

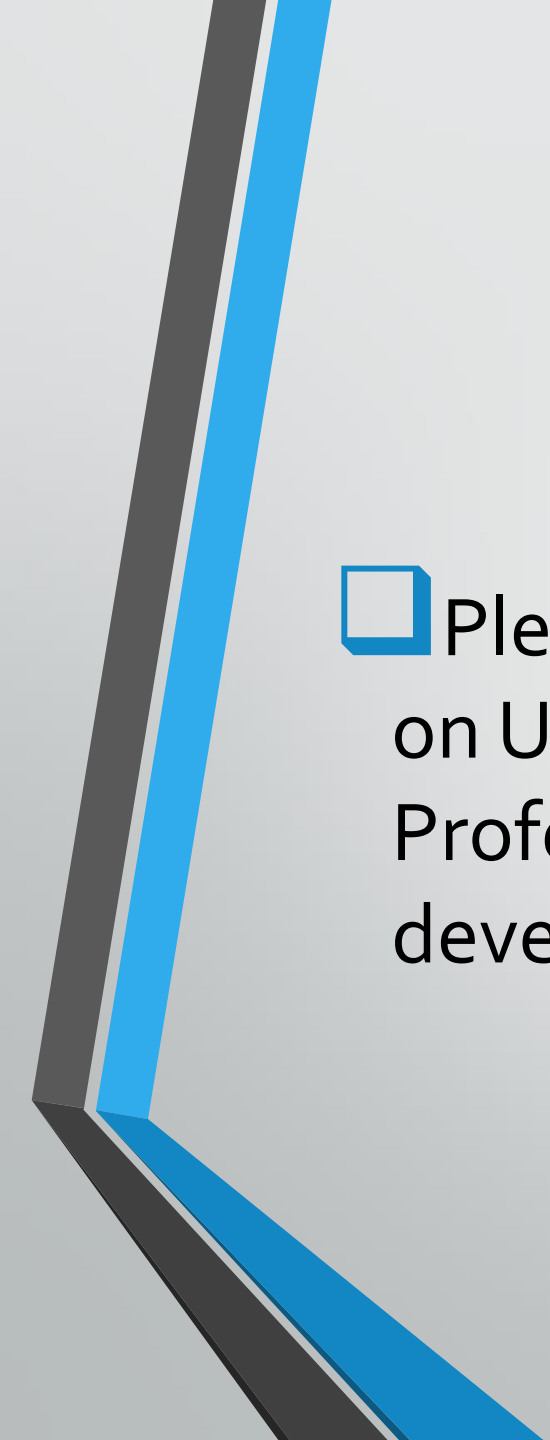


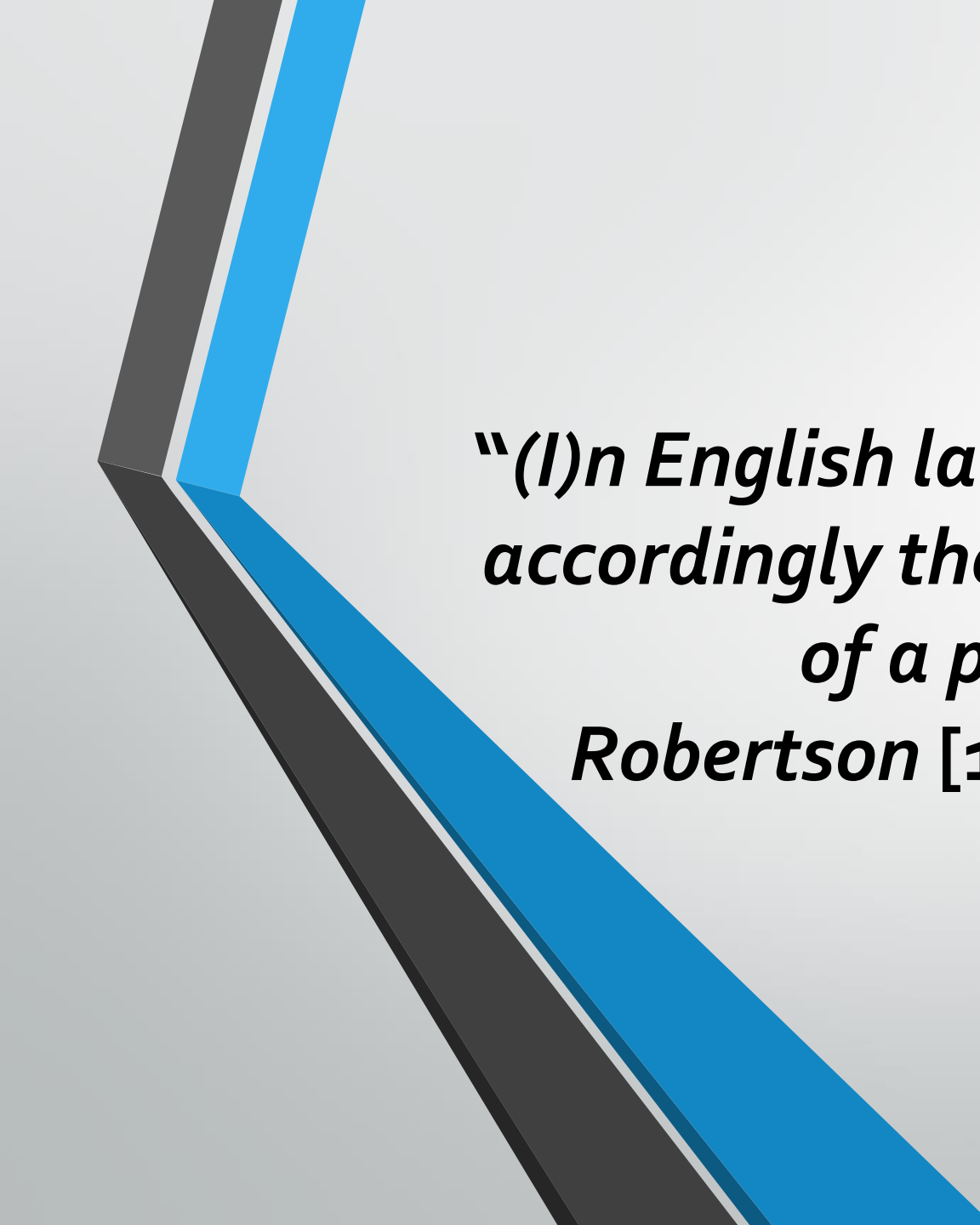
Lecture 10- Privacy in the laws of the UK

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- Please kindly note that the slides used for the sessions on UK Privacy Law have been developed by Associate Professor Guido Noto La Diega. I have updated them and developed them further.



"(I)n English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy" (Kaye (Gordon) v Robertson [1991] FSR 62 at 66 (Glidewell LJ))

Overview

- ☐ Breach of confidence
- ☐ The right to privacy (or lack thereof) in common law
- ☐ The European Convention on Human Rights (ECHR) and the Human Rights Act 1998 (HRA)
- ☐ When is information private? (*Campbell case*)
- ☐ Balancing freedom of expression and privacy (*Douglas, Beckham, Campbell cases*)
- ☐ ECHR v UK

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- **How do you understand confidentiality?**

When does the duty of confidentiality arise?

❖ 2 branches:

- 1. for trade secrets, business secrets, professional information (*Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, [1968] FSR 415)
 - Why do we need it? When patents are not available/the best option, employer/employee exception, to ensure novelty
- 2. Misuse of private information ([*PJS v News Group Newspaper*](#) [2016] UKSC 26 3some – ‘kiss and tell’ VIP stories)
- Breach of confidence is a cause of action, a common law right, not an IP right (but remedies are very similar)

Breach of confidentiality related to Trade secrets:

Three requirements in *Coco v Clark*



The claimant (C) designed a moped engine and sought the co-operation of the defendants (D) in the manufacture. After C had disclosed the details to D the parties fell out, and the D manufactured a moped which closely resembled the C's in design. C sought an injunction to restrain the D from misusing confidential information that had been passed solely for the purposes of the joint venture. D denied that any confidential information had been supplied to or used by them.

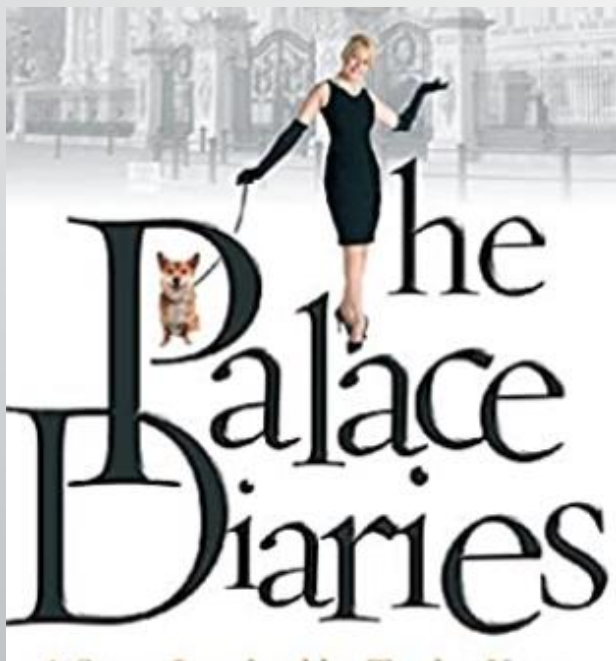
- (1) Information is capable of being protected**
- (2) D owes C an obligation to keep the information confidential – information imparted in circumstances importing an obligation of confidence**
- (3) Unauthorised use of the information [to the detriment of the C]**

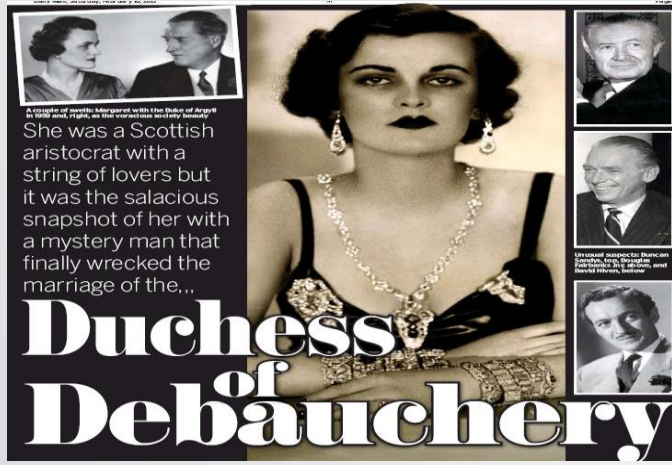
At the origins of the misuse of private information



- One of the first legal cases involving a breach of confidential information and the Royal Household was ***Albert (Prince) v Strange*** [1849] 1 Macnaghten & Gordon 25 (1849) 41 ER 1171
- V&A made drawings and etchings not for publication, kept under lock and key by Queen Victoria
- Unauthorised copies exhibited at private gallery collection + catalogue
- Lord Chancellor injuncted not to publish, ordered delivery up, costs
- Set the precedent for confidentiality in relation to private material, kept under lock and key

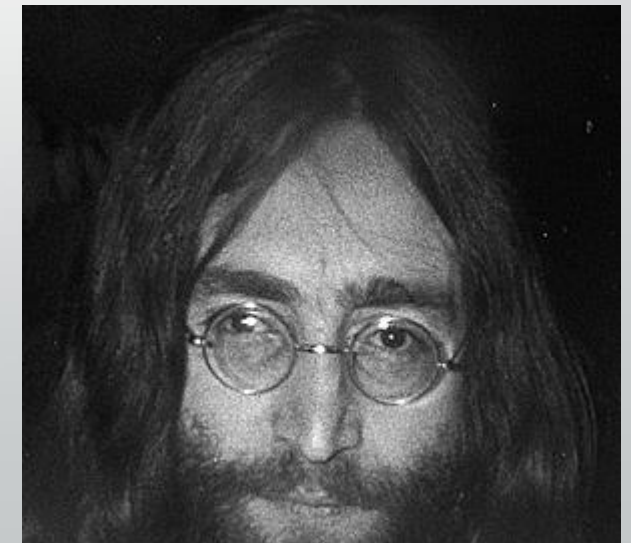
***HRH Prince of Wales v Associated
Newspapers [2006] EWHC 522 (Ch)***





'Kiss and tell'

- '(W)hen people kiss and later one of them tells, that second person is almost certainly breaking a **confidential arrangement**' (*Barrymore v Newsgroup Newspapers Ltd and Another* [1997] FSR 600, 602 per Jacobs J)
- *Argyll v Argyll and Others* [1967] Ch 301. The Duchess granted injunction *not* to publish sexually explicit polaroids.
 - Similar claims often fail e.g. *Lennon v News Group Newspapers* [1978] FSR 573



Close relationships

- Unmarried couples and same-sex relationships: covered, if express confidence (made by a form of contract) (*Stephens v Avery*)
- The Sun outed Michael Barrymore thanks to information leaked by lover Paul Wincott
- Granted injunction for breach of 'Trust and Confidence Agreement' made by deed.
- **Therefore, Law of confidence is available to people in 'close relationships'**



- ❖ **Sexual activities confidential** if unconscionable to disclose them ≠ gross sexual immorality (*Stephens v Avery* [1988] 1 Ch 449)
- Though gross sexual immorality might not be protected from disclosure, information about sexual activities could be protected under a legally enforceable duty of confidence, where it would be unconscionable for someone who had received information on an expressly confidential basis to disclose it!
- ❖ But, Disclosure may be in the **public interest** (*Theakston (Jamie) v MGN* [2002] EWHC 137 (QB))

- In *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, House of Lords confirmed for the first time that the HRA had led to the establishment of a **new cause of action** that they described as "**wrongful disclosure of private information**" or "**misuse of private information**"
- The UK courts do not recognize such a tort by that very name, and presently there is only the equitable action for breach of confidence which addresses the misuse of private information.
- **However, still no general tort of invasion of privacy** in E&W (*Wainwright v Home Office* [2003] 3 WLR 1137). – see There are a number of common law countries where the tort of invasion of privacy has been found in jurisprudence such as New Zealand and Australian courts that have long recognized the existence of a common law tort of privacy.



What is privacy?

- The protection of someone's privacy is frequently seen as a way of drawing the line as to how far society can intrude into an individual's private affairs. To define 'privacy' is perhaps most difficult, as the notion of privacy differs from country to country and from culture to culture. Individual states have defined their constitutional laws and substantive case law as the notion of privacy has developed.

Right to Privacy: From the European Convention on Human Rights to the Human Rights Act

- ECHR – international treaty signed by the UK in 1950, commitment to uphold fundamental rights. Affected by Brexit?
- HRA enables people to file claims in UK courts to uphold their ECHR rights
 - After failed attempts to introduce privacy legislation in 1961, 1967, 1969, 1987 and 1989
 - Conservatives: we will repeal and replace HRA (2010), we will not replace or repeal the HRA (2017); we will update the HRA to ensure [a proper balance between the rights of individuals, our vital national security and effective government](#) (2019); [overhaul “nonsensical” HRA](#) and “restore common sense” (2021)

European Convention on Human Rights (ECHR)

Article 8 – Right to respect for private and family life:

'1. Everyone has the right to respect for his **private and family life**, his **home** and his **correspondence**.

2. There shall be **no interference** by a public authority with the exercise of this right **except** such as is in accordance with the **law** and is **necessary** in a democratic society in the interests of national **security**, public **safety** or the **economic well-being** of the country, for the prevention of **disorder or crime**, for the protection of **health or morals**, or for the protection of the **rights and freedoms** of others.'

➤ Article 8(1) ECHR makes it clear that the concept of privacy is not limited to isolated individuals, but includes the general 'zone' of the family, the home, correspondence with others, telephone conversations and a person's well-being.

- However, Article 8 is **not an absolute right** and may be **'qualified'**, which means a Member State to the Convention may derogate under Article 8(2) ECHR:

'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

ECHR, art 8: an open-ended provision

- *S and Marper v United Kingdom* [2008] ECHR 1581 — **Retention of DNA sample** of persons arrested but not convicted of an offence held to breach of Article 8.
- *The Northern Ireland Human Rights Commission's Application* [2015] NIQB 96 — NI's **criminalisation of abortion** in the areas of significant abnormality, rape or incest are incompatible with Article 8.

Privacy in the literature

- Witzleb expresses concern that the lack of a substantive privacy law in the UK has led to **insufficient** legal remedies for invasions of privacy.
- Bennett disagrees and argues that it is negated by courts' **flexibility** in interpreting breach of confidence and the assessment of the breach of privacy on a case-by-case basis.
- **Moore's 4 types of privacy:**
 - **Information** privacy involves the establishment of rules governing the collection and handling of personal data such as credit information and medical records;
 - **Bodily** privacy concerns the protection of people's physical selves against invasive procedures such as drug testing;
 - Privacy of **communications** covers the security and privacy of mail, telephones, email and other forms of communication;
 - **Territorial** privacy concerns the setting of limits on intrusion into the domestic environment such as the workplace or public sphere; to control the channels through which one's image is distributed.

Campbell (Naomi) v Mirror Group Newspapers

[2004] 2 AC 457 (HL)

Landmark case because the HL set the threshold test as to whether information is private

- ☐ Daily Mirror published stolen photographs of Naomi Campbell arriving and leaving Narcotics Anonymous to show that she lied.
- ☐ **Rehabilitative treatment** is private information amounting to duty of confidence
- ☐ **The assurance of privacy is essential** to rehabilitation
- ☐ The courts have to balance an individual's right to privacy under Article 8(1) and the media's right to inform the public under Article 10(1) ECHR.

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- **How to examine whether the information is private?**

➤ Is the information private? The threshold test



'[T]he touchstone of private life is whether in respect of the disclosed facts the person in question had a **reasonable expectation of privacy**' (*Campbell* [21])

- ☐ **How was the info obtained?** Surreptitiously, covertly, without consent, private place, etc.
- ☐ **What's the harm** produced by the disclosure? E.g. chances of success of the rehabilitation decrease
- ☐ Does the **public interest in open media reporting prevail** on the privacy one is entitled to? Is the limitation **proportionate** to the need to the countervailing right?

Reasonable expectation of privacy?

Relevant factors



Murray v Big Pictures (UK) Ltd [2008] EWCA Civ 446)

1. What a **reasonable person of ordinary sensibilities** would feel...
2. ...if placed in the **same situation** as the subject of disclosure (not its recipient)...
3. ...and faced with the **same publicity**

Please remember! You need to take into consideration the circumstances of the case

- Complainant's attributes;
- Nature of the latter's activity;
- Place where it was happening;
- Nature and purpose of the intrusion + circumstances / purposes for which the information came into the hands of the publisher;
- Consent (was its absence known or could be inferred); and
- Effect on the Complainant.

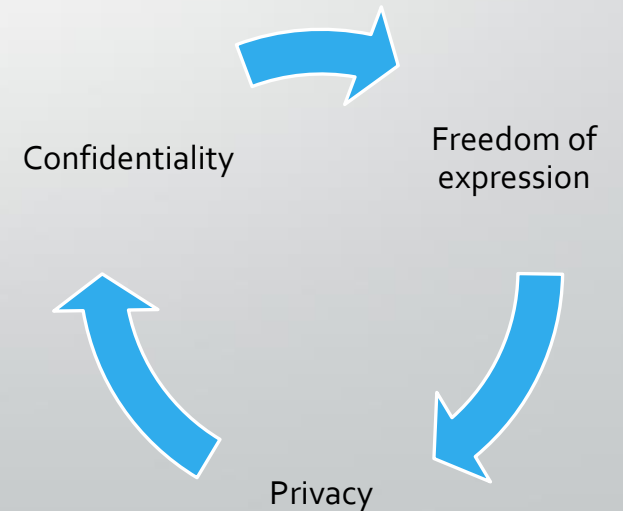


If there was a reasonable expectation of privacy, the second question to examine is:

- How the balance should be struck as between the claimant's right to privacy and the publisher's right to publish?

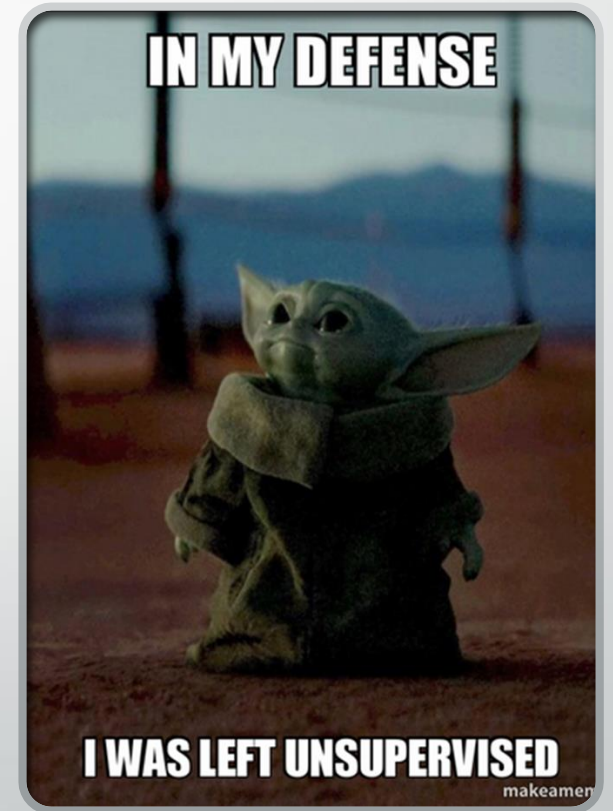
Balancing act between the interests at stake!

- Freedom of expression is a public interest that often overrides the claimant's argument for privacy
- But confidence often overrides the defendant's argument for freedom of expression
- ... and (theoretically speaking) *ad infinitum*
- **Neither right takes automatic precedence** over the other
- Case-by-case analysis



Defences

- Even when the information is private and there is an expectation of privacy, defenders (defendants in England and Wales) can invoke one of the following defences:
 - Freedom of expression (ECHR, art 10)
 - Other public interest (e.g. national security)
 - Public domain
 - Protection of journalistic sources (Contempt of Court Act 1981, s 10; *Richard v British Broadcasting Corporation* [2017] EWHC 1291 (Ch))



Freedom of expression (ECHR, art 10)

1. Everyone has the right to freedom of expression. This right shall **include** freedom to **hold opinions** and to **receive and impart information** and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, **restrictions** or penalties as are prescribed by **law** and are **necessary** in a democratic society, in the interests of national **security**, **territorial integrity** or public **safety**, for the prevention of disorder or **crime**, for the protection of **health** or morals, for the protection of the **reputation or rights of others**, for preventing the disclosure of information received in **confidence**, or for maintaining the authority and **impartiality of the judiciary**.'



Douglas v Hello! Ltd **[2001] EMLR 563 (QB)**

This was the first legal challenge after the Human Rights Act 1998 (HRA) had come into force on 1 October 2000.

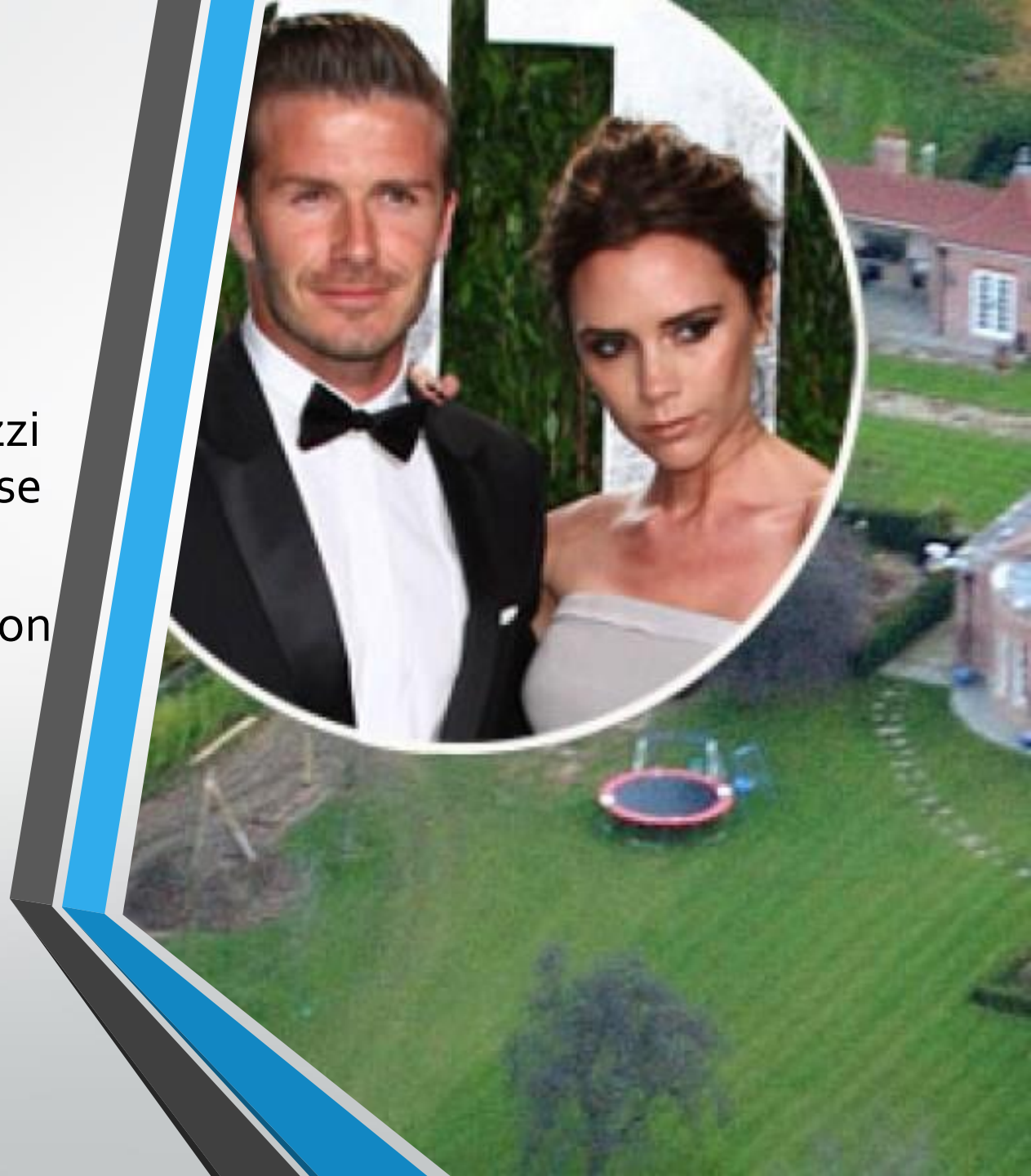
- Did Catherine Zeta-Jones and Michael Douglas had a reasonable expectation of privacy in their wedding photographs taken at the high-profile event at the Plaza Hotel in New York in November 2000.
- And would the notion of privacy under Article 8(1) ECHR include the exclusivity of their commercial wedding photographs which the celebrity couple had sold for £1m to OK magazine?

Douglas v Hello! Ltd [2001] EMLR 563 (QB)

- ☐ OK had exclusive license to publish Douglasses' wedding photos at Plaza Hotel
- ☐ Hello! Published them on the same day
- ☐ **'The law recognises (...) a right of personal privacy' [115]**
- ☐ Required by HRA (Article 8 of the ECHR)
- ☐ **A wedding is a public affair + Douglasses' lives in public domain + sold their photos = Therefore the Court agreed that freedom of expression prevails!**

Beckham v Mirror Group Newspapers Ltd [2001] All ER (D) 307

- Despite the Beckhams' best efforts, paparazzi obtained photos of interior of their new house and sold them to The Mirror
- Stopped negotiations for exclusive publication of photos for security and privacy reasons
- Interim injunction [interdict in Scots law] on condition not to publish them meanwhile.
- Unwarranted intrusion of privacy: upheld
- A week after, Posh Spice virtual tour of 'Beckingham Palace'.



How are *Douglas* and *Beckahm* different?



There is only a fine nuance in
Contract!
the Beckhams had not yet made a
commercial contract with a
magazine,
featuring the interior design of their
new home while the Douglasses had
made a £1m contract
with OK magazine for the exclusive
publishing rights of their wedding
photos!





Privacy and the media

- ☐ Arts 8 and 10 particularly relevant for tabloid media
 - William Randolph Hearst: news is 'what someone, somewhere doesn't want you to print'
- ☐ Most common remedy – injunction
- ☐ Occasionally, damages
- ☐ The centre of gravity – protection against state intervention (negative right)
- ☐ But now also protection expanded to private actions (positive right)
- ☐ When reporting delicate story, should personal details be removed?
 - *Often no, because media need context (otherwise the story is meaningless)*

Equitable remedies for breach of confidence / misuse of private information

- ☐ Injunctions
- ☐ Compensatory damages
- ☐ Exemplary damages
- ☐ Account of profits
- ☐ Delivery-up
- ☐ Proportion of costs

- Usually injunction and account of profits; 'where there is no breach of contract or other orthodox foundation for damages at common law, it seems doubtful whether there is any right to damages' (*Malone v Metropolitan Police Commissioner* [1979] 1 Ch 344 (Sir Robert Megarry VC))



HRH The Duchess of Sussex v Associated Newspapers Limited [2021] EWHC 273 (Ch)

- ❑ In his judgment, Lord Justice Warby found for Meghan in her claim for MoPI against Associated Newspapers, publishers of the Mail on Sunday (MoS) and Mail Online, over five articles in February 2019 that included extracts of a handwritten letter to her estranged father.
- ❑ [76] “This was not a business letter, or one advancing a complaint to a politician about their public conduct or functions. It was a communication **between family members** with a **single addressee**. Precautions were taken to ensure that it was **delivered only to him**. It was, in short, a personal and private letter. The majority of what was published was about the **claimant's own behaviour, her feelings** of anguish about her father's behaviour and the resulting rift”.
- ❑ Information was intrinsically private and imparted in circumstances that gave rise to a reasonable expectation of privacy.

Right to tell one's own story

- Mr Markle's **right to tell his own life story is qualified** and does not override the claimant's right to keep the contents of her letter private.
- Respect for claimant's privacy does not significantly impinge on Mr Markle's entitlement to give his own account of events in his own life. It only restricts his right to **use the contents of the unpublished letter** as a means of doing so!
- Applied legal principle in *McKennitt v Ash* [\[2005\] EWHC 3003 \(QB\)](#) [\[2006\] EMLR 10](#) [77]: "if a person wishes to reveal publicly **information about aspects of his or her relations with other people**, which would attract the prima facie protection of privacy rights, any such **revelation should be crafted, so far as possible, to protect the other person's privacy....** It does not follow, because one can reveal one's own private life, that one can also expose confidential matters in respect of which others are entitled to protection if their consent is not forthcoming".

Necessary and proportionate interference with Freedom of Expression

- [128] “The claimant had a **reasonable expectation that the contents of the Letter would remain private**. The Mail Articles interfered with that reasonable expectation. The only tenable justification for any such interference was to **correct some inaccuracies** about the Letter contained in the People Article. On an objective review of the Articles in the light of the surrounding circumstances, the inescapable conclusion is that, save to the very limited extent I have identified, **the disclosures made were not a necessary or proportionate means of serving that purpose**. For the most part they did not serve that purpose at all. Taken as a whole the disclosures were manifestly **excessive and hence unlawful (...)**.”
- Associated Newspapers was granted permission to appeal Warby J's decision in June 2021

ECHR v UK



Privacy in public places UK vs. ECHR. Different accents:

- *Naomi Campbell* [2004] If she is in public places – it is very difficult to justify her right to privacy (UK)
- *Von Hannover v Germany* [2004] EMLR 379 – **in her public capacity of Princess Caroline can be filmed**, but when she is with friends/family – paparazzi have to respect standards of privacy.
- *Murray* - JK Rowling took her child to McDonalds restaurant in Edinburgh. Pictures were made and published.
 - Parents were arguing for their child right to privacy, but the court applied *Campbell*: **no privacy in public places for celebrities**
 - On appeal however the court differentiated parents rights and **child's rights**. The former has been rejected, but the latter confirmed ([2008] EWCA Civ 446)



Big Brother Watch v UK (May 2021)

- Three applications were lodged after Edward Snowden, a former US National Security Agency (NSA) contractor, revealed the existence of surveillance and intelligence sharing programmes operated by the intelligence services of US and UK.
- The applicants believed that the nature of their activities meant that their **electronic communications and/or communications data** were likely to have **been intercepted by the UK intelligence services or obtained by them from either communications service providers or foreign intelligence agencies** such as the NSA.
- The case concerned complaints by journalists and human-rights organisations in regard to three different surveillance regimes: (1) the bulk interception of communications; (2) the receipt of intercept material from foreign governments and intelligence agencies; (3) the obtaining of communications data from communication service providers

Bulk interception is OK (kinda)

- ❑ Owing to the multitude of threats States face in modern society – networks of international actors, who use the Internet for communication and who often avoided detection through the use of sophisticated technology – Court wide discretion in deciding whether bulk interception necessary to protect national security ('margin of appreciation')
- ❑ Operating a **bulk interception** regime (Regulation of Investigatory Powers Act 2000 or RIPA) does **not in and of itself violate the Convention**.

However, such a regime had to be subject to “end-to-end safeguards”, meaning that:

- ☐ At the domestic level, an assessment should be made at each stage of the process of the necessity and proportionality of the measures being taken
- ☐ Bulk interception should be subject to independent authorisation at the outset, when the object and scope of the operation were being defined
- ☐ Operation should be subject to supervision and independent ex post facto review

Flaws in the bulk interception regime



- Bulk interception had been **authorised by the Secretary of State**, and not by a body independent of the executive.
- **Categories of search terms** defining the kinds of communications that would become liable for examination ('selectors') had **not been included in the application for a warrant**.
- **Search terms linked to an individual** (that is to say specific identifiers such as an email address) had not been subject to **prior internal authorization**.
- Insufficient protections for **confidential journalistic material**.
- **Bulk interception regime incapable of keeping the "interference" with citizens' private life rights to what is "necessary in a democratic society"**
→ art 8 violation

Criticism - Accessing data no longer constitutes 'a separate and further interference' with the right to respect for private life and correspondence under Article 8(1)

- Grand Chamber considers how an interference with Art 8 takes place over what it identifies as the four stages of data processing within a bulk interception system [325]
 - initial retention
 - application of selectors
 - examination of selected content/communications data by analysts
 - subsequent data retention and use/data sharing of the 'final product' para
- **'(D)egree of interference with privacy rights will increase as the process moves through the different stages'.**
- Departs dramatically from long-established ECtHR case law which provides that the operation of a bulk interception system involves not one but a series of interferences with individuals' rights under Article 8 → accessing data acquired from a bulk interception system constitutes 'a further separate interference' with the rights under Article 8 ECHR (see [Weber and Saravia v Germany](#))

Criticism – onlife and bulk surveillance

- [Criticisms](#) by judges of the ECtHR itself and scholars of the first instance judgment for the distinct lack of engagement by the ECtHR in general regarding how digitalised our lives have become and how this '[sea change](#)' has made the power of bulk interception to look into our private lives so much greater
- Given the novel and far-reaching scope of these modern and highly sophisticated regimes, it is a cause for concern that the Grand Chamber omits this factor in its Article 8(1) assessment of the degree of interference posed by the operation of bulk interception regimes to the rights to private life ([Ni Loideain 2021](#))

Developments

- In 2016, safeguards needed 'to be enhanced' in light of the capacity of State surveillance to now acquire detailed profiles of the 'most intimate aspects of individuals' private lives' ([*Szabó and Vissy v Hungary*](#))
- The Grand Chamber instead concludes that adapting the 'six minimum safeguards' developed from its caselaw dealing with the tapping of landline phones decades ago will suffice.
- They are not even minimum standards to be met for bulk interception to be ECHR-compliant: mere best practice, principles considered by courts in a "global assessment" of the regime [360]

Requests of intercept material from foreign authorities

- The Court concluded that UK law had set **out clear, detailed rules governing when intelligence services had been authorised to request intercept material from foreign** intelligence agencies and how, once received, the material requested should be examined, used and stored
- Interception of Communications Commissioner (official charged with providing independent oversight of intelligence service activities) + Investigatory Powers Tribunal (judicial body set up to hear allegations from citizens that their communications had been wrongfully interfered with) = adequate **supervision and effective *ex post facto* review** of activities
- Sufficient safeguards had been in place to protect against abuse and to ensure that UK authorities **had not used requests for intercept material from foreign intelligence partners as a means of circumventing their duties under domestic law and the Convention → no art 8 violation**

Further readings

- Normann Witzleb, 'Justifying gain-based remedies for invasions of privacy' (2009) 29(2) Oxford Journal of Legal Studies 325
- Colin J Bennett, *The privacy advocates: Resisting the spread of surveillance* (MIT Press 2010)
- Barrington Moore Jr, *Privacy: Studies in social and cultural history* (Routledge 1984)
- [The human rights implications of Brexit](#), Joint Committee on Human Rights
- Test for private information applies also to **children's privacy** (*In the matter of an application by JR38 for Judicial Review (Northern Ireland)* [2015] UKSC 42)
- Successful blockage of publication and serialisation of memoirs by Rosalind Marks, Cherie and **Tony Blair's former nanny** (*Blair v Associated Newspapers Plc* [2000] 11 WLUK 348)
- 2013-2017 – **Kate Middleton**, Duchess of Cambridge – publication of **topless pictures** (injunction in France [not Italy and RI] + damages) Cour d'Appel de Versailles, 19 September 2017
- **IPSO and OFCOM** have in their **codes of practice** requirements for protecting **privacy**, particularly in delicate cases (children, harassment, hospitals, reporting of crime, people in distress, emergency etc.)
 - Very difficult to achieve, particularly for live events