v Williams*,\(^65\) information about Lady Archer’s face lift before her ’trip with a special friend’, and the details of dates and places of cosmetic surgery, together with any information extracted from her personal diaries, details of the sexual relationship between Lady and Lord Archer, of the security arrangement at their various residences, and of Lady Archer’s home life, were all confidential.

- **The obligation of confidence arising from a ‘prior relationship’ of confidence between C and D:** this is the element which has seen the largest extension in the scope of breach of confidence. As well as protecting confidences disclosed within a pre-existing or antecedent relationship of confidence, the action has been permitted to include one-off intrusions on privacy where there was no pre-existing relationship between C and D at all. Given that there was no antecedent relationship of confidence between celebrity C and photographer D in *Douglas v Hello! Ltd*, this element of breach of confidence was stretched at best, and completely ignored at worst there – a point made in *Hosking v Runting* (NZCA).\(^66\) Further:

  In *A-G v Guardian Newspapers (No 2)*,\(^67\) Lord Goff gave the example of a private diary dropped in a public place and picked up by a passer-by. In *Hellewell v CC of Derbyshire*,\(^68\) Laws J gave examples of a found or stolen letter or diary. In *Francome v MGN Ltd*,\(^69\) information obtained via a telephone tap was ruled to be confidential. In *A v B plc*,\(^70\) Lord Woolf CJ gave the example of bugging or surveillance of C. All these examples were considered to be intrusions which breach of confidence would protect. In *Venables v Thompson and NGN Ltd*,\(^71\) injunctions were granted to prevent the disclosure of any information that might lead to the identification of the murderers of James Bulger after their release from prison.

It follows that, in the abovementioned instances, the information need not have been consciously imparted from C to D – it is enough if it merely comes into D’s possession, no matter how it does so. It also follows that, given that there does not need to have been an antecedent relationship, D does not need to know that the information was imparted in, or obtained with, an obligation of confidence. It is sufficient to establish the lesser standard that D ‘ought reasonably to have known’ that the information was confidential (per *A v B plc*\(^72\)). That notice (rather than knowledge) re the obligation of confidence may be met through the use of signs, security measures, written notices, or other measures. If D lacks actual knowledge, then whether D has sufficient notice that the information is confidential must be objectively assessed, by reference to a reasonable person standing in his shoes (*Force India Formula One Team Ltd v 1 Malaysia Racing Team*\(^73\)). An obligation of confidence arose in the following cases:

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\(^64\) [2001] EMLR 41 (QB) [21] (Collins J). See too, re addresses/location: *Venables v NGN Ltd* [2001] Fam 430; *Green Corns Ltd v Claverley Group Ltd* [2005] EMLR 748 (QB) [56] (Tugendhat J) (‘[t]here is nothing new about the recognition of the sensitivity of addresses’, even if some were ascertainable from the land register).

\(^65\) [2003] EWHC 1670 (QB).

\(^66\) [2004] NZCA 34, [2005] 1 NZLR 1, [43].

\(^67\) [1990] 1 AC 109 (HL) 281.

\(^68\) [1995] 1 WLR 804 (QB) 807.

\(^69\) [1984] 1 WLR 892 (CA) 900–1 (Fox LJ).


\(^71\) [2001] Fam 430 (Dame Butler-Sloss P).


\(^73\) [2012] EWHC 616 (Ch) [224], and the authorities cited therein.
In *Shelley Films Ltd v Rex Features Ltd*, signs at the entrance of a film set banned photography, but photographs were taken of the Frankenstein movie set. In *Creation Records Ltd v NGN Ltd*, minders and security staff, plus other measures taken to restrict knowledge about the photo shoot, gave rise to the obligation. In *Douglas v Hello! Ltd*, there was elaborate security to exclude intruders and to prevent unauthorised photography (including bag screening and removing cameras) and written instruction via the wedding invitations.

- **Unauthorised use:** proof of some detriment to C arising from D’s use of the information appeared to be required in *Douglas v Hello! Ltd* (where there was detriment to C, viz, distress in having to re-arrange their photograph selection plans, and possible loss of income from the syndication of the photographs). However, it is doubtful whether detriment is strictly required any longer, or adds anything to the other elements (a point left open in *A-G v Guardian Newspapers (No 2)*, in *X HA v Y* and in *R v Dept of Health, ex p Source Informatics Ltd (No 1)*).

These are all considerable expansions upon the original equitable doctrine. Even so, the cause of action will not readily cover intrusions in physical space. There was no confidential information in *Wainwright* (re the unlawful strip search); in *Peck* (where the CCTV footage was of C carrying a knife in the public domain); or in *Kaye* (re gaining access to Mr Kaye, lying in his hospital bed). Indeed, Lord Bingham remarked extra-curially that to use breach of confidence in *Kaye* would have done ‘impermissible violence to the principles upon which that cause of action was founded.’ Nevertheless, given the extensions noted above, a significant problem with using breach of confidence for privacy infringements was that some judges were prepared to extend its ambit rather more than others. All of this has contributed to a landscape in which the legal principles governing the cause of action for breach of confidence have become distorted or muddled.

The problem was by no means limited to England. Some leading Commonwealth cases have also grappled with the interplay between privacy intrusions and breach of confidence:

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**The comparative corner: An Australian vignette**

In *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd*, Lenah Game Meats, C, an abattoir operator, complained about a break-in through the roof of its abattoir by unknown trespassers. At the premises, and lawfully under licence, C slaughtered and processed native brush-tail possums for export. At least two video cameras were surreptitiously installed by the trespassers, and these recorded aspects of the abattoir’s operations. The film graphically reproduced the means by which the possums were killed (which was to stun them with a

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Nowadays, it is feasible that C may be able to sue for both the tort of misuse of private information, and for breach of confidence. As Buxton LJ said in Ash v McKennitt, C can always pursue the ‘old-fashioned breach of confidence by way of conduct inconsistent with a pre-existing relationship, rather than simply the purloining of private information’. Indeed, C may succeed on both causes of action. The facts of a high-profile case illustrated:

In Mosley v News Group Newspapers Ltd, Mr Max Mosley, then President of the FIA (the International Auto Federation), sued the News of the World, complaining of a 2008 article under the heading, ‘F1 Boss has sick Nazi orgy with 5 hookers’, with a sub-heading, ‘Son of Hitler-loving fascist in sex shame’, and a follow-up article, ‘Mosley hooker tells all: My Nazi orgy with F1 Boss’, with accompanying video footage and photos. The articles concerned a party/orgy on 28 March 2008, which was filmed clandestinely by one of the women at the party with a camera concealed in her clothing, and which had been supplied by the NOTW. The text of the first article included the following text: 'Formula 1 motor racing chief Max Mosley is today exposed as a secret sado-masochist sex pervert', and the articles variously described lurid details. The cause of action was brought in both breach of confidence and for the tort of misuse of private information. Held: both causes of action succeeded. The information was private in nature, consisting of sado-masochistic (S&M) and sexual activities. There was a pre-existing relationship of confidentiality between the participants, because most involved had known each other for some time, and took part in such activities on the understanding that they would be private. The evidence was that there was a fairly tight-knit community of S&M activists on the London 'scene', with an unwritten rule that people were trusted not to reveal what had occurred at the sessions.

The authorities canvassed in this chapter, relevant to the ‘Preconditions’ and ‘Elements’ of the action, are mostly drawn from the post-HRA era, and that is consciously deliberate, for as Lord Woolf CJ stated in A v B plc, ‘authorities which relate to the action for breach of confidence prior to the coming into force of the 1998 Act ... are largely of historic interest only.’ None of this means that the equitable action for breach of confidence has ‘died a death’, however – that action still has currency, especially where C is not in a position to invoke Art 8 for whatever reason (per Ferdinand v MGN Ltd).

Turning now to the preconditions for the tort of misuse of private information to arise:

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PRE-REQUISITES BEFORE COMMENCING A PRIVACY ACTION

Precondition #1: Proof of a ‘serious infringement’

§PR.3 For the tort of misuse of private information to apply, the infringement must reach a certain threshold or level of seriousness before Art 8 can be engaged. Information which is deemed to be useless or trivial will not trigger the tort.

Just as with a defamation claim (per Dell’Olio v Associated Newspapers Ltd\(^{87}\)), it has been judicially established that, for the purposes of a privacy claim, ‘intrusions must reach a certain level of seriousness’ before the tort can be invoked. For example, it was stated, in Trimingham v Associated Newspapers Ltd\(^{88}\), that ‘the misuse of this information [must be] sufficiently grave to pass the necessary threshold of seriousness’; while in Price v Powell\(^{89}\), Tugendhat J remarked that ‘[t]here can be circumstances where a privacy action may be struck out on Jameel grounds’. In McKennitt v Ash\(^{90}\), Eady J had a number of allegedly private pieces of information to consider, and held of some of them that they were unremarkable, ‘trivial and of no consequence ... [and] there is no need for the law to step in and offer protection.’

This requirement is a ‘safeguard’ against these tort claims becoming ‘unreal or unreasonable’ – as Laws LJ said in R (Wood) v Commr of Police for Metropolis, the personal autonomy protected by the tort is to be ‘preserve[d], even in little cases’; but not to the point of ridiculously trivial claims being brought by aggrieved claimants who dislike their personal information being circulated in the public domain.\(^{91}\) The borderline can be difficult to draw, however.

In Mosley v NGN Ltd\(^{92}\), Eady J gave this example: where a ‘technical or trivial’ crime was being committed on private property (e.g., C ‘smoking a spliff’), then that would not justify installing a camera in C’s home, to catch him in the act. ‘There must be some limits!’ In general, ‘political speech’ would be far more likely to be subject to the tort than would ‘gossip’ or ‘tittle tattle’. In Ewing v Times Newspapers Ltd\(^{93}\), the information concerned C’s name, his age, the statement that his only income was state benefits, and the reference to the location of his address as ‘a north London council flat’. Held: the tort of misuse of private information failed. It was adjudged to be just ‘trivial’ and not protectable (and what was not trivial was in the public domain anyway, discussed shortly under Element #1). In Price v Powell\(^{94}\), Katie Price, C, claimed that a former friend and modelling colleague, D, had disclosed to a News of the World (NOTW) reporter the identity of a man who C alleged raped her years earlier. Held: the action could not be struck out, as despite the huge amount of extremely personal information put out in the public domain by C herself, C had a legitimate expectation of privacy about that information, and the interests of her two children.


\(^{88}\) [2012] EWHC 1296 (QB) [305].

\(^{89}\) [2012] EWHC 3527 (QB) [48]. Also: Trimingham v Associated Newspapers Ltd [2012] EWHC 1296 (QB) [305]; and Hannon v NGN Ltd [2014] EWHC 1580 (Ch) [80]–[81].

\(^{90}\) [2005] EWHC 3003, [139], and aff’d on appeal: [2006] EWCA Civ 1714, [21].

\(^{91}\) [2009] EWCA Civ 414, [2010] 1 WLR 123 (CA) [22]. As noted in Hutcheson (formerly known as ‘KGM’) v NGN Ltd [2011] EWCA Civ 808, [24], Laws LJ dissented in Wood, but the principle has never been doubted. Indeed, it was recently reiterated in: Weller v Associated Newspapers Ltd [2014] EW 1163 (QB) [27].

\(^{92}\) [2008] EWHC 1777 (QB), with points respectively at [111] and [15], citing: Campbell v MGN Ltd [2004] 2 AC 457 (HL) [148], and Jameel v Wall Street Journal Europe Sprl [2007] 1 AC 359 (HL) [147].

\(^{93}\) [2010] NIQB 7, [22].  \(^{94}\) [2012] EWHC 3527 (QB) [45].
Analogously, the equitable action for breach of confidence does not apply to useless or trivial information either – a point made plain by Lord Goff in *AG v Guardian Newspapers (No 2).*

In the modern and technologically complex society in which we now live, there is a range of privacy intrusions (and changing social mores as to what is ‘private’), which make what is legally worthy of protection a more acute problem than ever before. Just as with the tort of private nuisance discussed in Chapter 16, and the tort of defamation analysed in Chapter 15, a threshold requirement of some serious infringement applies, and the interests in need of protection may change over time or require developing on a case-by-case basis. However, this precondition should not be stated too highly. It is apparent, from the relatively modest levels of damages which are awarded for privacy infringements (discussed later in the chapter), that distress, hurt feelings and the like, may not ‘sound’ in much compensation for C. However, that is, in itself, no ground for striking out the claim because it did not meet a *Jameel*-type threshold (per *Briggs v Jordan*).

**Precondition #2: Capacity of the corporate C to sue**

§PR.4 Whether a corporate C can sue for the tort of private information is presently unsettled in English law. However, the weight of authority is against the availability of the tort to a corporate C.

There are feasible circumstances in which a corporation may wish to sue for a privacy breach. For example, it will be recalled that, in the Australian case of the slaughtered possums in *ABC v Lenah Game Meats,* C was a corporation – the abattoir operator.

There have been judicial indications both for and against the proposition that a corporate C could sue for an infringement of its privacy and so engage Art 8 of the ECHR.

**View #1: Corporations cannot sue.** On the one hand, some judges have considered that to permit any non-individual to sue for infringement of ‘personal dignity’ is distinctly odd. In *Wainwright v Home Office,* Buxton LJ observed, obiter, that to make a general tort of privacy available to corporate bodies that want to keep their affairs private ‘plainly adds a further dimension of considerable difficulty to attempts to formulate the proper ambit and balance of the tort’.

In *R v Broadcasting Standards Comm; ex p BBC,* two members of the Court of Appeal had distinct reservations too. Notably, that case concerned the Broadcasting Act 1996, and not Art 8 or the tort the subject of analysis in this chapter. That Act explicitly provides for ‘an individual or a body ... whether incorporated or not’ to commence a ‘fairness complaint’ (per s 111(1)) – and, in the view of the Court of Appeal, that indicated a willingness by the Legislature to recognise that corporations can suffer infringements of privacy under this Act. That legislative wording is significant, as it is a distinct contrast with the Protection from Harassment Act 1997. As discussed in the online chapter ‘The statutory tort of harassment’, a company cannot be ‘harassed’ – given

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95 [1990] 1 AC 109 (HL) 282. 96 Cross cite pp 369–70.
97 [2013] EWHC 3205 (QB) [49]–[50] (re health information about C, which was private).
101 See *DPP v Dziurzynski* [2002] EWHC 1380 (QB Admin) [27]–[33] (Rose LJ), and cited in: *Majrowski v Guy’s & St Thomas’s NHS Trust* [2005] EWCA Civ 251, [11]. The situation was clarified, so that only individuals could sue under the 1997 Act, by amending provisions inserted by the Serious Organised Crime and Police Act 2005, s 125.
that, as a matter of statutory interpretation (e.g., the use of ‘him’ and ‘victim’ in various provisions), and in light of its legislative history, the word ‘person’ in the 1997 Act was aimed at protecting individuals, not corporations.

In *Broadcasting Standards Comm*, the programme makers for the BBC secretly filmed transactions in Dixons’ stores whilst investigating for the consumer affairs programme, *Watchdog*, as part of an investigation into the selling of secondhand goods as new. The filming did not reveal any evidence of wrong-doing, and was not used in the programme. Held: the secret filming was an unwarranted infringement of Dixon’s privacy under the Act.

However, Lord Mustill addressed his concluding remarks to a breach of privacy in general, and did not consider that a claim for privacy infringement would be ‘feasible’ if initiated by a corporation:

an intrusion into such matters has an extra dimension, in the shape of the damage done to the sensibilities of a human being by exposing to strangers the workings of his or her inward feelings, emotions, fears and beliefs – a damage which an artificial ‘person’, having no sensibilities, cannot be made to suffer. A company can have secrets, can have things which should be kept confidential, but I see this as different from the essentially human and personal concept of privacy.\(^{102}\)

Similarly, Hale LJ had reservations, remarking\(^{103}\) that Art 8 typically contemplated individuals only, and that of privacy in general, ‘[t]here may well be contexts in which the concept should be limited to human beings, whose very humanity is defined by their own particular consciousness of identity and individuality, their own wishes and their feelings. But that debate is for another day.’

Notably, English law reform has not been keen to endorse the idea of the corporate C either. The Lord Chancellor’s Department proposed a civil wrong for breach of privacy in 1993, for a ‘natural person’.\(^{104}\)

**View #2: Corporations can sue.** On the other hand, Lord Woolf MR favoured a more liberal view of standing in the *Broadcasting Standards Commission* case. Considering the issue more widely than per the strict terms of the Broadcasting Act 1996, the Master of the Rolls considered that a company may have activities of a private nature which needed protection from unwarranted intrusion – say, someone who listened clandestinely or secretly filmed a board meeting, or who broadcast correspondence which the company could justifiably regard as private: ‘[t]he individual members of the board would no doubt have grounds for complaint [for intrusions upon privacy], but so would the board and thus the company as a whole … It could not possibly be said that to hold such actions an intrusion of privacy conflicts with the ECHR.’\(^{105}\)

Additionally, in support for wider standing, the breach of confidence action is available to a corporate C (per *Schering Chemicals Ltd v Falkman Ltd*\(^ {106}\) and *Dunford & Elliott Ltd v Johnson & Firth Brown Ltd*\(^ {107}\)).

Whether a corporate C can sue for privacy infringements has been contentious elsewhere too:

\(^{102}\) *ibid.*, [49].  
\(^{103}\) *ibid.*, [42], [44].  
\(^{104}\) LCD, *Infringement of Privacy* (Green Paper, J060915NJ.7/93, 1993).  
\(^{105}\) [2001] QB 885 (CA) [33].  
\(^{106}\) [1982] QB 1 (CA) 15.  
\(^{107}\) [1978] FSR 143 (CA).
For English purposes, there has been no case in which a corporate C has sued for the tort of misuse of private information, so far as the author’s searches can ascertain, and hence, the question has not been definitely answered as yet.

Turning now to the four elements of the tort:

**ELEMENT #1: PROOF OF PRIVATE INFORMATION**

The information which D disclosed or published about C must truly have been private, i.e., information about which C had a reasonable or legitimate expectation of privacy.

This element involves three steps: specifying the information that is alleged to be private; proving that C had a legitimate expectation of privacy about it; and ensuring that the privacy of the information has not been somehow lost or removed. Dealing with each in turn:

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108 It provides: ‘Except for the appropriation of one’s name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded.’


110 (2001) 208 CLR 199 (HCA) [116], [119], [126] (Gummow and Hayne JJ); [43] (Gleeson CJ); [190]–[191] (Kirby J, referring to Art 17 of the International Covenant on Civil and Political Rights); [328] (Callinan J).

111 Privacy (Rep 22, 1983) vol 1, [27].
Identifying the private information

The ‘thing’ containing the information

C must identify the particular pieces of information which are claimed to be private. They may be photographic, video recordings, textual (e.g., text messages, letters, emails), audio, or pictorial (e.g., cartoons, drawings). Photographs and recordings taken of C in a public place may still constitute private information.

Correspondence between C and others is expressly referred to in Art 8 as being material in which C would have a legitimate expectation to privacy, but other things can just as easily satisfy this element. A newspaper article may contain various information about C, some of it private and some of it not.

In *Campbell v MGN Ltd*, the newspaper article was that the model, Naomi Campbell, C, had lied when she said she was not a drug addict. The article was accompanied by covertly-taken photographs showing the model standing on the steps of a building after leaving one of the Narcotics Anonymous meetings. Held: the text to the effect that C was a drug addict and was receiving counselling and treatment did not contain private information (i.e., it was information about which C could not have a legitimate expectation of privacy), but the photograph contained private information, as it was capable of identifying where C was being treated.

Photographs and video recordings attract special protection under the tort of misuse of private information, simply because they can be much more intrusive and informative than words can (per *Terry (LNS) v Persons Unknown*). In *Douglas v Hello! (No 6)*, Sedley LJ pointed out that photographs enable readers to become, not only a spectator, but also a ‘voyeur’ – a telephoto lens can reproduce scenes where the subject of the photograph could reasonably expect their activities not to be brought to the public’s attention.

Whether photographs or recordings of persons taken in a public, or semi-public, place can constitute private information is not entirely straightforward. Certainly, in *Peck v UK* (where C was photographed in a public street on CCTV while holding a knife, which footage was then reproduced in a television programme), the European Court of Human Rights held that, whilst it was impossible to regard that picture as containing confidential information insofar as that was defined in English domestic law (given that what happened plainly occurred in the public domain, i.e., on a public street), the CCTV recording did contain private information. It was later suggested (by the New Zealand Court of Appeal in *Hosking v Ruming*) that *Peck* could be an ‘exceptional case [in which] a person might be entitled to restrain additional publicity being given to the fact that they were present on the street in particular circumstances.’

Some English authorities have confirmed that view too. As already noted, confidential information was contained in the photos which were taken in public places, in *Campbell* and in *Douglas* (both of which were decided under the breach of confidence action). Some judges have indicated that private information and confidential information are not necessarily coincident (e.g., in *Wainwright*, Buxton LJ raised the possibility of ‘non-confidential and true,'
In the following post-HRA cases which were decided under the newly-developed tort, private information existed, despite C being photographed in a public place when it was taken:

In *Murray v Express Newspapers plc*[^118] a photography agency, D, arranged for its photographer to photo David Murray, C, the 19-mth-old son of JK Rowling, whilst he was being pushed in his stroller in the street. The photo was taken without the knowledge or consent of his parents. It was arguable that private information was published (this was a summary judgment application, so all the CA decided was that it was arguable that David’s reasonable expectation of privacy was engaged). The law should protect children from intrusive media attention, especially when the photographer took the photographs, knowing that David’s parents would object. In *AAA v Associated Newspapers Ltd*[^119] a photograph was taken of C, at less than one-year-old, when she was in her pram in a public place, and the photos were published in the *Daily Mail*, together with several (eight) accompanying articles in the same newspaper and published on D’s website, *Mail Online*. Her mother was unaware of the photo having been taken. The press suspected that C was the result of an extra-marital affair by a well-known politician with C’s mother, and that the politician gave a research position to C’s mother during the affair, thus exposing him to allegations of cronyism and nepotism. The taking of the photograph did not cause distress to C, given her extreme youth. D argued that the photographs were published in order to permit readers to see whether or not there was any family resemblance as between C and her supposed father. The photograph contained private information, in which C had a legitimate expectation as to privacy. In *Jagger v Darling*[^120] Jade Jagger, C, engaged in sexual activities with John Darling, D, inside the front door of the Kabaret nightclub, which was (unknowingly to C) filmed on CCTV. That film was allegedly taken out of the camera by D, manager of the club, and passed to *News of the World*, which published stills from the footage. C had a legitimate expectation of privacy, for her conduct was not so immoral as to prevent her from seeking a remedy from the court.

Notably, the Independent Press Standards Organisation (IPSO)’s *Editors’ Code of Practice (2015)*[^121] also supports the view that photographs taken in public places may be objectionable:

> **cl 3(iii)** It is unacceptable to photograph individuals in private places without their consent.  
Note – Private places are public or private property where there is a reasonable expectation of privacy.

However, to what extent information from the public domain can base an action for the tort of misuse of private information remains, in the words of the *Mosley* court, ‘yet to be determined ... If taken literally, it would mean a very significant change in what is permitted. It would have a profound effect on the tabloid and celebrity culture to which we have become accustomed in recent years.’[^122]

[^118]: [2008] EWCA Civ 446, [45], [57], [61].
[^120]: [2005] EWHC 683 (Ch) [13].
[^121]: The IPSO is charged with enforcing the Editors’ Code of Practice (revised Mar 2015). This organisation took over the role previously exercised by the Press Complaints Commission (which had administered the predecessor 2012 Code of Practice) on 8 Sep 2014. The 2015 Code is available in-full text at: https://www.ipso.co.uk/assets/82/Editors_Code_of_Practice_A4_March_2015.pdf.
[^122]: [2008] EWHC 1777 (QB) [131].
Obversely, the usual scenario giving rise to the tort of misuse of private information is where photographs are taken on private property, for that more naturally gives rise to private information (e.g., photographs of sexual activity in a brothel, per Theakston v MGN Ltd, or on private property, per Mosley v NGN Ltd). In the latter, it was said that this situation ‘may be at the extreme of intimate intrusion.’

What the information is about

The subject-matter which may constitute private information covers a wide variety of personal information as to name, health, sexuality, appearance, and behaviour. The fact that C partook in illegal or unlawful behaviour does not deprive C of the right to a legitimate expectation of privacy in respect of that information.

Private information is information about which C had a reasonable expectation of privacy. Wherever C is suing for the tort of misuse of private information (thus engaging Art 8), there are certain values which are at the heart of the claim: ‘the protection of human autonomy and dignity – the right to control the dissemination of information about one’s private life and the right to the esteem and respect of other people’ (per Campbell v MGN Ltd), and the right to make C ‘master of all those facts about his own identity, such as his name, health, sexuality, ethnicity, his own image’ (R(Wood) v Commr of Police of Metropolis).

The following list provides examples of what has constituted ‘private information’ for the purposes of the tort of misuse of private information (whether or not another element of the tort ultimately failed):

- information (even speculation) about C’s paternity (especially where the mother has withheld that information, suggesting that C’s mother will decide when it is appropriate to tell C who her father is), and the supposed circumstances of C’s conception – per AAA v Associated Newspapers Ltd (facts above);
- C’s appearance, such as facial features and hair colour – per AAA (re the politician’s alleged child), and also Murray v Express Newspapers Ltd (re JK Rowling’s child);
- information about C’s health or medical matters – for ‘information about a person’s health is generally information in respect of which the subject of the information has a reasonable expectation of privacy’ (per Briggs v Jordan):

In Cooper v Turrell, Mr Turrell, D, a former CEO of a financial company, disclosed information about the supposed health problems of Mr Cooper, the Executive Chairman and a director of the company. These problems supposedly rendered C medically unfit to perform his functions and duties as company director, and it was alleged that C had failed to fulfil his obligations to report his supposed medical condition to a regulator. D published the text of audio recordings of what C said to D and to others in certain conversations to his Wordpress blog. D also published that C was unfit to fulfil his responsibilities to a public company because he had a brain tumour (although C did not have any such tumour). In Peck v UK, the fact that C was ‘deeply disturbed, and in a state of

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126 [2004] UKHL 22, [2004] 2 AC 457 (HL) [52].
128 [2007] EWHC 1908 (Ch), [2007] EMLR 22; and on appeal: [2008] 3 WLR 1360 (CA).
129 [2013] EWHC 3205 (QB) [50].
131 (2003) 36 EHRR 41 (ECtHR) [62].
“distress”, having attempted suicide with a knife, meant that a film of his walking down the street in the immediate aftermath of that attempt contained private information. In *McKennitt v Ash*, Loreena McKennitt, C, a Canadian folk music composer and singer, sued her one-time long-standing friend and sometime-business associate (e.g., a merchandise supervisor), Niema Ash, D, for breach of confidence and infringement of privacy, for the publication by D of a book. ‘Travels with Loreena McKennitt: My Life as a Friend’. C alleged that the book revealed personal and private detail about her which she was entitled to keep private, including: C’s personal and sexual relationships; her feelings in relation to the drowning death of her fiancé; personal matters relating to C’s health and diet and her emotional vulnerability. In *Briggs v Jordan*, two business colleagues who were closely involved in the Crystal Palace FC, set up a very profitable mobile phone company. Mr Briggs, C, disclosed to his colleague, D, that he suffered from chronic fatigue syndrome. All of these cases concerned private information.

- information about C’s sexual orientation:

  In *Trimingham v Associated Newspapers Ltd*, Carina Trimingham, C, engaged in an affair with well-known Liberal Democrat MP and Cabinet Minister, Mr Christopher Huhne, whilst acting as his press officer, and she complained of publications that contained information – that she was bisexual; that she was engaged in a civil partnership with her lesbian lover at the time of the affair; and information about her sexual history and relations with a Mr Hughes (several years previously) and with Mr Huhne. C alleged that she was described in the publications as wearing Doc Marten boots and having ‘a boyish cropped, spiky haircut’, and that she ‘set her baseball cap’ like a man, thereby appealing to readers’ homophobic tendencies. C did not allege that information about the affair between her and Mr Huhne itself was private. *Held*: none of the information about C’s sexuality was private. Normally, information about sexual orientation will be private – it wasn’t, in this case, because C had no reasonable expectation of privacy (as discussed shortly).

- information about C’s personal finances, business dealings, or about C’s personal or family assets:

  In *Tchenguiz v Imerman*, about 2.5 million documents belonging to Mr Imerman were copied by Mr Tchenguiz from a server on which they were stored. *Held*: a proportion of these were private.

- information about illegal behaviour on C’s part – notably, the fact or allegation of wrongdoing does not automatically preclude the success of the tort of misuse of private information or undermine C’s right under Art 8. As stated in dicta in *Mosley*, ‘[i]t is worth remembering that even those who have committed serious crimes do not thereby become “outlaws” so far as their own rights, including rights of personal privacy, are concerned’. In *WXY v Gewanter*, C, who was a member of a foreign Head of State’s family, sought to restrain D’s threatened publication of information about her (pressure allegedly applied to secure the payment of a judgment debt owed by members of the Head of State’s family). The private information included that C had a sexual relationship with M; that C lied about the affair in denying it in legal proceedings (committing perjury); and that, during ‘pillow talk’ with M, C told him that the Head

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of State had provided support for terrorism. Any information conveyed as ‘pillow talk’ must have been communicated, and received, with the mutual expectation that the information would be confidential. In addition, D must have appreciated that the information had to remain confidential, otherwise C would be shunned by the Head of State's family and/or refused access back into the country for such ‘disloyal conduct’. In *Campbell v MGN Ltd*, the fact that the information published about Naomi Campbell, C, implied that she had regularly been in possession of prohibited drugs, and hence guilty of illegal behaviour, did not preclude the photograph from possessing a confidential/private character.

- information about C’s home and domestic arrangements, ‘simply because of the traditional sanctity accorded to hearth and home’, as Eady J put it in *McKennis v Ash*.136

In *McKennis v Ash*, facts previously, the book by D, ‘Travels with Loreena McKennis: My Life as a Friend’, contained details of the interior of C’s Irish home, including layout, decor, state of cleanliness, etc. That was private information. Re the home details, to publish them, ‘without permission, to the general public is almost as objectionable as spying into the home with a long distance lens and publishing the resulting photographs … Whether one is allowed into a person’s home professionally, to quote for or to carry out work, or one is welcomed socially, it would clearly be understood that the details are not to be published to the world at large’.

**SPR.8** The ‘bare fact’ of a sexual relationship is usually not private information, whereas the ‘details’ of such a relationship is usually private information.

The differentiation between bare facts and details of C’s sexual behaviour can be a finely-balanced and difficult judgment. In fact, the cases can be difficult to reconcile.

Certainly, in most cases which have come before English courts under this tort, in which C’s sexual liaisons or behaviour have been at issue, the courts have been inclined to hold that such information is private. In *Lord Browne of Madingley v Associated Newspapers Ltd (Rev 1)*,137 the Court of Appeal cited an earlier statement with approval: ‘to most people, the details of their sexual lives are high on the list of those matters which they regard as confidential’. In fact, upholding the privacy of sexual behaviour may have become more entrenched in law as time has passed, according to Eady J in *Mosley*: ‘[t]he modern approach to personal privacy and to sexual preferences and practices is very different from that of past generations … It has now to be recognised that sexual conduct is a significant aspect of human life in respect of which people should be free to choose. That freedom is one of the matters which Art 8 protects: governments and courts are required to afford remedies when that right is breached.’138

Private information could arise in the following cases involving sexual activities/relationships: C had an affair, in which details of family or business details were conveyed as part of very private conversations or during ‘pillow talk’ during the affair (*WXY v Gewanter*139); where salacious details about C were published by the other party to the affair (including where the parties met, and when, and the general communications between the parties to the affair) (*Ferdinand v MGN Ltd*140); where

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136 [2005] EWHC 3003, [135], and with quote in case description at [136], and aff’d on appeal: [2006] EWCA Civ 1714.
C has engaged in sexual and M&S activities, on private property and between consenting adults (Mosley v NGN Ltd\textsuperscript{144}); where Lord Browne, the Chief Executive of BP, had a homosexual relationship with a Canadian student, and where the information concerned details of how those parties met and of their 4-year relationship (Lord Browne of Madingley v Associated Newspapers Ltd\textsuperscript{142}); or where a high-profile figure in the entertainment industry had an affair with a female entertainer with whom he worked, and which eventually resulted in the latter’s leaving her place of employment by termination (ETK v NGN Ltd\textsuperscript{143}).

The fact that C paid for sexual activities does not make the transaction a purely commercial (as opposed to a private) relationship – and the fact that there were a number of other parties involved in the activity; and that it was recorded on video by C at his request, do not destroy the fact that the information about sexual conduct may still constitute private information capable of being protected in tort (Mosley v NGN Ltd\textsuperscript{144}).

On the other hand, the mere fact or existence of a sexual relationship may not be private information:

In Hutcheson (formerly known as KGM) v NGN Ltd\textsuperscript{145} Christopher Hutcheson, C, was the father-in-law of Gordon Ramsay, the well-known TV chef. The Sun newspaper published a story in which it was revealed that C had a 'second family'. He had married and had four children with his wife; but several years after he married, he developed a relationship with another woman with whom he had had two further children. For many years, the ‘first family’ had no idea about the existence of the ‘second family’ (although the second family knew all about the first). C argued that the information about his ‘second family’ was private, was no more widely known than among his two families, and that he had a reasonable expectation of keeping his ‘second family’ secret, in the sense that he should not be identified as being the father of the two children in question or as having had a relationship with their mother. Held: private information was unlikely. No concluded view was expressed on this 'borderline case', but Eady J suggested that, whilst it was arguable that this was private information, arising both from the sexual and family nature of the relationship, and that for decades the existence of the second family had remained ‘secret’, and that only a limited number of people knew of it, this was a ‘bare fact of the relationship’ case. In any event, there was no reasonable expectation of privacy (for reasons discussed below).

**§PR.9** Information cannot be private if it is not about C.

Publication of anonymous information which does not refer to C does not constitute an interference with C’s legitimate expectation of privacy or constitute private information (per R v Dept of Health, ex p Source Informatics Ltd\textsuperscript{146}). The principle is analogous to a so-called defamatory statement which does not refer to C – there can be no defamation without identification.

**§PR.10** The private information about C may be either true or false; either type is actionable under the tort of misuse of private information.

\textsuperscript{141} [2008] EWHC 1777 (QB) [98]–[99], citing: Dudgeon v UK (1981) 4 EHRR 149 (ECtHR) (sexual behaviour ‘concerns a most intimate aspect of private life’).

\textsuperscript{142} [2007] EWCA Civ 295, [85].

\textsuperscript{143} [2011] EWCA Civ 439, [5].

\textsuperscript{144} [2008] EWHC 1777 (QB) [107], [109].

\textsuperscript{145} [2011] EWCA Civ 808, quotes at [26] and [40].

\textsuperscript{146} [2001] QB 424 (CA) [34]. Also: Peck v UK [2003] EMLR 15 (ECtHR) [61], [62], [80]–[85]; JIH v NGN Ltd [2011] EWCA Civ 42, [25]; and cited in: Giggs v NGN Ltd [2012] EWHC 431 (QB) [61], [70].
Whereas the tort of defamation will be the more obvious tort for C where the information about C was false, the tort of misuse of private information will often concern information that was true, and yet published against C’s wishes. Defamation typically protects and vindicates C’s reputation, about which untrue allegations have been made; whereas the tort of misuse of private information is directed to the publication of material that infringes C’s right to privacy, irrespective of the accuracy of the information.

However, the fact that the information about C is false does not preclude a claim for misuse of private information. As Tugendhat J clarified in Trimingham v Associated Newspapers Ltd, ‘[i]t is part of Ms Trimingham’s complaint about these statements that they are not true ... [and that is not] an obstacle to a claim for misuse of private information in relation to these statements’, whilst Longmore LJ noted, in McKennitt v Ash, that ‘[t]he 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 sidetracked into that irrelevant inquiry.’

In Cooper v Turrell, facts previously, part of the information published by D was true (the text of audio recordings of what C said to D in certain conversations); and partly false (that D published false information that C was unfit to fulfil his responsibilities to a public company because he had a brain tumour, which he did not have). Held: the tort of misuse of private information was proven.

It is certainly not required that C should have to admit the truth of what has been published, as ‘the price’ of obtaining redress for the tort of misuse of private information (per Ferdinand v MGN Ltd (Rev 2)).

Both defamation and the tort of misuse of private information may potentially be pleaded on the same fact situation, particularly where D publishes information about C’s personal or private life (and not about his professional or public life) – that is the legal territory in which a claim can be advanced either in libel or for misuse of private information’, according to Tugendhat J in Dell’Olio v Associated Newspapers Ltd.

In Dell’Olio, Nancy Dell’Olio, C, the former partner of the then-English football manager, Sven Goran-Eriksson, complained about an article in The Daily Mail reporting on her relationship with actor and director Sir Trevor Nunn. C complained that the article was capable of bearing the defamatory meaning that ‘C was a serial gold-digger who cynically seeks out relationships with men, not for genuine emotional reasons, but because they are millionaires and therefore capable of funding her conspicuously lavish and ostentatious lifestyle’. Held: the claim in defamation failed because the words were not capable of being defamatory, but in any event, a claim based on the publication of information about a sexual relationship was more likely pursuable as a claim for misuse of private information (and no such claim was pleaded here).

**Proving a legitimate expectation of privacy**

Whether C had a legitimate or reasonable expectation of privacy about the information requires an objective, and not a subjective, assessment. It depends upon what a person of ‘ordinary sensibilities’ would consider to be private.

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147 [2012] EWHC 1296 (QB) [304].  
150 [2011] EWHC 2454 (QB) [67].  
151 [2011] EWHC 3472 (QB) [14], with quote in case description at [3].
Any information about C cannot become private, merely because C preferred not to reveal it and considered it to be private.\(^\text{152}\) Rather, the relevant question (according to Lord Hope in \textit{Campbell v MGN Ltd}) is ‘what a reasonable person of ordinary sensibilities would feel if placed in the same position as [C] and faced the same publicity’.\(^\text{153}\) Whether or not C has a reasonable expectation of privacy in respect of the information requires a ‘broad’ and fact-sensitive enquiry (\textit{Murray v Associated Newspapers Ltd}\(^\text{154}\)).

There are a number of objective factors which have emerged from the case law to date, by which courts have assessed whether C had such a reasonable expectation of privacy. These are outlined below, and are derived, in combination, from Murray,\(^\text{155}\) Trimingham,\(^\text{156}\) Lord Browne of Madingley \textit{v} Associated Newspapers Ltd,\(^\text{157}\) Ferdinand \textit{v} MGN Ltd,\(^\text{158}\) and most recently, in Weller \textit{v} Associated Newspapers Ltd\(^\text{159}\):

\textbf{Factor #1: C’s personal attributes:} the court will scrutinise the particular attributes of C which stimulate interest in information about him – including whether C is a child, or an international sportsman, a politician, or someone associated with a politician; or who C’s parents are. Also, the court will consider what C’s own character was like – whether it was ‘robust’, or even publicity-seeking, and therefore less likely to suffer distress from disclosures about himself. That may be evident from C’s occupation too.

In \textit{Trimingham v Associated Newspapers Ltd},\(^\text{160}\) facts previously, Ms Trimingham, C, had disclosed information about other people for newspaper publication, and so ought not reasonably be distressed when such information was published about herself.

Where C is a child, the court will scrutinise the extent of publicity or privacy given to C’s affairs by the parents/guardians/others responsible for his welfare and upbringing – the greater the publicity given about C, the less reasonable is any expectation of privacy. The converse is true too (as the aforementioned facts of Murray, concerning JK Rowling’s child amply demonstrated.)

\textbf{Factor #2: Location and activities:} the court will consider whether the information was obtained when C was in a private or a public place, and what C was doing when the information was acquired.

In \textit{Campbell v MGN Ltd},\(^\text{161}\) the majority of the HL pointed to the fact that the taking and publication of the photo of Naomi Campbell, C, outside a Narcotics Anonymous meeting could be potentially harmful to her rehabilitation and recovery. Also, C was receiving medical treatment, and by publishing details of the frequency of the treatment, intruded into personal medical information, and the publication tended to deter C from continuing with the treatment when it was in her interests to do so. In \textit{Rocknroll v NGN Ltd},\(^\text{162}\) Edward Rocknroll, C, was a guest at a fancy dress private party...
on private property when photographs were taken of him, partially naked, and engaging in ‘silly schoolboy-like behaviour’. Following C’s marriage to actress Kate Winslet, Mr Pope, D, who took the photos, posted them to his Facebook page and relaxed the privacy settings, so that they could be viewed by about 1,500 friends, but not by the general public. The information contained in the photos remained private.

Any recklessness on C’s part in dealing with the information is relevant, albeit that even if C has been somewhat ‘reckless’ in his behaviour, that does not automatically preclude a reasonable expectation of privacy (per Mosley v NGN Ltd).

Factor #3: Previous disclosures, or undertakings of confidentiality: the fact that C is suing for privacy infringement confirms that, at least at this juncture, C is not consenting to any publication of the information. However, the court will scrutinise the extent to which relevant information about C has been disclosed by himself in the past, and how much disclosure he has consented to. Notwithstanding that, the fact that C had not litigated previous information disclosures cannot be taken as a ‘tacit acceptance’ by C that the current information is not private.

In Ferdinand v MGN Ltd, D published articles in its newspaper, the Sunday Mirror and also on its website, Mail Online, about Rio Ferdinand, C, entitled, variously, ‘My Affair with England Captain Rio’, and ‘Boozer, love cheat and drug-test dodger. Meet the NEW England captain Rio Ferdinand’. Held: the information about C’s affair with Ms Carla Storey was private. C had not before disclosed anything about his relationship with Ms Storey. In an ‘extreme case, widespread and extensive discussion by a person of similar aspects of their private life would disentitle him to have a reasonable expectation of privacy’, but C’s case was ‘nowhere near that extreme’. Previous newspaper articles about C’s numerous affairs (when involved in a longstanding relationship) were published with his consent, and the fact that he had not litigated then could not be taken as his tacit acceptance of another article about a different woman.

The antecedent relationship between C and D (if any) is also relevant, e.g., whether they shared a contractual relationship containing confidentiality undertakings, thus creating an expectation of privacy.

In Prince of Wales v Associated Newspapers Ltd, Prince Charles made handwritten notes in his journals, 1993–99, during the course of overseas tours. Some of these were disparaging of the formalities and hosts which he encountered on these tours. A copy of the journal was seen by his staff, and sent to 50–75 close friends, in envelopes marked, ‘Private and Confidential’. An employee of the Prince provided these journals to D’s newspapers, via an intermediary, and in breach of an express undertaking of confidentiality in the contract of employment. Held: the information was private, notwithstanding its limited dissemination.

Factor #4: The likely effect of publication on C: publication of the information is likely to be distressing, hurtful and unwelcome, and perhaps even to be feared, by C – but information does not have a private quality, merely for these reasons. The level of distress caused to C by the publication of the private information is relevant to damages assessment – but if the subject matter is likely to cause ‘even a phlegmatic character some embarrassment’ (as Nicol J put it in Ferdinand v MGN), then that supports a contention that it was private information.

Factor #5: How many know: some information will be so private that it is known only to C, whilst some will be semi-private (only known to a few people in C’s close circle); whereas some information may be quite commonly-known, even in the public domain. Where the information lies on this spectrum will be relevant in determining whether there is any reasonable expectation of privacy. This is discussed further under ‘Public domain’ below.

How the information came into D’s hands has been cited as being relevant to establishing a legitimate expectation of privacy; it has also been highly relevant to the balancing test under element #2, and hence, is considered as Factor #10 under that element.

Sportsmen, as an illustrative cadre: Applying the abovementioned five factors to recent sports privacy cases – in which a sportsperson alleged that he had some reasonable expectation of privacy – it is plain that not every factor will feature in every scenario, and that the factors must be balanced in the scales. Taking some contrasting cases:

In Ferdinand v MGN Ltd,\(^{166}\) where information was published about an affair between former English football captain, Rio Ferdinand, C, and Ms Carla Storey, held: there was a legitimate expectation of privacy about information and a photograph taken of them both in a hotel bedroom (which ‘show[ed] nothing remarkable’, according to the court). In his autobiography, C had admitted to previous affairs, including whilst in a relationship with his longterm female partner (now wife), and had not denied reports of affairs and wild partying, nor taken any action in relation to them. The past disclosures and admissions did not show C and Ms Storey as a couple. Whilst C and Ms Storey may have been seen in clubs at the same time, they were not open about being a couple; and knowledge of their relationship was confined to their circle of family and friends. Notably, C’s position as English football captain ‘has no effect on the question as to whether in principle the information which was published about him was entitled to protection.’

In Terry (LNS) v Persons Unknown,\(^{167}\) John Terry, C, then current English football captain, complained about the threatened publication of details of his affair with the girlfriend of an England teammate. Held: there was no legitimate expectation of privacy. There was no personal distress referred to by C; C ‘appears to have a very robust personality, as one might expect of a leading professional sportsman’; the concern of C for the private lives of others connected with the affair did not appear to be altruistic; and the assembling of the evidence for the case was left to C’s business partners and not to his solicitors, because the real basis for the concern of C was likely to be the impact of any adverse publicity upon the business of earning sponsorship and similar income. For these reasons, the information was not to be considered private. In Spelman v Express Newspapers,\(^{168}\) C was 17 years old, and the son of a Tory MP. He played rugby for England in the U16 and for the Harlequins Rugby Football Club. He sued for injunctive relief to stop publication of certain private information (the nature of which was redacted in the judgment) about his conduct as an athlete. (This was subsequently revealed, in media sources, to be the taking of steroids.) Held: there was no legitimate expectation of privacy. C had the status of an international player; the information regarded C’s health; and those engaged in sport at the national and international level are subject to health matters which have to be monitored, no matter what their age. This litigation was not nakedly political, to ‘get at’ C’s mother, the politician; it was being brought in her name as C’s litigation friend, and C would only have started the action with parental advice.

\(^{166}\) [2011] EWHC 2454 (QB) [59].  
\(^{167}\) [2010] EWHC 119 (QB) [95], [127].  
\(^{168}\) [2012] EWHC 355 (QB) [100].
However, it is very plain that D's merely taking a photo of C in a street or other public place cannot constitute an infringement of privacy, for there can be no legitimate expectation of privacy in that circumstance. In *Campbell v MGN Ltd*,¹⁶⁹ Baroness Hale remarked that, ‘[w]e have not so far held that the mere fact of covert photography is sufficient to make the information contained in the photograph confidential. The activity photographed must be private.’ A photograph of Miss Campbell, or of Mr Peck, or of the child of JK Rowling, in the public street, was entirely different, for those photographs contained private information about those particular subjects. Hence, on the basis of the authorities to date, photographs of the unsuspecting public which are then inserted in promotional pamphlets, brochures and the like, simply could not base an action for infringement of privacy, no matter how strongly the photographed subject disliked the publication of himself in the photograph.

**How a legitimate expectation to privacy can be lost**

There are a number of ways in which any legitimate or reasonable expectation of privacy can be lost:

**C's own conduct**

The behaviour of C can cause the information to lose any private nature which it may otherwise have possessed.

Of course, the very fact that C is suing for privacy infringement means that C, at least, considers that he has not consented to the dissemination of the information or otherwise acted to deny the information its quality of privacy. However, the court will assess the matter objectively. The conduct of C – or C’s parent, if C is a child – can destroy any reasonable expectation of privacy, as it did in the following cases:

In *AAA v Associated Newspapers Ltd*,¹⁷⁰ facts previously, the information about C’s paternity had lost its private nature. At a country house party, C’s mother was happy to talk to strangers about the paternity of her child (‘even with people she had not previously met, she was not averse to hinting at or permitting speculation as to the identity of the father of her child’); and she was willing to do an interview for a magazine in which speculation was raised as to the identity of C’s father. In *Trimingham v Associated Newspapers Ltd*,¹⁷¹ facts previously, none of the information about C’s bisexuality and sexual relationships was private, because her own behaviour had caused her to lose any legitimate expectation of privacy. C was living with her civil partner at the time when, in June 2010, it was revealed that she was in a sexual relationship with Mr Huhne, a prominent politician who had conducted the election campaign the previous month on the basis of ‘good family values’, and who had said earlier, in 2007, ‘Cheat on my wife? Nothing like that will ever emerge’ – the court held that ‘the revelation of the affair to the public at large was inevitable’. Further, C had relationships with other men which she had willingly disclosed to others; and as a journalist herself, she had disclosed information about other people for newspaper publication, and so ought not reasonably be distressed when such information was published about herself. In *Hutcheson (formerly known as*

KGM v NGN Ltd, facts previously, it was held to be a borderline case, but there was a 'very public dispute' between TV chef Gordon Ramsay and son-in-law C, with various 'open letters' in the media from one to the other, etc: 'those who choose to conduct their quarrels in such a fashion take the risk that they may not be able to insist thereafter on clear boundary lines between what is public and what is private – regardless of whether they were, hitherto, only public personalities in a very limited sense.'

The role and profile of another party to the incidents

§PR.13 C’s legitimate expectation of privacy about information involving himself, and another party, may be lost, if the other party has a very high public profile, or is in public office, or has conducted himself in circumstances whereby the information concerning C could not be regarded as private.

In Trimingham v Associated Newspapers Ltd facts previously, information about C’s sexuality, etc, was not private. C had chosen to become involved with Mr Huhne, a well-known politician – both professionally as his press agent, and personally as his secret mistress – and in circumstances where he campaigned to his electorate about how much he valued his family. Any behaviour involving C, which showed hypocrisy on Mr Huhne’s part, reduced C’s legitimate expectation of privacy.

In the public domain

§PR.14 Information can lose its private quality by being put in the public domain – whether by C or by another party. Obversely, information in the public domain (but confined to a limited group) may still be private.

Public domain is a defence, wherever there has been a sufficient prior publication of the information, so that there is ‘no longer anything by way of privacy left to be protected’ (per Rock’nroll v NGN Ltd). ‘Public domain’ does not mean that the information was available to the whole world – all that is required is that the information was made available to a ‘significant section of the public in the past’ (per Spelman v Express Newspapers). In that regard, being ‘in the public domain’ does not deprive information of protection under the tort of misuse of private information to the same extent as that would deprive information of its confidentiality in an action for breach of confidence (where the test is: ‘so generally accessible that, in all the circumstances, it cannot be regarded as confidential’, per AG v Guardian Newspapers (No 2)).

Whether information is in (or is about to enter) the public domain is a matter to which the court must have regard under the tort, by virtue of s 12(4)(a)(i) of the Human Rights Act 1998:

[the court must] have particular regard to the importance of the Convention right to freedom of expression and … to the extent to which (i) the material has, or is about to, become available to the public.

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The most common means by which the information about C may be already in the public domain include:

- C put it out there himself, by his words/conduct/written materials (AAA, Trimingham, and Hutcheson, all considered previously);
- publishers, other than D, also published the relevant information widely:

In *AAA v Associated Newspapers Ltd*, any legitimate expectation of privacy had been lost, partly because numerous articles in the press, following the birth of the child, indicated who the child’s father was, and some of these emanated from the ex-boyfriend of C’s mother. Also, while D itself published a series of articles about C’s paternity over a period of 7 months, other media organisations published articles on the same story in that period, meaning that the information was in the public domain within a very short time.

- the information was already a matter of public record – as it was in both of the following cases, where no legitimate expectation of privacy was established:

In *Trimingham v Associated Newspapers Ltd*, the fact that C had married a man in 1999, and then entered into a civil partnership with another woman in 2007, were both public events and matters of public record, and hence, C’s bi-sexuality was already in the public domain, and did not constitute private information. In *Ewing v Times Newspapers Ltd*, Mr Ewing, C, complained about an article published by D’s newspaper, entitled ‘Heritage Fakers Hold Builders to Ransom’, alleging that, despite claiming to campaign to protect Britain’s architectural heritage, C headed a non-profit group, Euston Trust, which had accepted a secret payment from builders to drop objections to a development in a seaside town in England. The Trust was described as being run by C, who was said to have studied planning law while serving a prison sentence for theft and forgery in the 1980s. No legitimate expectation of privacy occurred. The information referred primarily to C’s public activities in connection with the Euston Trust. C’s convictions were a matter of public record, including reference in prior judgments.

However, information in the public domain may still retain its private character, in some circumstances, which can render this first element of the tort difficult to defeat for D (and unpredictable):

- even if information about C has been published on ‘obscure websites’ which were not widely available (but in the public domain in some respect), the information can still be sufficiently private:

In *WXY v Gewantar*, facts previously, the information about C’s sexual relationship with another person was sufficiently private, even though that relationship was reported on some ‘obscure websites’. Also, given that D intended to release the information about that relationship ‘piece by piece’, that showed that the information was not in the public domain or readily accessible.

- even if the information was previously published or known to a limited audience (e.g., to C’s circle of family, friends or associates), it may still be ‘private’. As explained by Lord Phillips CJ in *Douglas v Hello! (No 3)*: ‘information will be confidential if it is available to one person (or a
group of people) and not generally available to others, provided that the person (or group) who possesses the information *does not intend that it should be available to others*, while Lord Nicholls stated, on appeal in the same case, that ‘privacy can be invaded by further publication of information or photographs already disclosed to the public’. In *Douglas*, of course, the 360 guests who attended the wedding reception of the Hollywood couple were fully aware of the information contained in the photographs which were published of the event, and yet, it still retained confidentiality. The same principle has applied in the context of misuse of private information too, as the following (and previously-considered) cases demonstrated:

In *Mosley v NGN Ltd*, other participants (i.e., prostitutes, dominatrices) involved in the several orgies/parties in which Mr Mosley, C, had participated obviously knew of the private information regarding the activities carried out there, and which was conveyed in the articles and photographs. In *Prince of Wales v Associated Newspapers Ltd*, even though Prince Charles’s journals were seen by his staff, and sent to 50–75 close friends, in envelopes marked, ‘Private and Confidential’, that information retained its private nature. In *ETK v NGN Ltd*, news of C’s affair with a work colleague, X, was known throughout the group of people with whom C and X were working in the entertainment industry, but was still private. In *Rocknroll v NGN Ltd*, where explicit photographs were taken of C by D at a private party, D posted them to his Facebook page and relaxed the privacy settings, so that they could be viewed by about 1,500 friends, but not by the general public. D then removed them from his Facebook page, and they were thereafter difficult to find by internet search engines. C still had a legitimate expectation of privacy in relation to the photos, given where and by whom they were taken. Hence, the fact that a limited (or even a wider) audience knows of the ‘private information’ may not preclude the existence of the tort – but it may well deprive C from obtaining injunctive relief to stop further dissemination (as occurred in *Mosley* itself, discussed later under ‘Remedies’).

- merely because documents or email correspondence are stored on a computer server which can be physically accessed by others (e.g., an employer or work colleague) does not deprive C of the reasonable expectation of privacy in the contents of those documents. Similarly, just because D has the ‘means of access’ to get into C’s room or his desk does not mean that C has lost any reasonable expectation of privacy to information which is kept in that room or in that desk: ‘[c]onfidentiality is not dependent upon locks and keys or their electronic equivalents’ (*Tchenguiz v Imerman*).

In *Tchenguiz v Imerman*, facts previously, C had a legitimate expectation of privacy about documents stored on a server. C was a bare licensee of rooms in the office, and may have shared those rooms with D, but that did not mean that D was entitled to look at C’s personal or business papers, just because those papers were kept there.

**ELEMENT #2: THE ‘ULTIMATE BALANCING TEST’ FAVOURS THE CLAIMANT**

 C’s interests as the owner of private information protected by Art 8 of the ECHR must be adjudged to prevail over (rather than yield to) the right of freedom of expression conferred on D.
as publisher, and the right of the general public to receive information, protected by Art 10, once the court has conducted the ‘ultimate balancing test’ between the two rights.

Wherever C had a reasonable or legitimate expectation of privacy in respect of information, then (as different Courts of Appeal made clear in Murray v Express Newspapers plc\textsuperscript{188} and in McKennitt v Ash\textsuperscript{189}) the second stage of the enquiry must be whether or not D, the publisher, has a prevailing interest in freedom of expression under Art 10, or whether C’s right to protection of his private information under Art 8 should prevail. Neither right is absolute – Arts 8(2) and 10(2) make that clear. An infringement of either will not be made out, if the interference was prescribed by law, for a legitimate aim, and was necessary in a democratic society.

Where both rights are ‘in play’ – as is necessary under the tort of misuse of private information – the court has to conduct a balancing exercise to decide which right should prevail, as the House of Lords reiterated in Campbell v MGN Ltd\textsuperscript{190} The balancing exercise, in the case of a privacy infringement claim, requires a reminder of the four principles prescribed by Lord Steyn in Re S (A Child) (Identification: Restrictions on Publication):

- neither Art 8 nor Art 10 has precedence over the other;
- where the values under the two Articles are in conflict, an ‘intense focus’ on the comparative importance of the specific rights being claimed in the individual case is necessary;
- the justification for interfering with or restricting each right must be taken into account;
- the proportionality test – or ‘ultimate balancing test’ – must be applied.\textsuperscript{191}

The first point is important – there can be no automatic priority given to one Article over the other. As noted in X and Y v Persons Unknown, ‘[i]t is no longer fashionable, as it was for a short time a few years ago, to describe Article 10 as a “trump card”, as had been stated in earlier cases such as Venables v MGN Ltd\textsuperscript{193} and Douglas v Hello! Ltd. That view is now otiose.

An appellate court will be very slow to overturn the trial judge’s conclusion on this balancing exercise, given the intense focus that the exercise requires, and given that the trial judge saw the witnesses and could make an assessment of them – as noted, and evident, in AAA v Associated Newspapers Ltd.\textsuperscript{195}

When assessing whether D’s right to freedom of expression under Art 10 should prevail over C’s legitimate expectation as to privacy under Art 8, the court will have regard to a number of factors which have emerged from the case law to date (e.g., from Spelman, Murray, Trimingham, and AAA, all of which are referred to under the discussion of the factors below). It is also necessary to have regard to the matters which are statutorily-expressed to be relevant under s 12 of the HRA 1998, because wherever a court is granting (especially) injunctive relief that will affect D’s Convention right to freedom of expression, and of any third parties who are served with the injunction, that section applies. To summarise these various factors (hereafter called, ‘the balancing factors’):

\textsuperscript{\textbullet} [2008] 3 WLR 1360 (CA) [24], [27], [35], [40] (Sir Anthony Clarke MR).
\textsuperscript{\textbullet} [2008] QB 73 (CA) [11].
\textsuperscript{\textbullet} [2004] 2 AC 457 (HL) [20]–[21]. Also: Murray v Express Newspapers plc [2009] Ch 481, [24], [27], [35], [40].
\textsuperscript{\textbullet} [2004] UKHL 47, [2005] 1 AC 593 (HL) [17] (Lord Steyn).
\textsuperscript{\textbullet} [2006] EWHC 2783 (QB), [2007] EMLR 10 (QB) [22] (Eady J).
\textsuperscript{\textbullet} [2001] 1 All ER 908, [2001] EMLR 10 (QB) [36]–[41] (Dame Elizabeth Butler-Sloss P).
\textsuperscript{\textbullet} [2001] QB 967 (CA) [137].
\textsuperscript{\textbullet} [2013] EWCA Civ 554, [9], [55].
The ‘balancing factors’ in a privacy claim

Does the private information about C:

1. entail any breach of a provision of the Editors’ Code by D?
2. concern C, a child?
3. concern norms of behaviour, about which there may be justifiable and legitimate pluralism of opinion?
4. concern C’s capacity as a public figure, or as the accused in a criminal proceeding?
5. impact adversely upon persons closely connected to C?
6. fall within the ‘journalistic’ and ‘presentational’ freedoms enjoyed by D?
7. concern matters of public interest which deserve a public airing?
8. be published, ‘on the back of’ a monetary motive on D’s part?
9. arise from circumstances in which there has been undesirable or disingenuous conduct on C’s part?
10. come into D’s possession via wrongful or reprehensible means?

Hence, a wide-ranging enquiry is required under this second element of the tort of misuse of private information. Indeed, it may be considered that some of these factors may be somewhat relevant when determining whether there was a reasonable expectation of privacy, under element #1 – they can overlap with each other (per Weller v Associated Newspapers Ltd 196). Dealing with each factor in turn, and sourced to relevant authorities:

Factor #1: Any breach of the Editors’ Code

§PR.16 In circumstances where D has committed a breach of the relevant Editors’ Code of Practice, C’s legitimate expectation of privacy is likely to (but will not necessarily) prevail over D’s right to freedom of expression.

Where the court is concerned with issues of freedom of expression, then it will pay careful attention to any breach of the rules contained in the relevant Editors’ Code of Practice (or modern equivalent), according to Brooke LJ in Douglas v Hello! Ltd. 197

Indeed, s 12(4)(b) of the Human Rights Act 1998 obligates the court to ‘have particular regard to the importance of Convention right to freedom of expression and … any relevant privacy code.’ The Press Complaints Commission’s (PCC’s) 2012 Editor’s Code (which is now contained in IPSO’s 2015 Code) is a ‘privacy code’ for the purposes of s 12(4)(b), according to Spelman v Express Newspapers Ltd. 198

Publishing photographs of C which were taken in a private place without C’s consent will constitute a breach of the Code – that is ‘unacceptable’ conduct (per cl 3(iii), reproduced previously in the chapter 199).

Factor #2: Whether C is a child

§PR.17 Where private information is about C, a child, then that child’s legitimate expectation of privacy under Art 8 is likely to (but will not necessarily) prevail over D’s right to freedom of expression in publishing private information about that child.

198 [2012] EWHC 355 (QB) [35], where that point was conceded by D. 199 Cross cite p 336.
A child may be entitled to protection from publicity, via the tort of misuse of private information, where an adult would not be. Nevertheless, as demonstrated in *AAA v Associated Newspapers Ltd*, the child’s ‘best interests are not paramount, in a sense that they must always prevail over all other concerns [including D’s freedom of expression], however powerful.’ Davies J further remarked that a court should ‘attach considerable weight’ to the child (C’s) interests, but that those interests were not so powerful as to trump, of itself, the competing interests involved in any balancing exercise.

Insofar as the publication of private information about children is concerned, the *Editors’ Code of Practice* (2015) provides that:

6. Children
   
   (i) Young people should be free to complete their time at school without unnecessary intrusion.
   
   (ii) A child under 16 must not be interviewed or photographed on issues involving their own or another child’s welfare unless a custodial parent or similarly responsible adult consents.
   
   (iii) Pupils must not be approached or photographed at school without the permission of the school authorities.
   
   (iv) Minors must not be paid for material involving children’s welfare, nor parents or guardians for material about their children or wards, unless it is clearly in the child’s interest.
   
   (v) Editors must not use the fame, notoriety or position of a parent or guardian as sole justification for publishing details of a child’s private life ...

   The public interest

5. In cases involving children under 16, editors must demonstrate an exceptional public interest to over-ride the normally paramount interest of the child.

In combination with the provision about photographs in cl 3(iii) of the *Code*, these provisions mean that where a child has been photographed solely because of who his parent is, without his/her consent, then Art 10’s right is likely to be subservient to C’s right to privacy. This tendency to favour C’s Art 8 rights has been apparent, even where the conduct of the parent was under scrutiny and of particular public interest.

In *Murray v Express Newspapers*, facts previously, held: the balancing exercise was in favour of C’s privacy. The photograph of David Murray would not have been taken, had his mother not been JK Rowling. It was also apparent that the parents of David took numerous steps to secure his privacy. In *AAA v Associated Newspapers Ltd*, facts previously, held: the balancing exercise was also in favour of C’s privacy in relation to the publication of the photo (and C obtained £15,000 damages for that). D’s argument that it was in the public interest to publish the photo to enable the public to judge for themselves whether or not there was any physical resemblance between C and her supposed father was not accepted. The articles provided sufficient information, and the photograph added nothing to the matters being reported. However, the balancing exercise was in favour of the publication of the other information about C, given that: C, the child, was too young to be distressed about what was being written about her; this was another alleged example of the

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200 [2012] EWHC 2103 (QB) [104] (emphasis added), and aff’d: [2013] EWCA Civ 554, [10]–[20].
201 *ibid*, [114].
202 [2008] EWCA Civ 446.

politician’s recklessness in relation to an extramarital affair which had resulted in a woman becoming pregnant, and in this case, having a child; reporting that C, the child, looked like the politician was relevant; and there was a public interest in an allegation of cronyism or nepotism. The child’s reasonable expectation of privacy was outweighed by the public interest in the alleged father and his fitness for public office.

It is also apparent that older children (around 16–17 years old) are not gauged to be in the same vulnerable position as children of more tender years.

In Spelman v Express Newspapers, facts previously, held: the alleged private information related to C’s sporting achievements and aspirations. Given that he was 17 at the time of the litigation, the court held that C’s argument that what the newspaper was proposing to do would be in breach of the PCC Code was unlikely to succeed. Moreover, D had good prospects of establishing that it would be in the public interest to publish the private information. An interim injunction would not be continued.

In Spelman, the court distinguished that child of 17, ‘with a personality and public profile of his own’, from an infant in a pushchair – clearly, the Art 8 rights of the latter type of child C will usually prevail over D’s freedom of expression.

Moreover, and somewhat paradoxically, if children are simply too young to appreciate the significance of private information about them or of the consequences of its publication, then that has counted in favour of D’s Art 10 right to freedom of expression; and justifies publication of the said information, particularly if there is a public interest in publishing it. That outcome was evident in AAA (except for the photo, discussed above), and was reiterated in Ferdinand v MGN Ltd (Rio Ferdinand’s two children were aged 1 and 3 at the time of D’s publication about their father’s affair). Such an unsympathetic view appears to fly in the face of the ethos of Cl 6 of the Code, but has key judicial support.

Factor #3: So-called ‘pluralism of opinion’

Where the publication of information about C promotes pluralism of opinion and public discussion, then D’s right to freedom of expression under Art 10 is likely to (but will not necessarily) prevail over C’s legitimate expectation of privacy under Art 8.

This is surely one of the more nebulous factors relevant to the balancing exercise. In the context of the tort of misuse of private information, ‘pluralism of opinion’ means that there may be differing public opinion as to whether the behaviour and activities of C, which D has disclosed or published, are discreditable and to be discouraged, or whether they are acceptable, at least as social norms of behaviour have changed over time. Information about C in which there is legitimate pluralism of opinion can be considered worthy of being discussed and/or criticised, and hence, its dissemination by D is likely to be upheld under Art 10. The reason: pluralism ‘has long been recognised by the Strasbourg Court as one of the essential ingredients of a democracy’ (per Ferdinand v MGN Ltd).

In Hutcheson (formerly Known as KGM) v NGN Ltd, the point was made that private information does not have to concern unlawful conduct on C’s part, in order to be the proper subject

207 ibid, [64], citing: Handyside v UK (1979–80) 1 EHRR 737, [49].
of discussion in public. For example, footballers’ alleged affairs are not unlawful, but the fact of that behaviour, and the high-profile responsible positions which the footballers may occupy (e.g., the English captaincy) may render the subject an appropriate one for public opinion. In Terry (LNS) v Persons Unknown, where D sought to publish information about John Terry’s alleged extra-martial affair, it was said to be something about which, ‘in a plural society, there will be some who would suggest that [such behaviour] ought to be discouraged’. Tugendhat J remarked that, whilst it is not for the court to pass moral judgments, the freedom to criticise (within legal limits) the conduct of other members of society as being harmful or wrong was an important freedom that should be preserved wherever possible. In Ferdinand, another publication-of-a-footballer’s-alleged-affair case, Nicol J acknowledged that, ‘in a plural society, there will be a range of views as to what matters or is of significance in particular in terms of a person’s suitability for a high profile position’.

It follows that D may be justified (under Art 10) in publishing information about unlawful conduct, as well as perfectly lawful but (to some) morally blameworthy conduct, which C may have engaged in, where that encourages public debate about appropriate norms of behaviour. The factor appears to have a fairly ephemeral and indistinct quality to it (on what topic is there no pluralism of opinion in a democratic society?). Moreover, as the cases above suggest, its relevance is not restricted to scenarios in which C is in (or associated with) political or business life.

Factor #4: Where C is a public figure (of whatever calling)

D’s right to freedom of expression is more likely to (but will not necessarily) prevail where C is a public figure; or where C is the accused in a criminal proceeding. The type of persona of C is highly relevant in the balancing exercise.

Public figures. Public figures have been judicially described as ‘those who exercise public or official functions’ (per Spelman v Express Newspapers). That court also cited the definition in the Resolution of the Parliamentary Assembly of the Council of Europe: ‘public figures are persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain’. Such figures are treated somewhat less sympathetically in the tort of misuse of private information. Essentially, their scope for complaint about intrusion is less, and they have to expect their conduct to be closely scrutinised – albeit that they may still have some private information which is entitled to protection.

Strasbourg jurisprudence has emphasised that Art 10’s right to freedom of expression is to be given more weight, when the alleged intrusion concerns this type of claimant – at least where information about such persons contributes to a ‘debate of general interest’ (von Hannover v Germany (No 2), re a claim by Princess Caroline of Monaco in relation to the publication of photographs in various German magazines which were not pertinent to her performance of

208 [2011] EWCA Civ 808, [29].
211 [2011] EWHC 2454 (QB) [64].
212 [2012] ECHR 228 (ECtHR), [2011] ECHR 16, [33], [53], [76], [90], and cited in Ferdinand [2011] EWHC 2454 (QB) [62].
official duties – given that the Princess was a well-known person but not a ‘public figure in the sense of being a politician, etc, the photographs were merely to satisfy readers’ curiosity, and not to contribute to a debate of general interest). This sentiment has been endorsed in domestic case law too (in, e.g., Spelman, Ferdinan, and ETK v NGN Ltd). So-called public figures can include:

i. politicians, and those holding public office – ‘[t]he limits of permissible criticism are wider as regards politicians than for a private individual’ (per Saaristo v Finland and evident in Trimingham and AAA);

ii. sporting stars, artists, entertainers – ‘society’s attitude towards a sports star’ is an issue of general interest, justifying the exercise of D’s freedom of expression (per Axel Springer AG v Germany and illustrated by reference to English football captains in Terry and Ferdinand). This factor can be very relevant to child claimants too, for as pointed out in Spelman, young children can frequently appear in the fields of sports and the performing arts (‘[s]ome sports are dominated by competitors under 18 …[and] children can be world-class performing artists, and performing artists often are children’). Such children cannot have the same reasonable expectation of privacy as other children do;

iii. well-known business figures – an ‘exceptionally forceful business man’, or a CEO of a major public company, can fall within the concept of a public figure (per Frederick Goodwin v NGN Ltd and Lord Browne of Madingley v Associated Newspapers Ltd (Rev 1), respectively).

The accused in criminal proceedings. D may be able to prove a public interest in naming C, in a publication, especially where the report of criminal proceedings is at issue, unless C’s name is suppressed by court order. Otherwise, as Lord Steyn said in Re S (A Child), ‘from a newspaper’s point of view, a report of a sensational trial without revealing the identity of [C] would be a very much disembodied trial’.

In In re British Broadcasting Corp there was a report about criminal proceedings by D, relating to C’s activities. Held: the balancing exercise was in favour of publication of C’s identity. It was not realistic for BBC to report the trial, without mentioning C’s name, and it should not be required to restrict the scope of their programme in this way. The BBC was entitled to disclose C’s identity, so as to convey the message that they intended, with maximum impact on the programme’s audience.

Factor #5: The effect of publication on people connected to C

Where both C’s legitimate expectations of privacy, as well as those of C’s family and other ‘interested persons’, are affected by D’s publication of private information about C, then C’s legitimate expectation of privacy is likely to (but will not necessarily) prevail over D’s right to freedom of expression.

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218 [ECtHR, 12 Oct 2010] [59], as cited in: AAA v Associated Newspapers Ltd [2012] EWHC 2103 (QB) [85].
220 [2012] EWHC 355 (QB) [49]–[50], citing Axel, ibid, [90].
223 [2005] 1 AC 593 (HL) [34].
Under the balancing exercise, the court must balance D’s right to freedom of expression against the rights of other individuals concerned in the matter (per Trimingham v Associated Newspapers Ltd). As the Court of Appeal remarked in ETK v NGN Ltd, where the benefits achieved from D’s freedom of speech are to be ‘wholly outweighed by the harm that would be done through the interference with the rights to privacy of all those affected, especially where the rights of the children are in play’, then the balancing test will come down in C’s favour.

In ETK, facts previously, C was a ‘male working in the entertainment industry’, who had an affair with a woman in the same place of employment, X. C’s wife discovered the affair, and confronted C, and he agreed to end it, and X’s employment was then terminated. All this was disclosed to the News of the World, which proposed to publish it, against the wishes of C, his wife, and X. Held: the balancing exercise was in C’s favour, because of the impact that disclosure would have on C’s wife and two teenage children. In particular, the harmful effect on the children was important, both as not to undermine the family as a whole, and to protect them from the ‘cruel place’ of a playground, ‘where the bullies feed on personal discomfort and embarrassment’. In Rocknroll v NGN Ltd, facts previously, held: the balancing exercise was in C’s favour. There was a real risk that the publication of partially-naked photographs of C would potentially cause great embarrassment to the children of Kate Winslet, and would expose them to teasing and ridicule, and could be damaging to the caring relationship which C, as their new stepfather, was trying to establish with them. It was a key factor in favour of C’s Art 8 rights prevailing over D’s freedom of expression.

Notably, this factor is unlikely to feature in the ‘balancing exercise’, without any witness statements or other evidence being available from the other parties said to be affected by the publication. The absence of any justifying statements from those supposedly affected by the publication as to why they would wish for privacy of the information, means that the impact on other persons’ Art 8 rights cannot be taken into account in the balancing exercise, and the factor will be legally irrelevant.

As Tugendhat J noted in Terry, ‘if practicable, they should speak for themselves ... If it is not practicable or just that the other person or anyone else should give evidence personally, the court should know why.’ There may, indeed, be good reasons as to why these other interested parties may not have ‘spoken for themselves’, but none could be shown in the following collection of cases (considered previously), in which the balancing test was found in D’s favour:

In Ferdinand v MGN Ltd, footballer Rio Ferdinand alleged that he had a legitimate expectation of privacy in relation to information about his affair with Ms Carla Storey, and that the publication of an article about the affair had had a detrimental impact upon his wife, Ms Ellison. No weight was given to that impact. There was no witness statement or other evidence from Ms Ellison, and ‘that is material’.

In Hutcheson v NGN Ltd (re Gordon Ramsey’s father-in-law’s ‘second family’), there was no evidence, from any family members (first or second) in support of the claim for privacy infringement. There was ‘no explanation before this Court as to why they have not done so, save for the valiant submission [by C] that it may have been attributable to pressure of time, given the speed with which this application [for injunctive relief] came before Eady J. On any view, if timescale was the problem, an application could have been made subsequently for such evidence to be introduced.

In Terry (LNS) v Persons Unknown, John Terry tried to invoke the Art 8 rights of the other party to his

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228 [2011] EWHC 2454 (QB) [50], [60].
229 [2011] EWCA Civ 808, [47(ii)].
affair and to others connected with the affair. However, there was no explanation for why evidence should not have been given by these persons (and the other party to the affair could have provided a witness statement but had not done so). Also, C had no financial constraints to hinder obtaining witness statements for the court.230

Of course, the reason for direct evidence from third parties supposedly affected by the publication of private information about C was reiterated in Terry, on the basis that C will frequently lack the necessary independence to give that evidence, and will ‘not [be] well-placed to represent their interests’.231

Factor #6: The relevance of ‘journalistic freedoms’

§PR.21 D’s right to freedom of expression under Art 10 includes its right to make ‘journalistic’, ‘editorial’, and ‘presentational’ decisions in its publications. Matters which fall within this realm of decision-making are likely to favour D in the balancing exercise.

The European Court of Human Rights (per, e.g., Jersild v Denmark,232 and Fressoz and Roire v France233) has emphasised that Art 10’s right to ‘freedom of expression’ means that it is for the press to exercise its judgment in the presentation of journalistic material, and it is not for a court to substitute itself as a newspaper editor or journalist. Furthermore, the freedom of expression protected by Art 10 covers, not only the substance of the information, but also the form in which it is conveyed and presented.

Domestic case law under the tort of misuse of private information has endorsed these propositions. In Rocknroll v NGN Ltd, Briggs J remarked that, ‘a margin of appreciation is to be allowed to journalists in deciding where to draw the line’,234 while in AAA v Associated Newspapers Ltd, the trial judge emphasised that, when faced with a news article which contains private information about C, the correct question ‘is whether the decision to include it was reasonable, or within a proper journalistic margin’.235 In Trimingham too, Tugendhat J noted that courts must be careful not to ‘express opinions on matters which are not relevant to a legal issue. Matters of style, and to a large extent what is or is not relevant, are matters within a journalist’s or editor’s field of independence, upon which the court should express no view … All the court can do is to find whether or not it is necessary and proportionate to sanction or prohibit a particular publication’, under Art 8(2) or Art 10(2).236

In fact, these ‘journalistic margins’ have been construed in such a way that gives newspaper publishers considerable scope to argue that the balancing exercise should be exercised in their favour, when sued for the tort of misuse of private information.

i. Information surrounding the ‘core information’. Newspapers are entitled to argue that there is a core piece of information that should legitimately be published in the public interest – and that, surrounding that core piece of published material is other material (which may in fact include private information about C). If that argument is accepted, then the balancing exercise will favour D’s publication of the private information.

231 ibid, [67].  
232 (1995) 19 EHRR 1 (ECtHR) [31].  
233 (2001) 31 EHRR 2 (ECtHR) [54]–[56].  
234 [2013] EWHC 24 (Ch) [32].  
235 [2012] EWHC 2103 (QB) [103], aff’d: [2013] EWCA Civ 554.  
236 [2012] EWHC 1296 (QB) [81]–[85], [340].
In *Trimingham v Associated Newspapers Ltd*, facts previously, C complained that some articles which described her affair with Mr Huhne quoted statements which C had made to some friends, in which she had described her sexual relations with Mr Huhne in glowing terms. Held: these statements could not be protected by Art 8. To include such statements, attributable to C's friends, in the article was within the range of editorial judgment, and was upheld under Art 10.

ii. A newspaper’s commercial imperative. Newspaper editors are entitled to capture the attention of the reader, given the ‘commercial imperative’ to pique the readers’ interests and to sell newspapers. The freedom for journalists to write pieces in such a way that public interest matters will be engaging to read (and pay for) is a legitimate factor to take into account, when assessing D’s overall right to freedom of expression under Art 10. In *Hutcheson v NGN Ltd*, it was pointed out that developments in privacy law may give rise to ‘real commercial concerns’ amongst the media industry – and the court should take into account the ‘the public interest in having a thriving and vigorous newspaper industry, representing all legitimate opinions’. This is a very pro-D point of view, which has the potential to skew the balancing exercise in a newspaper’s favour.

iii. Photographs: adding something or nothing? Newspapers are entitled to use photographs, accompanying the text, to highlight and reinforce the story being conveyed, as part of the journalistic margins – but if an intrusive photograph adds nothing to the text, then the balancing exercise will favour C, as it did in these cases:

In *AAA v Associated Newspapers Ltd*, the balancing exercise did not favour the publication of the photograph of C, when less than one year old. ‘Even allowing for the margin of journalistic appreciation’, the court did not regard the publication of any of the photographs of C as being reasonable or in the public interest. The text in the articles provided sufficient information (and the balancing exercise favoured the publication of that text), and no more was required by way of photographs. In *Campbell v MGN Ltd*, the publication of a photo of model Naomi Campbell, C, leaving the Narcotics Anonymous meeting was an infringement of C’s privacy under Art 8, which prevailed over D’s right to freedom of expression, because the photo was both superfluous to the exposure of C’s alleged dishonesty about drugs, and potentially harmful to her recovery. Plus, it added nothing to the credibility of the story because the reader depended on the newspaper to explain what the picture showed (it simply looked like C standing on steps with another person).

On the other hand, if the photo does contribute further information (and verification), then D’s Art 10 rights will be favoured (as in the following case). Clearly, it is a case-sensitive assessment.

In *Ferdinand v MGN Ltd*, the photo of Rio Ferdinand, C, and Ms Clara Storey, in a hotel room, fully clothed and not engaging with each other (C was photographed speaking on a mobile phone) did add something to the story which D was conveying, and its publication was justifiable as part of D’s freedom of expression. It supported the story, because it showed C and Ms Storey together; it was dated and hence was not misleading of when the couple were together; it provided some corroboration for the story; and was a ‘legitimate ingredient’ of D’s argument as to why C had not reformed himself from his ‘wild ways’.

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239 [2004] 2 AC 457 (HL).
Factor #7: Matters of public interest
Public interest versus interest to the public

§PR.22 Where publication or disclosure of the private information about C was in the public interest, then D’s right to freedom of expression is likely to (but will not necessarily) prevail over C’s legitimate expectation of privacy. What is in the public interest (i.e., relevant to the balancing exercise) may not equate to what is of interest to the public (i.e., not relevant to the balancing exercise).

A court must have regard to the public interest in the balancing exercise, because s 12(4)(a)(ii) of the HRA 1998 obliges the court to ‘have particular regard to the importance of the Convention right to freedom of expression and … to the extent to which it is, or would be, in the public interest for the material to be published’. The extent to which the private information about C is of public interest or contributes to a debate of general interest, is very important – indeed, it has been called ‘the decisive factor’ in the balancing exercise (per Ferdinand v MGN Ltd).42

In Mosley v NGN Ltd42 facts previously, held: the balancing exercise favoured Max Mosley, C. The fact that photographs and accounts of Cs participation in clandestine S&M activities may have been of interest to the public did not mean that the reports were in the public interest. No reasonable person could think, from the published material, that it had anything to do with Nazism or concentration camps; rather, it was simply a ‘standard’ S&M prison scenario. The intrusion by clandestine filming was not justified by the Nazi theme, and there was no indication that the party/orgy was intended to re-enact Nazi behaviour, or that the participants mocked Holocaust victims. Hence, publication of the articles and the accompanying visual images were not a matter of public interest, nor relevant to C’s suitability for the responsibilities of his post as President of the FIA.

The court pointed out that what took place on 28 March in this case could be described as of interest to the public, regarding whether the events were depraved, adulterous and immoral (‘[e]veryone now, thanks to the News of the World, probably holds an opinion on that’); but even if the events were, ‘it by no means follows that they are matters of genuine public interest, as that is understood in the case law’.42

Moreover, the question of whether the publication was in the public interest is not governed by the reaction to its publication – whether a backlash or a deafening silence should greet the publication. In any event, the assessment about public interest must be made in advance of any reaction to the publication (per Ferdinand v MGN Ltd – where there was no adverse media comment in the wake of the publication of the article about Mr Ferdinand’s alleged affair, but nevertheless, the publication was still in the public interest, for reasons discussed below).

Indicators pointing to, or away from, public interest

§PR.23 False information about C cannot be in the public interest to publish.

As WXY v Gewanter45 held, ‘[i]t is uncontroversial that there can be no public interest in the publication of false information’. Hence, whether the publication of the private information is...

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241 [2011] EWHC 2454 (QB) [62], citing: Von Hannover v Germany (2005) 40 EHRR 1 (ECtHR) [76].
242 [2008] EWHC 1777 (QB). 243 ibid, [48], [52], [124]. 244 [2011] EWHC 2454 (QB) [95].
245 [2012] EWHC 496 (QB) [62], citing: Reynolds v Times Newspapers [2001] 2 AC 127 (HL) 238 (‘there is no human right to disseminate information that is not true. No public interest is served by publishing or communicating misinformation’: Lord Hobhouse), and [64] citing: Spycatcher (AG v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109 (HL) 283 (Lord Goff).
in the public interest depends upon both the credibility of the allegation, and the reliability of the source of information – both are material to the balancing exercise.

In *WXY v Gewanter*, facts previously, held: C’s legitimate expectation of privacy prevailed over D’s right to freedom of expression. There was no public interest in publishing the perjury and terrorism allegations, because neither was from an apparently reliable source. Rather, they were mere allegations of unproven acts. In any event, any public interest in publishing the perjury or the terrorism allegations did not require publication to the world at large – they could have been made to the police or security authorities. Injunctive relief was continued.

**SPR.24** On the one hand, it will likely be in the public interest to publish information about C which reveals criminal or unlawful misconduct, or anti-social behaviour. On the other hand, it is less likely to be in the public interest to publish information about C which reveals merely discreditable but personal information about C. Mid-spectrum, there will be borderline cases upon which the court will need to make a finely-balanced judgment as to public interest.

There is likely to be a public interest in D’s ‘revealing (say) criminal misconduct or antisocial behaviour’, or some seriously unlawful behaviour, by C (per *X and Y v Persons Unknown*). The tort of misuse of private information is unlikely to succeed in that scenario, because the balancing exercise will frequently be in favour of D’s freedom of expression. For example, in *Peck v UK*, the European Court of Human Rights reiterated that the State had a ‘strong interest in detecting and preventing crime’, and that CCTV footage played an important role in that regard. In that case, however, the balancing test was held in Mr Peck’s, C’s, favour, given that he was not committing any offence when photographed, and further, measures such as masking his image, or verifying his consent to disclosure, were not adopted by D when showing the footage.

Furthermore, the tort is more likely to succeed, and the balancing exercise held in favour of C, where the information relates to conduct by C which is voluntary, discreditable, and personal (e.g., sexual or financial) but not unlawful (or not seriously so).

In *Rocknroll v NGN Ltd*, facts previously, the photos of Edward Rocknroll, C, partially-naked and behaving immaturity, did not contribute to legitimate public debate about any subject. The conduct was foolish, but not unlawful, and the fact that C was married to a well-known actress did not render it of public interest.

However, that is not an immutable principle, as the ‘footballer affairs’ cases of *Terry (LNS) v Persons Unknown* and *Ferdinand v MGN Ltd* demonstrate – where both footballers failed to establish the tort, and the balancing exercise was in D’s favour, despite the personal nature of the information published about them. Indeed, for these types of cases which do not involve any unlawful behaviour, their outcome can be very difficult to predict. The legitimate discussion of information about C, which merely discredits C, has been a natural progression of the sort of wide public debate which the development of the print media has fostered – for as Tugendhat J stated in *Terry*:

> Both the law, and what are, and are not, acceptable standards of behaviour have changed very considerably over the years, particularly in the last half century or so. During that time these changes

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246 [2006] EWHC 2783 (QB) [25].
247 (2003) 36 EHRR 41, [79]–[84].
249 [2011] EWHC 2454 (QB) [63].
(or, as many people would say, this progress) has been achieved as a result of public discussion and criticism of those engaged in what were, at the time, lawful activities. The modern concept of public opinion emerged with the production of relatively cheap newspapers in the seventeenth century. Before that, there was no medium through which public debate could be conducted. It is as a result of public discussion and debate that public opinion develops.\textsuperscript{250}

A useful pointer to matters of public interest is contained in the IPSO Editors’ Code of Practice (2015):

<table>
<thead>
<tr>
<th>The public interest includes, but is not confined to:</th>
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<tr>
<td>(i) Detecting or exposing crime or serious impropriety.</td>
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<tr>
<td>(ii) Protecting public health and safety.</td>
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<tr>
<td>(iii) Preventing the public from being misled by an action or statement of an individual or organisation.</td>
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Furthermore, matters of public interest sufficient to justify D’s publication of private information, as evident from relevant case law, have included:

- matters pertaining to the fitness of persons for public office, especially the conduct of politicians:
  
  In \textit{AAA v Associated Newspapers Ltd},\textsuperscript{251} the balancing exercise favoured publication of textual information, but not the child’s photograph, as explained previously. The ‘core information’ that the politician had an adulterous affair with the mother, and that C was likely to be the politician’s child, ‘was a public interest matter which the electorate was entitled to know when considering his fitness for high public office.’ In \textit{Trimingham},\textsuperscript{252} the balancing exercise favoured publication about C’s affair with Mr Huhne and about C’s conduct. The developments in Mr Huhne’s personal life were relevant to his public life (given his electoral campaign and commitment to family values, etc).

- matters to do with the health, welfare and wellbeing of children:
  
  In \textit{Spelman v Express Newspapers}, the question of public interest was finely balanced (it was only an interim injunction application, and did not have to be decided in final). On the one hand, the D newspaper argued that there was a ‘clear public interest in this story being reported, highlighting as it does, the pressures on elite athletes from the very beginning of their sporting careers. The facts of [C’s] story act as a warning’ to others engaged in highly professional and potentially lucrative sporting careers at a young age, and to those who care for and guide these young athletes. On the other hand, C was still a child, and the price of publication of the information upon the welfare of C was likely to be very high.

- alleged wrongdoing, involving shareholders’ funds in companies being diverted by a director of the company, for personal use:
  
  In \textit{Hutcheson},\textsuperscript{253} facts previously, held: D’s right to freedom of expression about the existence of C’s ‘second family’ prevailed over C’s reasonable expectation of privacy (if any). There had been a very

\textsuperscript{250} Terry (LNS) v PersonsUnknown [2010] EWHC 119 (QB), [2010] EMLR 16, [104].
\textsuperscript{251} [2013] EWCA Civ 554, [55], affirming: [2012] EWHC 2103 (QB) [118].
\textsuperscript{252} [2012] EWHC 1296 (QB) [338(iii)].
\textsuperscript{253} [2011] EWCA Civ 808 (CA) [45]–[46].
public dispute between TV chef Gordon Ramsay and Mr Hutcheson, C, much ventilated in the media, and there was a grave risk that this dispute would be presented in the media in a distorted way, if C obtained the injunction sought, to prevent publication of so-called private information. Also, there was a public interest in D's newspaper being free to publish the fact of Mr Hutcheson's 'second family' to authenticate the allegation of diversion of corporate funds for private purposes, viz, to fund the second family, given that 'it stands to reason that supporting two families will cost more than supporting one'.

- where D was correcting a ‘false image’ of C, which had been put about by C, so as to expose hypocrisy, especially where C was a public figure/role model. To be in the public interest, however, D must show that it was acting in the public interest in correcting a false image – so this ‘public interest’ factor can only be ‘in play’ where C's image is indeed false, and if, therefore, there is something to be corrected. However, the cases show the difficulty in assessing whether public interest is indeed served by D's exposure:

  In *Campbell v MGN Ltd*, facts previously, the model Naomi Campbell, C, had publicly denied taking illegal drugs or being a drug addict. D published a photograph of C on the steps of a venue at which Narcotics Anonymous was holding a meeting. Held: C had a claim for breach of confidence. C accepted that her statements that she was not a drug addict had been untrue, and that D's newspaper had the right to correct the false image which she had projected. D was serving the public interest in exposing those untruths. However, ultimately, C's right to privacy prevailed over D's freedom of expression, because the article published by D unnecessarily included a photograph and details of C's attendance at Narcotics Anonymous, which was an added and important intrusion into her private life which went beyond what was justified for the purpose of correcting her misleading image.

  In *Ferdinand v MGN Ltd*, facts previously, held: D's freedom of expression prevailed over Rio Ferdinand's, C's, right to privacy about information as to his affair with Ms Carla Storey. In several interviews with newspapers, he had given the impression that he had put aside his past wild ways, matured, settled down with his longterm partner and his children, and was a committed family man. However, Ms Storey's account showed that this was not so, and there was a public interest in demonstrating (if it were to be the case) that the image cultivated by C was false, especially given C's role as English football captain. While some may consider that all that mattered was a captain's performance on the pitch, that was by no means a universal view. The football captain was a 'role model' in the view of many (including Lord Woolf in *A v B plc* and the CEO of the English FA, quoted in the judgment), and carried with it an expectation of high standards of behaviour, on and off the pitch.

- furthermore, as the court said in *Francome v MGN Ltd*, the press campaigns for reform, and is a platform for the view of minorities – and Art 10 protects that ‘invaluable function’.\(^{255}\)


\(^{255}\) [1984] 1 WLR 892 (CA) 898 (Sir John Donaldson MR).
of whether the publication was in the public interest? Or is D’s opinion completely irrelevant to the assessment?

In Terry (LNS) v Persons Unknown, Tugendhat J noted that this legal issue remains a real area of uncertainty in the law of misuse of private information (and in the action for breach of confidence too).

On the basis of several judicial statements to date, the fact that a journalist genuinely considers the private information to be in the public interest can never be conclusive of the issue. Note, e.g., the views of Nicol J in Ferdinand v MGN Ltd ('the subjective perception of a journalist cannot convert an issue into one of public interest if it is not') and Eady J in Mosley ('it is only the court’s decision which counts on the central issue of public interest'; a judge ‘could not possibly abdicate the responsibility for deciding issues of public interest and simply leave them to whatever decision the journalist happens to take’; and ‘I cannot believe that a journalist’s sincere view on public interest, however irrationally arrived at, should be a complete answer. A decision on public interest must be capable of being tested by objectively recognised criteria’).

However, there is also judicial support for the view that D’s reasonable belief must be relevant to the court’s assessment of what is in the public interest to publish. After all, there may be ‘plural views’ about an issue, and as a matter of policy, the journalist’s opinion is one of the views to which a court should properly have regard. This was the view of Nicol J in Ferdinand: ‘the Court’s objective assessment of whether there is a public interest in the publication must acknowledge that, in a plural society, there will be a range of views as to what matters or is of significance in particular in terms of a person’s suitability for a high profile position’.

Evidence that D carried out checks and enquiries consistent with ‘responsible journalism’, and formed its views carefully and not in a ‘casual or cavalier fashion’, is relevant to the reasonableness of D’s views, said Eady J in Mosley.

In Mosley v NGN Ltd, facts previously, held: there was no public interest in this publication of C’s private information, and there was no reasonable basis for believing so. D’s journalist and editor thought that there was ‘a Nazi element’ to the party/orgy in which C participated; but they both ‘needed to believe this, in order to forge the somewhat tenuous link between C and his father’s notorious activities more than half a century ago and, secondly, to construct an arguable public interest defence. The belief was not arrived at, however, by rational analysis of the material before them. Rather, it was a precipitate conclusion that was reached “in the round”. The journalist and editor ultimately conceded that there were no Nazi indicia.

§PR.26 Where the public interest is in favour of publication, that may still only permit publication by D to a small group of individuals.

In WXY v Gewanter, the court emphasised that where the private information merely speculates as to the possibility of some wrongdoing or misconduct on C’s part, then the only likely
justifiable disclosure, at least in the first instance, would be to the appropriate investigative authority (e.g., a regulator, the police, or some professional disciplinary body).\(^{262}\) It would not justify publication to the whole world.

The same principle had already applied under the action for breach of confidence, and has been carried over to the tort of misuse of private information (per \textit{AG v Guardian Newspapers (No 2)}\(^{263}\)).

In \textit{Francome v Mirror Group Newspapers Ltd}\(^{264}\) an action for breach of confidence was brought, where the information concerned possible breaches of the criminal law or Jockey Club regulations by an individual jockey. \textbf{Held:} the information was confidential, but could justifiably be disclosed to the police or to the Jockey Club. In \textit{Hellewell v CC of Derbyshire}\(^{265}\) an organisation of shopkeepers, which was concerned about the level of shoplifting, asked the local police, D, to distribute to them photographs of individuals known to be causing trouble in the area, so that the staff would recognise them. Mr Hellewell's, C's, custody photo was included in that bundle distributed to traders. D gave over the photos with instructions to shopkeepers not to publicly display them but to distribute them to their staff. C sued for breach of confidence. \textbf{Held:} the information was not confidential (C's numerous previous convictions were a matter of public record), but a duty of confidence could arise if the police took a photograph of a suspect without his consent. In any event, in this case the publication was in the public interest and in good faith, as it was reasonably required for the prevention/detection of crime; and the police had distributed the photos only to persons who had reasonable need to make use of them.

\section*{Factor #8: The motives behind D's actions}

\textbf{§PR.27} D's motives in publishing, or threatening to publish, private information about C are relevant, in determining whether D's freedom of expression under Art 10 trumps C's legitimate expectation to privacy under Art 8.

Various motives on D's part may tip the balancing exercise in C's favour, and refute D's right to freedom of expression. There is sometimes a monetary motive in D's publishing the private information about C; or D may make unwarranted demands with threats to publish (per \textit{AMM v HXW}\(^{266}\)). Moreover, 'the freedom of expression rights of blackmailers are extremely weak, (if they are engaged at all)' under Art 10 (\textit{DFT v TFD}\(^{267}\)); and D's motives for publicising the private information about C may have stemmed from a desire to exert pressure on C for D's financial benefit (per \textit{WXY v Gewanter}\(^{268}\)).

However, just because the private information about C was akin to a 'kiss and paid-for-telling story' (as the court called the article in \textit{Ferdinand v MGN Ltd}\(^{269}\)) does not deprive the article or story of having a public interest – D's Art 10 rights may still prevail over C's legitimate expectation to privacy (as they did in that case).

\section*{Factor #9: Any undesirable conduct on C's part}

\textbf{§PR.28} If C has committed any subterfuge or undesirable conduct in prosecuting his claim, then the balancing exercise is highly likely to favour D's Art 10 right to freedom of expression.

If C’s evidence on oath, given to support his claim to misuse of private information, was untrue or ‘simply disingenuous’, then this is a factor to take into account, in favouring D’s freedom of expression.

In *Ewing v Times Newspapers Ltd*[^270] facts previously, held: C had attempted to retrospectively create a pre-existing confidential relationship between himself and a journalist, by recording a phone conversation without the journalist’s knowledge, and being willing ‘to lie to the court in order to strengthen his case’. Even if C could establish a reasonable expectation to privacy (which he could not), ‘no reasonable court approaching the balancing exercise in a proportionate manner could do other than to give precedence to [D’s] Art 10 rights’.

**Factor #10: How the information was acquired**

A court will consider whether the information was obtained by way of breach of confidence; or whether D has acquired the information from others who shared a contractual, professional, or trustworthy relationship with C.

The importance of this factor is reiterated by the IPSO’s Code:

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<th>cl 10 Clandestine devices and subterfuge</th>
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<td>(i) The press must not seek to obtain or publish material acquired by using hidden cameras or clandestine listening devices; or by intercepting private or mobile telephone calls, messages or emails; or by the unauthorised removal of documents or photographs; or by accessing digitally-held private information without consent.</td>
</tr>
<tr>
<td>(ii) Engaging in misrepresentation or subterfuge, including by agents or intermediaries, can generally be justified only in the public interest and then only when the material cannot be obtained by other means.</td>
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In both of the following (and previously-considered) cases, the tort was proven, and the way in which the information was obtained by D was a key factor in the ultimate balancing exercise:

In *Prince of Wales v Associated Newspapers Ltd*,[^271] the information was obtained by D via a breach of an express obligation of confidence contained in the employee’s contract with the Prince of Wales. There is an important public interest in employees in the position of Ms Goodall respecting the obligations of confidence that they have assumed. Both the nature of the information and of the relationship of confidence under which it was received weigh heavily in the balance in favour of Prince Charles. In *Mosley v NGN Ltd*,[^272] the fact that the information was obtained by clandestine filming was significant in finding that there was a legitimate expectation of privacy by C.

In addition, the tort requires ‘misuse’, and it is to that element that we now turn.

[^271]: [2006] EWCA Civ 1776, [70]–[74].
[^272]: [2008] EWHC 1777 (QB) [16]–[17], and citing the PCC’s *Code of Practice* in [16].
ELEMENT #3: PUBLICATION, OR OTHER MISUSE

SPR.30 Actionable wrongdoing by D in respect of C's private information may take various forms: publication to the whole world; dissemination to a specified party or group; or even mere retention of the information.

Generally, this is a non-contentious element. ‘Misuse’ may take a variety of potential forms:

- publishing the private information about C in a publicly-available medium (via hard copy, or web and internet publications) – this is the usual ‘misuse’ alleged, and evident, e.g., in most of the leading cases discussed in this chapter (e.g., AAA, Trimingham, Ferdinand, Terry, Mosley);
- audio-recording the private information about C via an illegally-recorded audio recording of conversations between C, D and third parties such as solicitors (e.g., Cooper v Turrell273);
- taking and retaining photographs which contained private information about C (e.g., R (on the application of Wood) v Commr of Police of the Metropolis,274 where the taking of photographs of demonstrators in a street was not a misuse of private information about the demonstrators, but the retention of the photographs was). The mere fact that a photograph of C was taken by D covertly does not make publication objectionable as a misuse of private information – unless the particular activity or situation photographed was confidential (per Murray v Express Newspapers plc,275 and Campbell v MGN Ltd276);
- copying and retaining information about C, whether photocopying in hard copy, or downloading from a server onto another electronic storage device (e.g., Tchenguiz v Imerman277);
- supplying the private information about C to a newspaper for subsequent publication (e.g., the photographic agency in Murray v Express Newspapers plc278).

ELEMENT #4: COMPENSABLE HARM

SPR.31 It is presently unsettled as to whether C must have suffered some damage which is causally linked to D’s misuse of private information about C, or whether the tort is actionable per se. It is also unsettled as to whether a test of remoteness of damage should apply to the tort.

The closely-related causes of action of breach of confidence and libel are actionable per se (i.e., without proof of damage). Recently, in AVB v TDD,279 where C could establish both a breach of confidence and the tort of misuse of private information, Tugendhat J declined to award any damages to C – concluding that, ‘as to those publications which I have found are in breach of AVB’s right to privacy, the question arises as to whether I should make an award of damages. I decline to do so ... he has suffered no real distress. He has suffered some embarrassment, but that is different.’ This suggests that the tort may not require proof of damage, and is actionable per se. However, the point does not appear to have been dealt with explicitly as yet.

Whether there is an encirclement around the damages recoverable, by virtue of a test of remoteness or other limiting device, is not clear either. During its ascent to the House of Lords, Wainwright v Home Office280 was considered in the Court of Appeal, where Buxton LJ queried
what the position should be, where private information was published about C, with the result that he forfeited his employment, or his marriage – would damages be recoverable for that loss? The question was not answered in the judgment itself, and nor has it been addressed in any English case since, so far as the author’s searches can ascertain. However, it is extremely doubtful that all damage flowing from an invasion of privacy should be recoverable, merely on the basis that the misuse caused the damages complained of.

DEFENCES

Possible defences (already considered)

A number of matters which will defeat the tort have already been considered within the analysis of the elements of the cause of action, viz:

- disclosure of the private information was in the public interest;
- the private information was already in the public domain;
- by C’s own conduct, C consented to the use of the private information; or
- the balancing exercise favoured D, such that D’s Art 10 right to freedom of expression trumped C’s Art 8 right to privacy.

Contributory negligence

§PR.32 Whether contributory negligence is a (partial) defence to the tort of misuse of private information is presently unsettled in English law.

Can it be said that the intrusion of privacy that C suffered was (partly) due to C’s own reckless or self-destructive conduct, such that C was legally the ‘author of his own misfortune’? In Mosley v NGN Ltd, Eady J suggested that the defence could operate in an appropriate case, given that contributory negligence allocates causal responsibility between C and D.281

Logically, it may be said, C’s conduct has nothing to do with whether or not his privacy has been invaded or the impact upon his feelings caused by such an intrusion. There is no doctrine of contributory negligence. On the other hand, the extent to which his own conduct has contributed to the nature and scale of the distress might be a relevant factor on causation. Has he, for example, put himself in a predicament by his own choice which contributed to his distress and loss of dignity? ... To a casual observer, and especially with the benefit of hindsight, it might seem that C’s behaviour was reckless and almost self-destructive. This does not excuse the intrusion into his privacy but it might be a relevant factor to take into account when assessing causal responsibility for what happened. It could be thought unreasonable to absolve him of all responsibility for placing himself and his family in the predicament in which they now find themselves. It is part and parcel of human dignity that one must take at least some responsibility for one’s own actions.

In Mosley, facts previously, if Mr Mosley, a ‘prominent man’, placed himself, ‘year after year, into the hands (literally and metaphorically) of prostitutes (or even professional dominatrices) he is gambling in placing so much trust in them.’ It could lead to exposure/blackmail. Also, C had received warnings that he was being watched by some unidentified hostile group. C ‘took the matter sufficiently seriously to arrange instruction for himself in spotting or avoiding surveillance’, but he

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281 [2008] EWHC 1777 (QB), with quotes locatable at [224]–[226].
continued to participate in such orgies/parties, ‘knowing of the heightened risk’. Held: contributory negligence not found. On the facts, there was no evidence that the surveillance C was warned about had any connection with the woman who actually ‘tattled’ to NOTW, or to the newspaper itself.

In the end, Eady J did not explicitly take account of any contributory negligence on Mr Mosley’s part. No other case to date has definitively considered the effect of C’s own actions under this tort.

Self-help remedy

The self-help remedy known as the wide construction of the Hildebrand rule is not good law, and cannot be used by D to defend a misuse of private information.

According to the wider interpretation of the Hildebrand rule (named after the decision in Hildebrand v Hildebrand282), a family court will not penalise D’s taking and copying confidential or private documents belonging to a spouse, C – provided that no force is used to obtain the documents (either in hard copy or in electronic form). Under that rule (per White v Withers LLP and Dearle283), the evidence contained in those documents can be admitted in evidence in family court proceedings, because there is an overarching duty on the parties to give full and frank disclosure as to their assets. In family law proceedings, D may retain and use those copies (but not the originals), provided that those copies must be disclosed if requested. The rule may be helpful in family proceedings where D, a wife in divorce proceedings, is seeking evidence that a rich husband is ‘salting away’ assets in order to avoid their being taken into account in a divorce settlement, and has been less-than-candid about the amount and location of his assets. According to Tchenguiz v Imerman, the Hildebrand rule has shown that ‘there is real concern among judges and practitioners in this field that many rich husbands are dishonestly hiding their assets with a view to avoiding their responsibilities’.284

The version of the rule outlined above is a true self-help remedy – D has obtained private information about C, and misused (i.e., retained and/or published) that information, and is claiming that such conduct was legally justifiable, in all the circumstances.

However, since Tchenguiz v Imerman285 was decided in 2010, that version of the Hildebrand rule is no longer good law, and cannot be used, as a defence, in any action which C may bring against D for misuse of private information. For one thing, the law of confidence has existed for at least 200 years, and yet, there was ‘no hint’ that a self-help remedy of this sort could be used as a defence to such an action, where confidential information was misused. For another, any ‘self-help’ remedy in law has to be narrowly construed and ‘jealously policed’, and whilst it can be invoked in the law of private nuisance (via the abatement of a nuisance286), there had never been any indication that self-help should be extended into areas in which private information has been purloined and/or misused. To the contrary, the law has always demonstrated a ‘long-standing aversion to unregulated self-help’.

Hence, as the law now stands, there is nothing in the so-called Hildebrand rule which can be relied upon as a defence by D, in justifying conduct which would otherwise be a misuse of private information.

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282 [1992] 1 FLR 244 (Fam).
285 ibid, [117]–[121].
REMEDIES

A successful claim for the tort of misuse of private information may give rise to a number of remedies. It may also entail procedures which would not normally be required or invoked for other tortious actions – e.g., a private hearing\(^ {287} \) (as occurred in \textit{McKennitt v Ash}\(^ {288} \) and \textit{ETK v NGN Ltd}\(^ {289} \)).

One remedy to which \(C\) is not entitled is advance notice of the forthcoming publication of private information about \(C\). That may be a ‘common practice in the media’, according to Nicol J in \textit{Ferdinand v MGN Ltd}\(^ {290} \) but it is not necessary that the practice be followed (in that case, the footballer, Mr Rio Ferdinand, did not receive prior notification of a story appearing in the \textit{Sunday Mirror}, ‘My Affair with England Captain Rio’, an account of an affair between the footballer and the story’s informant, Ms Carla Storey, but nor did he need to be notified). That conclusion was also upheld by the European Court of Human Rights in \textit{Mosley v UK}\(^ {291} \) – ‘having regard to the chilling effect to which a pre-notification requirement risks giving rise, to the significant doubts as to the effectiveness of any pre-notification requirement and to the wide margin of appreciation in this area, Art 8 does not require a legally binding pre-notification requirement [and] ... there has been no violation of Art 8 by the absence of such a requirement in domestic law.’

\textbf{§PR.34} The principal remedies to which \(C\) may be entitled, for the tort of misuse of private information, consist of the following: delivery up; damages (both compensatory and aggravated); and injunctive relief.

\textbf{Delivery up}

\textbf{§PR.35} If \(C\) brings his suit after publication, an order for delivery-up may be ordered.

Delivery-up of the information or published material may be ordered, whether that is in \(D\)’s possession or with a third party. Obviously, if \(C\) brings his action for privacy infringement before the information is published/disseminated or otherwise misused, then injunctive relief and/or damages is far more appropriate.

In \textit{Cooper v Turrell}\(^ {292} \), facts previously, held: \(C\) were granted an order for delivery up of the original, and all copies and transcripts, of the audio recording made by Mr Turrell, \(D\) (which included copies which were within his control but in the possession of third parties to whom he may have sent the recordings).

\textbf{Damages}

\textbf{Compensatory damages}

\textbf{§PR.36} There are two principal heads of damage which are compensable for the tort of misuse of private information: distress/injury to feelings, and vindication. Any award of compensatory damages for misuse of private information must be proportionate and not unduly arbitrary. Some guidance may be drawn from awards of pain, suffering and loss of amenity in personal injury cases.

The principal damage will be that of distress and injury to feelings. Mere distress will suffice, there is no precondition of a recognised psychiatric injury in relation to this tort. In Cooper v Turrell, it was reiterated that the aim of such damages is ‘to compensate for the damage, and injury to feelings and distress, caused by the publication of information which may be either true or false’. 293

Secondly, for the infringement of C’s dignity, damages for vindication are awardable. In Mosley, Eady J remarked that this head of damage was of a ‘less tangible nature’ than for distress – but that its purpose was ‘simply to mark the fact that either the State or a relevant individual has taken away or undermined the right of another – in this case, taken away a person’s dignity and struck at the core of his personality’. 294

This principle reflects that which applies in the tort of defamation, as recognised both by the European Court of Human Rights (e.g., in Tolstoy Miloslavsky v UK295) and by the English Court of Appeal (e.g., in John v MGN Ltd296). The court may have regard to the levels of personal injury awards for pain, suffering and loss of amenity in order to help maintain a sense of proportion and to provide a comparator for cases of misuse of private information (per Mosley297).

Notably, the levels of compensatory damages for the tort have increased over the years. When pitched very low, then whether damages awards meet the standard of ‘an effective remedy’ required by Art 13 of the ECHR298 must be considered, as pointed out by Tugendhat J in Spelman v Express Newspapers (No 2): 299

[i]f damages is to be an effective remedy, then the amount that the court may award must not be subject to too severe a limitation. Recent settlements in the much publicised phone hacking cases have been reported to be in sums far exceeding what in the past might have been thought to be available to be awarded by the courts. The sums awarded in the early cases such as Campbell were very low. It can no longer be assumed that damages at those levels are the limits of the court’s powers.

The figures bear this out, albeit that current awards, whilst significant, are hardly eye-watering:

The vagaries of compensatory damages

2002–2008:

- Campbell v MGN (2002)300 – £2,500 damages for distress/injury to feelings;
- Cornelius v De Taranto (2000)301 – £3,000;
- Douglas v Hello! Ltd (2005)302 – each C was awarded £3,750;
- McKennt v Ash (2006)303 – £5,000;

297 [2008] EWHC 1777 (QB) [218].
298 The article requires that ‘[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority’.
The task of the judge in awarding damages for misuse of private information is fairly thankless-to-impossible, as Eady J pointed out in *Mosley*: 311

As the media are well aware, once privacy has been infringed, the damage is done and the embarrassment is only augmented by pursuing a court action. Claimants with the degree of resolve (and financial resources) of Mr Max Mosley are likely to be few and far between. Thus, if journalists successfully avoid the grant of an interlocutory injunction, they can usually relax in the knowledge that intrusive coverage of someone's sex life will carry no adverse consequences for them and … that the news agenda will move on … it 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 … 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 *restitutio* is not available.

Another factor to consider is that the deterrent effect of an award of damages on D’s conduct may properly be part of any award of exemplary damages (as discussed below, 312), but insofar as *compensatory* damages are concerned, any deterrent effect must be of *incidental* effect only (per *Mosley*). 313

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\[2008\] EWHC 1777 (QB) [220], [236]. 305
[2011] EWHC 3269 (QB) [92]–[95], [107]. 306
[2013] EWHC 589 (QB) [58]–[59]. 308
[2014] EWHC 1163 (QB) [197]. 309
[2015] EWHC 1482 (Ch) [167]ff.

'Pocket-book' interests

Whether the tort of misuse of private information can be used to recover economic damages caused by the infringement is unsettled in English law.

As the Court of Appeal explained in *Douglas v Hello! Ltd*, the cause of action for breach of confidence can be used to protect C’s ‘pocket-book’ sensitivities (as it was in that case). However, whether a tort of privacy should be so used has been left open by some courts.

For example, in *Wainwright v Home Office*, Lord Hoffmann noted that – were a tort of privacy to be developed in English law – then one crucial question would be whether it should be principally seen as a ‘right to be let alone’ (i.e., seeking to prevent intrusions and publication which would lead to distress, embarrassment, or humiliation), or whether it should also protect against harm to C’s commercial interests. In *Douglas* itself, claimants Michael Douglas and Catherine Zeta-Jones were keen to ensure a restricted distribution of their wedding photographs, so as to ensure maximum financial remuneration and ensure that syndication receipts were paid to them and not lost because their wedding photographs had been published by Hello!. However, in neither case was the tort of misuse of private information successful, and hence, whether C’s pocket-book interests are protected by that tort is still unsettled.

The contentious point has arisen in other jurisdictions too:

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**The comparative corner: Mixed views**

**Australia:** In *ABC v Lenah Game Meats Pty Ltd*, the abattoir in whose premises the slaughtering operations were illicitly filmed by trespassers and thereafter published was seeking to use a new tort of privacy as a means of controlling the use of information, so as to preserve its business goodwill. A director of Lenah was cited in the High Court’s judgment: ‘[t]hese are sensitive markets which [Lenah] has spent 4–5 years developing. [Lenah] also wishes to expand into other markets. The likely effect of airing this sort of graphic video material could be potentially catastrophic for [Lenah’s] present business and the business which it may be able to do in the future especially in new markets.’ However, breach of confidence failed there; and no tort of privacy was recognised.

**United States:** In her interesting study of personality rights and infringements, Beverly-Smith makes the points that, although indications were mixed, early privacy case law in the US did sometimes recognise that a privacy action was ‘capable of remedying injuries to interests of an economic nature in addition to injuries to inviolate personality’; but that a ‘right of publicity’ was ultimately developed in that jurisdiction to enable the law to draw a sharp distinction between cases involving economic interests and cases involving purely emotional damages such as grief, humiliation and loss of personal dignity.

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315 To adopt the words of Judge Cooley (*Cooley on Torts* (2nd edn, 1888) 29, as cited by Lord Hoffmann in *Wainwright v Home Office* [2003] UKHL 53, [2003] 4 All ER 969, [15].
316 [2003] EWHC 786 (Ch), [2003] EMLR 31, [196]–[199].
317 Quoted in the judgment of Callinan J, (2001) 208 CLR 199 (HCA) [231].
Damage to reputation

§PR.38 Whether compensatory damages can be awarded for damage to reputation, under the tort of misuse of private information, is presently unsettled.

It has not been conclusively determined whether the tort of misuse of private information can include compensation for injury to reputation. That is certainly the province of the separate tort of defamation, but whether damage to reputation can also comprise a head of damage in the tort of privacy is clearly a developing area of the law, with arguable authorities both for and against the proposition that a reputational claim can be instituted under the tort of misuse of private information (per Hannon v NGN Ltd[319]). Prior to that, it was held that, if no claim for defamation is brought by C to augment the claim for misuse of private information (as it was not in Mosley), then C will be limited to an award for injury to feelings/distress/etc, and not for compensating or vindicating injury to reputation[320] — but Hannon held that Mosley ‘did not go so far’ as to rule out the possibility of the recovery for loss of reputation in a misuse of private information action.[321]

Aggravated damages

§PR.39 An award of aggravated damages is available for the tort of misuse of private information, where appropriate.

It will be recalled from the discussion of these damages in Chapter 11 that aggravated damages are a form of compensatory damages. In earlier cases which concerned privacy infringements but which were pursued as breach of confidential information actions, aggravated damages were occasionally upheld (e.g., in Campbell v MGN Ltd,[322] an amount of £1,000 was awarded under this head, because some of the offending publications concerning the model had ‘trashed her as a person’ in a highly offensive and hurtful manner).

Where the tort of misuse of private information has been explicitly recognised and sued for, aggravated damages have also been recognised as being available, but only to compensate ‘any aggravating conduct in privacy cases on the part of D which increases the hurt to C’s feelings or “rubs salt in the wound”’ (per Eady J in Mosley[323]). Recently, in Gulati,[324] Mann J noted that three aspects of D’s conduct may aggravate C’s damages: how the wrong was committed; motive; and subsequent behaviour.

In Mosley, C’s character was attacked by D during the trial (e.g., he was referred to as ‘depraved’, etc), but those personal attacks could not be taken into account for aggravated damages, because ‘this is not a defamation case and reputation is not in issue’. However, an aggravating factor was that D persistently accused C of engaging in Nazi-sympathetic and concentration camp activities, which was not proven, and this was reflected in the award. By contrast, in WXY v Gewanter, £5,000 was awarded by way of aggravated damages, given the circumstances of threatening behaviour and D’s acting for financial gain.

[319] [2014] EWHC 1580 (Ch), with a detailed analysis of the pro’s and con’s at [25]–[78] (Mann J).
[320] [2008] EWHC 1777 (QB) [3], [213]–[214].
[321] [2014] EWHC 1580 (Ch) [65].
[322] [2004] 2 AC 457 (HL), quote at [139], and see too, [169].
[323] [2008] EWHC 1777 (QB) [222], and with quote in case description at [223].
[324] [2015] EWHC 1482 (Ch) [205].
In both *Cooper v Turrell*\(^{25}\) and *Applause Store Productions Ltd v Raphael*,\(^{26}\) various factors were stated to be ‘aggravating factors’ which will elevate C’s damages, if:

- the publications referred to *medical* information about C (which pitches the claim at ‘a high level of seriousness’);
- D knew that what he was publishing was false;
- D had adopted a campaign of revenge against C, whereby D aimed his publications at those whose good opinion was most important to C;
- publication was widespread and substantial, such that large numbers of people came to hear of the private information about C (e.g., via the internet), rather than a more narrowly-based or discreet publication;
- C was carrying out his duties as director of a public company with ancillary responsibilities to the public, and if the publication of the private information seriously damaged C’s standing and capacity to serve as a director carrying out such public service; or
- D had persisted in the accusations against C after the publication complained of, where that conduct had caused increased injury to C’s feelings.

### Exemplary damages

An award of exemplary damages is presently not available for the tort of misuse of private information, even in cases of extreme intrusion and subsequent publication, although the issue remains somewhat unsettled in English law.

It will be recalled, from the discussion of exemplary damages in Chapter 11, that there are two pre-requisites for an award of exemplary damages. First, such an award may only be made in circumstances where an element of punishment is thought appropriate by the court; and the amount to be awarded by way of compensation (including aggravated damages) is not sufficient to serve a punitive as well as a compensatory function.

**Present authority.** In *Mosley*\(^{27}\) – where the court described the intrusion upon Mr Mosley’s personal privacy as ‘the extreme of intimate intrusion’, and the scale of distress and indignity that he suffered ‘difficult to comprehend ... probably unprecedented’ – exemplary damages were not awarded, and Eady J considered that, until the House of Lords ruled on the matter, this species of damages was not available for the tort of misuse of private information. The many reasons as to why exemplary damages is an anomalous form of relief have been described in Chapter 11 (e.g., the award does not go to the State as it would with a fine, but to C as a ‘windfall’). In addition to those difficulties, Eady J noted various other matters in *Mosley* – specific to the tort of misuse of private information – that dissuaded any award from being available. For example:

- given that the tort engages freedom of expression in Art 10, and the right of privacy in Art 8, that makes it necessary to address matters of necessity and proportionality, and also whether such an extension of relief could be characterised as ‘prescribed by law’. Eady J concluded that the availability of exemplary damages could not be justified under Art 10(2), in that it was not ‘prescribed by law’ or necessary in a democratic society. English law did not require such relief, in addition to the availability of compensatory damages and injunctive relief. In any event, it would

\(^{25}\) [2011] EWHC 3269 (QB) [102]–[106].  
\(^{26}\) [2008] EWHC 1781 (QB) [81].  
\(^{27}\) [2008] EWHC 1777 (QB), with quotes at [23] and [16], and the reasoning at [172]–[211].

be ‘somewhat eccentric to graft on to this Convention jurisprudence an alien anomaly from the common law in the shape of exemplary damages – not apparently familiar in Strasbourg’;

- given the frequency with which this tort will be pleaded against media defendants, exemplary damages would have a ‘chilling effect’ on that industry;
- extending exemplary damages to this tort of misuse of private information would extend their scope ‘beyond any point hitherto recognised’ – and *Kuddus v CC of Leicestershire*\(^{328}\) suggested a reluctance by the House of Lords to extend the remedy to newly-developed causes of action. Even though both defamation and invasion of privacy were causes of action directed to protecting C’s rights under Art 8 – and even though exemplary damages are (rarely) available in defamation – it ‘is a different matter to make an extension by judicial intervention’ into another cause of action altogether.

The Supreme Court has not considered the issue since, and hence, Eady J’s reasoning in *Mosley* remains the current law on this issue.

**Fusion fallacy?** As one further point of interest, regarding the availability of exemplary damages: it will be recalled from earlier discussion in this chapter\(^{329}\) that, whilst misuse of private information may have arisen from the equitable cause of action for breach of confidence, it has been judicially described on several occasions as a tort.

That designation is important, because exemplary damages is a tortious remedy, and not an equitable one. Those damages could not be awarded for an equitable cause of action – or, at least, not without creating a so-called ‘fusion fallacy’. A ‘fusion fallacy’ arises from ‘[t]he (mistaken) view that the rules of common law and equity have been amalgamated, rather than merely that their administration was amalgamated, following the UK Judicature Act 1873 ... Under this view, equity has lost its identity as an independent body of legal principle, and a new body of law containing both equity and common law has been created ... The fusion fallacy gives rise to arguments, for example, that defences available to a cause of action at common law are available to an equitable action.’\(^{330}\)

In *Mosley*, Eady J adverted to the problem of determining precisely what type of cause of action he was dealing with, when being asked to grant Mr Mosley an award of exemplary damages for misuse of private information, when he said that, ‘[i]t can only be a matter for speculation whether a hypothetical future House of Lords would now follow Lord Nicholls’ classification [in *Campbell*] of invasion of privacy as a “tort” and, having done so, would regard it as a wrong to which exemplary damages should now be extended.’\(^{331}\) There is certainly New Zealand authority for the proposition that exemplary damages may be awarded for breach of confidence (*viz*, *Aquaculture Corp v New Zealand Green Mussel Co*\(^{332}\) – which Eady J cited in *Mosley*\(^{333}\)). However, *Aquaculture’s* reasoning has been discussed elsewhere by this author\(^{334}\) as amounting to a fusion fallacy in operation.

In any event, the better (and certainly more supported view) in English law is that misuse of private information is an action properly brought in tort. If that is correct, then an award of

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\(^{330}\) [2008] EWHC 1777 (QB) [184]–[186] (emphasis added).

\(^{331}\) 1990 3 NZLR 299 (CA) 301 (Cooke P, Richardson, Bisson and Hardie Boys JJ).

\(^{332}\) [2008] EWHC 1777 (QB) [184].


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exemplary damages would not cause an inappropriate merging and intermingling of substantive law and equity.

Disgorgement remedies?
§PR.41 Whether an award of restitutionary damages is available for the tort of misuse of private information remains somewhat unsettled in English law.

An equitable cause of action ought to give rise to equitable remedies – including that of restitutionary damages, which disgorge from D its ill-gotten gains. An account of profits is a remedy calculated by D’s gain, rather than by C’s loss, and serves as equity’s response to a breach of confidence. Of course, for the tort of misuse of private information, compensatory damages would flow as of right following the successful proof of its elements. However, whether restitutionary remedies should be available for that tort is not as clear, although recent case law, viz, Walsh v Shanahan suggests (without much discussion) that an account of profits is a discretionary remedy available for the tort of misuse of private information.

The issue of remedies particularly highlights the previously-mentioned importance of appropriately classifying the jurisdictional basis of the misuse of information (i.e., an equitable cause of action, or a tort?).

Injunction

Injunctive relief is an oft-sought remedy for the tort of privacy, given the ease with which private information may be disseminated in the modern technological age. For example, as noted in Jagger v Darling, Jade Jagger was especially anxious to obtain an injunction to stop CCTV footage of her sexual activities from being further distributed or published on the worldwide web, ‘where publication would be almost impossible to stop.’

To the contrary, if the private information has already been disseminated widely, then C will be left to his remedy in damages, and no injunctive relief will be possible.

In Mosley v NGN, Eady J held that the video and photo footage of Mr Mosley’s participation in the party/orgy ‘has been seen by thousands of people around the world, and that it continues to be available’, and that to award an injunction ‘would merely be a futile gesture. Anyone who wishes to access the footage can easily do so, and there is no point in barring the News of the World from showing what is already available’. Damages were the only appropriate remedy in all the circumstances.

The impact of s 12 of the HRA 1998

An injunction to stop publication of private information will be granted to C, only where the remedy is both necessary and proportionate to protect C’s legitimate expectation to privacy, given that injunctive relief will curtail D’s freedom of expression under Art 10.

Where the tort of misuse of information is concerned, it is incumbent on an English court to follow the ‘statutory steer’ given by s 12 of the HRA 1998, according to the Court of Appeal in Hutcheson v NGN Ltd. That section applies whenever the relief granted to C might affect D’s right to freedom of expression.

Whenever the private information is contained in journalistic, literary or artistic material, then the court must have regard to the public interest, when deciding whether to grant an injunction at all, under s 12(4):

### s 12(4)
The court must have particular regard to the importance of the Convention right to freedom of expression and ... to –

- **(a)** the extent to which –
  - **(i)** the material has, or is about to, become available to the public; or
  - **(ii)** it is, or would be, in the public interest for the material to be published;
- **(b)** any relevant privacy code.

In light of s 12, courts have frequently reiterated the need for both ‘necessity’ and ‘proportionality’, whenever the court is contemplating an injunction by which to curtail D’s freedom of expression. According to *Giggs v NGN Ltd*, an interim injunction for alleged privacy infringements ‘must be no more than is necessary and proportionate to achieve the legitimate aim of protecting the rights of [C] (including Art 8 rights).’

Similarly, according to *X and Y v Persons Unknown*, a court cannot use injunctive relief to ‘wield an axe where a scalpel would do’.

Notably, whilst the law will not award an interim injunction to stop the publication of defamatory material which is true, the fact that private information about C may be true does not preclude injunctive relief. In fact, as the Court of Appeal pointed out in *Hutcheson*, ‘often, if not invariably, the fact that the information is true is the reason why injunctive relief is sought’ in a privacy case.

### §PR.43
An interim injunction may be ordered for the tort of misuse of private information, if the court is satisfied that three criteria are met: (1) C is likely to establish that publication should not be allowed; (2) damages would not be an adequate remedy for C, if the court did not award an interim injunction; and (3) the balance of convenience favours the award of an injunction.

This three-part test for the award of an interim injunction has been modified from the common law, in privacy-related interim injunctions, by s 12(3) of the HRA 1998.

### s 12(3)
No such relief [which might affect the exercise of D’s right to freedom of expression] is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

According to the well-known test for the award of an interim injunction set down in *American Cyanamid Co (No 1) v Ethicon Ltd*, the first question to be asked (‘is there a serious question to be tried?’) was too low a threshold to be met by C, in light of s 12(3). Rather, C must prove the following 3-part test in order to obtain an interim injunction (per *Giggs v NGN Ltd* and *Cream Holdings Ltd v Banerjee*):

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340 [2012] EWHC 431 (QB) [105].  
342 [2011] EWCA Civ 808, [33].  
344 [2012] EWHC 431 (QB) [97]–[107].  
345 [2005] 1 AC 253 (HL) [22]–[23] (Lord Nicholls).
(1) Is C likely to establish that publication should not be allowed? This means that C must prove that he will probably (i.e., more likely than not) succeed at trial, in proving a misuse of private information by D.

In Terry (LNS) v Persons Unknown, s 12(3) HRA could not be met. C was not likely to establish that publication should not be allowed – when having regard to the potential defence of public interest in the information being published. No continuance of the urgent interim injunction was granted. In Jagger v Darling, s 12(3) was met. C was likely to establish at trial that there would be no legitimate public interest in further disseminating the CCTV images, ‘which could only serve to humiliate C for the prurient interests of others’.

(2) Would damages be an adequate remedy for C, if the court did not award an interim injunction? As the court stated in Spelman v Express Newspapers, ‘[i]n one sense, damages are never an adequate remedy for ... an interference with privacy. But the court law does not adopt as stark an approach as that.’ There are a few principles (derived from Spelman and from Terry) which the court must assess, in determining the second Cyanamid question, in the context of this particular tort. Wherever the privacy infringement threatens the disclosure of C’s secret which is the very essence of the interim injunction application that it be kept private, then it is unlikely that damages will be an adequate remedy. If the threatened privacy infringement is said to cause distress/injury to feelings to C, or to adversely affect C’s sponsorship or economic interests, then damages are likely to be an adequate remedy. However, where the potential adverse consequences of publication are not particularly grave for C, then C is likely to be left to his remedy in damages.

In Terry (LNS) v Persons Unknown, facts previously, John Terry, C, was left to his remedy in damages. The consequences of publication of the affair were not particularly grave for C, given that: it was not likely that C regarded the news of the affair as particularly sensitive information of the kind that is sought to be protected; C was a robust character and personality, unlikely to be too sensitive to the disclosure of the information; and the information of the affair had already spread ‘in the world in which [C] lives and works’, including amongst agents, other players, and others in sporting circles. An injunction would not be necessary or proportionate in this case.

(3) Where does the ‘balance of convenience’ (or, as re-phrased in Francome, the ‘balance of justice’) lie? All that C has to establish, at this stage, is that C would be ‘likely to establish’ that publication was a misuse of private information – whereas, at trial, C must establish that very matter. As pointed out in Giggs, there are many tactical aspects to the interim injunction. If a lower threshold did not apply at that interim stage, then ‘there would no practical possibility of getting an interim injunction’. D may generally offer undertakings as to damages, and/or may not oppose the grant of an interim injunction – which may, in turn, incentivise C to seek an interim injunction, and then ‘hold on to it as long as possible, and proceed to trial as slowly as possible, if at all’. Also, C may not want a trial at all, but be happy to prolong the interim injunction, given that a trial will give publicity to the information which C is so desperate to keep private.

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Against whom may an injunction be granted

§PR.44 Injunctive relief may be granted against two types of defendant: a specific D; or as a ‘John Doe’ injunctive order against unknown parties.

A specific D. Most obviously, C may be awarded injunctive relief (whether interim or final) against the particular party who has misused the private information.

In Cooper v Turrell,[352] injunctive relief was awarded, ordering D to take down the audio recording of private conversations with C from D’s Wordpress blog. In Jagger v Darling, the injunctive order had to be served on Mr Darling’s employees who had access to the CCTV recording, and also on the publishers of national newspapers other than NOTW.

An injunction directed towards the restraint of publication of C’s private information may affect, not only D’s Art 10 right to freedom of expression, but third parties’ Art 10 rights too. This may validly occur, under what is known as the ‘Spycatcher principle’ – a doctrine endorsed in AG v Newspaper Publishing plc,[353] and approved at the highest judicial level.[354] The Spycatcher principle is only useful in the case of interim injunctive orders, so as to preserve the status quo pending a trial, and to prevent a third party from frustrating the court’s purpose of putting a ring around the information, until the merits of the claim for misuse of private information can be fully tried (per X and Y v Persons Unknown[355]).

‘John Doe’ injunctions. At the other extreme, however, injunctive relief in misuse-of-private-information cases may also be expressly directed to unknown parties – requiring those parties to refrain from publishing the information. In such cases, the injunction is directed against no particular D at the hearing, because the hearing is conducted ex parte, i.e., with only C present. Such injunctive orders are frequently referred to as ‘John Doe injunctions’ – issued against ‘persons unknown’, but identified by description. There are two caveats to a ‘John Doe injunction’:

(i) it should only run for a brief period, and C’s claim must proceed expeditiously, so that this ‘indefinite’ injunction does not cause undue hardship to third parties; and

(ii) the description in the injunctive order must sufficiently describe those who are included and those who are not, so that anyone to whom the injunction was shown would know immediately whether it was directed to him. Once that is satisfied, then as Sir Andrew Morritt V-C stated in Bloomsbury Publishing Group Ltd v NGN Ltd, ‘it does not … matter that the description may apply to no one or to more than one person, nor that there is no further element of subsequent identification’. [356]

‘John Doe injunctions’ are usually obtained for protection against media defendants or against other parties associated with C. In Terry (LNS) v Persons Unknown,[357] the injunctive order sought named no particular defendant, but it was stated at the hearing that the order ‘is likely to be served on media third parties’. Of course, when an injunction is awarded against ‘persons unknown’, a practical problem is to identify upon whom to serve the court order. There are a few alternatives, as the court in X and Y v Persons Unknown[358] pointed out. On the one

[352] [2011] EWHC 3269 (QB).
[353] [1988] Ch 333 (CA), 375, 380.
[354] e.g., AG v Punch Ltd [2003] 1 AC 1046 (HL) [32].
[355] [2006] EWHC 2783 (QB), [2007] EMLR 10, [72].
[356] [2003] EWHC 1205 (Ch), [2003] 1 WLR 1633, [21].
[358] [2006] EWHC 2783 (QB), [2007] EMLR 10, [70]–[79].

Online resources: Mulheron, Principles of Tort Law, Cambridge University Press, © 2016
hand, the injunction may be served upon some or all newspapers who have apparently been approached with a view to selling C’s private information to them – given that someone on the newspapers’ staff will know the identity of the source(s), and have some means of making contact with that source, informing them of the injunction. This amounts to using the newspapers as ‘process servers’ – not an attractive proposition in all cases, as acknowledged in X and Y. On the other hand, C may be content to sit back and make no attempt at all to serve any person who may be subject to the injunction – but that was not a favourably-received course in X and Y (‘the tail will be wagging the dog’). Finally, some effort may be made by C to trace the primary wrongdoer/s with the injunction, so that C reduces the ‘field of suspects’ to x number, and serves those. Of course, this scattergun approach may be counter-productive for C, ‘alienating’ people unnecessarily and alerting interest in their difficulties among some who had not been aware of them. Which of these is the most appropriate means to ‘serve’ the injunction will depend upon all the circumstances. ‘John Doe injunctions’ were obtained in the following cases:

In Bloomsbury Publishing Group Ltd v NGN Ltd, Bloomsbury, C, the publisher of the JK Rowling novel, Harry Potter and the Order of the Phoenix, obtained an injunction against persons who had offered an advance copy of the novel, without the consent of C, to The Sun, the Daily Mail, and the Daily Mirror newspapers, and against the newspapers themselves. In X and Y v Persons Unknown, a married couple, C, obtained an injunction to prevent the further dissemination to the press of allegations about the state of their marriage. The court agreed that the advance copy of JK Rowling’s relevant novel was a more specific concept than ‘information about the status of the marriage’, but anyone served with this injunction was likely to know whether or not they had been offering such information to the relevant newspapers. It did not matter that C themselves did not yet know the identity of the person(s) concerned or know the precise nature of the titbits being offered to the tabloids.

Unsurprisingly, media reaction to the ‘John Doe’-type injunction tends to be unfavourable. In Terry v Persons Unknown, the court cited the response of one leading broadsheet newspaper to orders of that type:

It appears to me that this latest order is symptomatic of a trend whereby this sort of order:

(1) is sought against persons unknown by which I deduce that no one was heard in opposition to the injunction request. No advance notice was given to the media;

(2) is immediately served on the legal departments of the national media, who are not defendants to the action;

(3) dispensed with any obligation to serve evidence in support;

(4) protects an anonymous claimant [especially in the event of a super-injunction discussed shortly].

Given the potentially stultifying effect on the dissemination of information caused by an injunctive order – and given that the court which has granted a privacy injunction must not, itself, act in a manner which is incompatible with ECHR rights, pursuant to s 6 of the Human Rights Act 1998 – Lord Neuberger MR took the step of publishing a Practice Guidance on Interim Non-Disclosure Orders in August 2011. This document provided assistance to ensure that the Convention rights of all parties were adhered to, where ‘interim non-disclosure orders’ were ordered. The Guidance emphasised (as the practice of the courts prior to that had indicated, in

any event) that a speedy trial as quickly as practicable is necessary, to ensure that the interference with D’s Art 10 rights is minimised.

However, as Tugendhat J pointed out in Giggs v NGN Ltd, allegations about privacy intrusions ‘very rarely’ make it to actual trial. Media defendants often (and ironically, given their general interest in the freedom of expression) have no interest in a speedy trial, or indeed, perhaps any trial. In that experienced judge’s view, ‘[i]t may be on account of the high costs of litigation, or ... [i]n some cases, it may be because the media recognise that there can be no defence in law to the claim.’

That places even more emphasis (said Tugendhat J) on the court’s need, when issuing an interim non-disclosure injunction, to consider carefully the rights of any parties who are affected by that injunction.

In Giggs v NGN Ltd, Ryan Giggs, C, sued The Sun, D, for, inter alia, misuse of private information, for an article under the title, ‘Footie Star’s Affair with Big Bro Imogen’. The article did not name Ryan Giggs as the football figure, but that became well-known within a very short time. An interim non-disclosure injunctive order was granted, and directions were given for the service of claim, defence and reply. Unknown to the court until just before trial, C and D privately agreed to have the service of the defence deferred for several months. This delay amounted to both a breach of the court-ordered timetable, and of the Civil Procedure Rules. C missed complying with a court direction, and being a ‘guillotine order’, the action by C against D was automatically struck out. C sought to have the claim reinstated. Held: the action was not reinstated. The conduct of C and D was an intentional ‘serious breach’, and the court did not give credit to the reason given for the agreement (i.e., to settle the action). The private undisclosed agreement between C and D had the effect of interfering with the Art 10 rights of third parties.

Refusing injunctive relief
No injunctive relief will be awarded in the following instances:

• where the private information (or a considerable amount of it) is already in the public domain, for an injunction to prevent any further publication upon the topic would serve no real purpose. If there was no question of a ‘fade factor’, of the information ‘returning to obscurity’, having been ‘put out there’, then an injunction would not be worthwhile.

In AAA v Associated Newspapers Ltd, a considerable amount of information regarding C’s mother’s affair with the supposed father (the politician), and information about C’s birth and her supposed paternity, were in the public domain, some of it put there by C’s own mother, and some of it by C’s mother’s ex-boyfriend. There was no ‘fade factor’ possible here (‘it is fanciful to expect the public to forget the fact that the man who is said to be C’s father, and who is a major public figure, has fathered a child after a brief adulterous affair (not for the first time’):

• where there was undue delay in seeking injunctive relief, upon the publication of private information.

In AAA, no explanation was given as to why C’s mother delayed almost one year following the publication by D of the first article with C’s photograph contained in it, before the privacy infringement

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363 ibid. [81], and with quotes in case description at [84].
claim was issued: ‘[i]f there had been a wish on the part of those acting on behalf of [C] to prevent
publication of similar articles, action could and should have been taken much earlier.’

Super-injunctions
§PR.45 A super-injunction is an order prohibiting the disclosure of the fact that an injunctive order has
been made, and providing that the court file be sealed.

The abovementioned description was given in Terry (LNS) v Persons Unknown. It has also
been described as an order ‘grant[ing] an anonymised C an injunction restraining an anonymised
D from doing specified but unpublishable things, and further, restraining D and others from publish-
ing the fact that the injunction had been sought and obtained’ (per Ntuli v Donald). Such
a remedy may be sought for the tort of misuse of private information – although the publicity
accorded to this remedy is somewhat greater than the extent of its judicial use thus far (e.g.,
as Slade J pointed out in WXY v Gewanter, the relief granted in that case were not super-injunctions, despite the extensive media publicity describing them in those terms).

Procedural matters
Although a fulsome discussion of the law associated with injunctive relief is beyond the scope
of this book, a couple of points have arisen in actions involving the tort of misuse of private
information which are noteworthy.

The fact that D is out of the country when an interim injunction is obtained by C against him
in a privacy action will not necessarily preclude the enforceability of that court order, although
the court will consider various factors in order to determine whether the injunctive relief should
be granted.

In Cooper v Turrell, where an interim injunctive order was sought for misuse of private informa-
tion, D was absent from England at the time that an interim injunction was entered against him
(in fact, D was unrepresented at the trial). Held: there were ‘good reasons to grant an injunction’
here. D had assets in the jurisdiction; he was director and shareholder of an English company; he
had obeyed a previous interim injunction in the case; and he was in the jurisdiction when the case
was commenced.

Any injunction granted against D who is out of the jurisdiction will be subject to a proviso –
that the injunctive order does not affect anyone outside the jurisdiction other than D, and any
others who are specified in the order itself (per Babanaft Intl Co v Bassatne). These principles
were embodied in the Practice Guidance on Interim Non-Disclosure Orders issued by Lord Neu-
berger MR in 2011.

Further, where there is the threat of imminent publication of private information, then C
may try to seek an interim injunction urgently and ex parte, i.e., without notice to anyone
at all. Such an application may not be capable of being granted, given the derogation of D’s
Art 6 rights, and the compromise of the principle of ‘open justice’. Anyone who is subject to
injunctive relief without the opportunity to be heard will suffer a tangible derogation from

370 Available in full-text at: http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/practice-guidance-
civil-non-disclosure-orders-july2011.pdf, and see, especially, [20].

Online resources: Mulheron, Principles of Tort Law, Cambridge University Press, © 2016
his Art 6 right to access to justice, given that he is denied the right to be heard. The right to ‘open justice’ will also be severely compromised, given that it requires, inter alia, that the proceedings should be held in ‘the full glare of a public hearing’; and that the public should be informed about evidence at the hearing so that ‘uninformed and inaccurate comment about the proceedings [is] less likely’ (per R v Legal Aid Board, ex p Kaim Todner,371 and cited in Terry (LNS) v Unknown Persons372). Concerns about derogations from D’s Art 6 rights become particularly apparent, when an ex parte injunctive order is delivered to numerous newspapers and other publishing outlets which will be affected by it. As emphasised in Terry,373 ‘[e]ach derogation from Art 6 and open justice must be justified on the particular facts of the case, in accordance with the intense scrutiny required’ – and C’s right to ex parte injunctive relief is far less justifiable where the ‘other party’ targeted by the secretive application is a reputable national newspaper.

In Terry (LNS) v Persons Unknown, English football captain, John Terry, C, had obtained an interim injunction to stop publication of an article about his extra-marital affair with a girlfriend of an English teammate, and sought to extend that injunction, arguing that the reason for the ex parte application was that C did ‘not know of any media organisation which has a specific interest in the story’. Held: the interim injunction was not extended. C knew that NGN were intending to publish a story about C and the affair on the Sunday (after the Friday when the injunctive remedy was obtained), and NGN should have been given notice of C’s application.

STATUTORY INTERVENTION

In England, Parliament has steadfastly refused to enact any type of general and wide-ranging statutory tort of privacy, despite constant invitations from the judiciary (and others) to do so. In Douglas, Lindsay J declared that a general privacy tort was so broad, and the ramifications of any free-standing law in the area so great, ‘that the subject is better left to Parliament which can, of course, consult interests far more widely than can be taken into account in the course of ordinary inter partes litigation. A judge should therefore be chary of doing that which is better done by Parliament.’374 In Wainwright, the Court of Appeal (via Buxton LJ),375 and House of Lords,376 fervently agreed. However, there has been little support for this course of action. Indeed, in Douglas (CA, 2005), it was noted that ‘[t]he Government has made it clear that it does not intend to introduce legislation in relation to this area of the law’.377

Although there have been various attempts to interest legislators in a broad-ranging privacy tort over the years (e.g., by Private Members’ Bills;378 Government committees;379 the EWLC;380

374 [2003] EWLC 786 (Ch) [229(iii)].
375 [2002] QB 1334, [112].
376 [2003] UKHL 53, [2003] 4 All ER 969, [18], [22], [33].
378 See: ‘Written Evidence Submitted by the Master of the Rolls’, submitted to the Dept of Culture, Media and Sport Select Committee, in its investigation into Press Standards, Privacy and Libel (23 Feb 2010) [13].
and Departmental Green Papers, the Government concluded against a free-standing privacy law again in 2010, in its Report of the Culture, Media and Sport Committee on Press Standards, Privacy and Libel. It stated that even if there was a statute, 'given the infinitely different circumstances which can arise in different cases, and the obligations of the HRA, judges would inevitably still exercise wide discretion ... for now, matters relating to privacy should continue to be determined according to common law, and the flexibility that permits, rather than set down in statute.' Various other reasons have also been evident, as to why there has been a general lack of enthusiasm for a statutory broad-based privacy law – i.e., it is an area where law reform and politics collide; thus far, there has been a philosophical preference (and, unsurprisingly, strong industry support) for self-regulation rather than for interventionist statutory involvement; and the difficulties of drafting the legislation itself are oft-mentioned. On this latter point, Gleeson CJ noted in the leading Australian case of Lenah Game Meats that the drafting difficulties are plain from the complexities which quasi-privacy legislation takes, with careful definitions and a myriad of exceptions and qualifications.

The UK legislature has seen fit to enact a number of situation-specific statutory responses to privacy invasions. A detailed examination of these provisions lies outside the scope of this book. However, their number and variety suggest that the judicial invitations to Parliament to implement a broad-brush privacy law, as mentioned at the commencement of this section, seem unlikely to be taken up in the foreseeable future.

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381 LCD and Scottish Office, Infringement of Privacy (CP, 1993).
382 Second Report of Session 2009–10 (HC 362) [67].
384 e.g., the Consumer Credit Act 1974, ss 158–160 (re information held by a credit reference agency, in respect of consumers); the Rehabilitation of Offenders Act 1974, s 9 (re the unauthorised disclosures of 'specified information' regarding spent convictions); and Telecommunications Act 1984, s 43 (prohibits improper use of public telecommunications systems, e.g., re messages grossly offensive, or of an indecent, obscene or menacing character.)