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## Defamation and the Misuse of Private Information: A Comparative Analysis

This article considers the interrelationship between defamation and misuse of private information actions and whether the same set of facts might give rise to parallel actions. The starting point for the analysis is that privacy actions are tortious rather than equitable which removes a fundamental difference between the two. In comparing the two actions, the author analyses whether corporations can rely on ECHR Art 8 in privacy cases which has proved controversial. The application of ECHR Art 10 to natural and legal persons is however more straightforward in both cases. Central to the analysis in this article is how the Art 8 and 10 balance is struck, and the role played by public interest in this assessment. The Strasbourg decision in *Axel Springer* is crucial in this regard as it applies the same set of criteria to both actions. Once all these issues have been considered, then the availability of remedies and defences will be analysed and compared. The author will conclude by arguing that both torts protect different aspects of reputation and they should be seen as separate but overlapping. Recent developments are however bringing them closer together.

### Introduction

Challenging questions about the interrelationship between actions for defamation and the relatively new action for misuse of private information have been raised recently although many aspects of that relationship remain unresolved.<sup>1</sup> Case law suggests that the precise nature of that relationship is largely untested and therefore merits further analysis.<sup>2</sup> The tensions between the two actions have been heightened by the influence of European Court of Human Rights<sup>3</sup> and the reaction to it by English judges. Any consideration of the overlap between the two actions must start with the European Convention on Human Rights and Fundamental Freedoms (1950) ETS 5; 213 UNTS 221<sup>4</sup> Art 8 which protects both reputation and privacy and Art 10 which guarantees freedom of expression. This is because English and Strasbourg case law concern reputation and image.

This article will begin by considering cases on whether the misuse of private information action is a tortious or equitable which had proved controversial in the past but it will be argued that it is a tort based on recent case law. This is the starting point for the comparison between the two actions. Both actions will then be compared once it has been determined that it is a tort. We will continue by considering who can sue, which involves analysing whether corporations can sue in defamation and whether they can argue misuse of private

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<sup>1</sup> See Eric Barendt, *An overlap of defamation and privacy?* (2015) 7(1) JML 85; David Rolph, *Vindicating reputation and privacy* in *Comparative Defamation and Privacy Law* edited by Andrew Kenyon (Cambridge University Press, 2016) and Ursula Cheer, *Singapore Conference Articles Recognition of business and economic interests of media in defamation and privacy law* (2016) 23 TLJ 193.

<sup>2</sup> *John Terry (originally LNS) v Persons Unknown* [2010] EWHC 11 (QB), [78] (Tugendhat J) and Lord Sumption in *Khuja v Times Newspapers Limited* [2017] UKSC 49 [21]. See also Nicole Moreham and Mark Warby, *Tugendhat and Christie the Law of Privacy and the Media* (Oxford University Press, 3<sup>rd</sup> ed, 2016), 351.

<sup>3</sup> Later the Strasbourg Court

<sup>4</sup> Later ECHR.

information. This issue is uncontroversial for defamation purposes but remains more difficult for the misuse of private information action. The focus will then shift to Art 8 / 10 balance which is crucial to the determination in all cases in this field. The penultimate area for discussion will be remedies: first, damages, and in particular the availability of exemplary damages which is more controversial in privacy cases; and second, interim injunctions where the interplay between the two actions is tricky. Lawyers are circumventing the restrictive rules on injunctions in defamation cases by arguing them as harassment cases instead which has complicated matters. There is “clear water” between the two actions when it comes to defences. The author will conclude that it would be best from an English law perspective to argue the two actions in the alternative rather than in parallel.

### **Is the Action for Misuse of Private Information a Tort?**

Whilst defamation is a tort, the misuse of private information action emerged from breach of confidence, an equitable right.<sup>5</sup> The latter rests on rather different foundations and protects different interests: secret or confidential information as opposed to private information.<sup>6</sup> Eady J argued that privacy was equitable in *Mosley v News Group Newspapers*,<sup>7</sup> whereas Tugendhat J took the opposite view in *Vidal-Hall v Google*.<sup>8</sup> The Court of Appeal in *Vidal-Hall*<sup>9</sup> decided that it was a tort for the purposes of service out of the jurisdiction. Although an appeal to the Supreme Court was allowed in part, this issue did not raise any arguable points of law and was not appealed.<sup>10</sup> There is therefore strong recent authority for the proposition that the misuse of private information action is a tort removing the most obvious distinction between the two. We will now continue by looking more closely at both actions.

### **The Essence of the Actions for Defamation and for Misuse of Private Information**

Defamation is defined as the publication of material which refers to the claimant and which tends to lower him in the estimation of right-thinking people<sup>11</sup> and causes or is likely to cause him serious harm.<sup>12</sup> The emphasis is on false information<sup>13</sup> whereas the action for misuse of

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<sup>5</sup> Most believe that breach of confidence is an equitable cause of action although some argue that it might be tortious. For further analysis: see Roger Toulson and Charles Phipps, *Confidentiality* (Sweet & Maxwell, 3<sup>rd</sup> ed, 2012) chapter 2; Tanya Aplin, *Gurry on Breach of Confidence* (Oxford University Press, 2<sup>nd</sup> ed, 2012) chapter 4.

<sup>6</sup> As *Tugendhat and Christie*, above n 2, put it at 150 the action for breach of confidence and the action for misuse of private information “coexist”. A detailed consideration of breach of confidence is beyond the scope of this article although it is dealt with fully in texts such as *Tugendhat and Christie* above n 2 and *Gurry* above n 5. The interrelationship with the action for misuse of private information will be considered in outline only.

<sup>7</sup> [2008] EWHC 1777 (QB).

<sup>8</sup> [2014] EWHC 13 (QB) [50] – [70].

<sup>9</sup> [2015] EWCA Civ. 311.

<sup>10</sup> Misuse of private information is viewed as a tort in cases such as *Campbell v News Group Newspapers Limited* [2004] UKHL 22 [14] (Lord Nicholls); *Douglas v Hello (No. 3)* [2003] EWCA Civ. 595 [96] (Lord Phillips MR); *Gulati v News Group Newspapers Limited* [2015] EWCA Civ. 1291 [87] – [89] (Arden LJ).

<sup>11</sup> *Sim v Stretch* [1936] All ER 1237.

<sup>12</sup> The Defamation Act 2013 (UK), c 26 s.1 and *Ambrosiadou v Coward* [2011] EWCA Civ. 409 [28] where Lord Neuberger MR pointed out that information of a “trivial nature of a low level of personal significance” would not engage Art. 8 for privacy purposes. The appeal in *Lachaux v Independent Print* [2017] EWCA Civ. 1334 (on s. 1(1)) is due to be heard by the Supreme Court in November 2018.

<sup>13</sup> *Tugendhat and Christie*, above n 2, argue that: “Defamation protects a person against humiliation, and from discrimination based on false facts in personal and professional relationships. It also protects society from making political, professional and personal choices on a factual basis which is false”, 355.

private information focusses on true but private information<sup>14</sup> and the requirement since *Campbell*<sup>15</sup> that there is a reasonable expectation of privacy to engage ECHR Art 8.<sup>16</sup>

In *Douglas v Hello*,<sup>17</sup> the House of Lords accepted that a new cause of action had been created separately from the action for breach of confidence.<sup>18</sup> Indeed, *Tugendhat and Christie* suggest that the tort of misuse of private information might be more appropriate than the action for breach of confidence where the claimant is trying to protect his private life.<sup>19</sup> Breach of confidence is not redundant in privacy cases where the media is the defendant. The Court of Appeal has held that a duty of confidence can arise from a confidential relationship which might be important or even decisive in a claim for misuse of private information although not relevant to a defamation claim.<sup>20</sup>

The Strasbourg Court confirmed in *Pfeifer v Austria*<sup>21</sup> that ECHR Art 8 encompasses a

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<sup>14</sup>David Rolph says that defamation turns on the true / false dichotomy and privacy on the public / private dichotomy in *Irreconcilable Differences? Interlocutory Injunctions for Defamation and Privacy* (2012) 17(2) MALR 170, 173. However even this distinction is questionable as defamation cases can succeed where the material cannot be proved to be true by the defence and there are cases of “false privacy” such as *P v Quigley* [2008] EWHC 1051 (QB).

<sup>15</sup>[2004] UKHL 22, [21] (Lord Nicholls).

<sup>16</sup>As *Tugendhat and Christie*, above n 2, say, 152: since the enactment of the Human Rights Act 1998 (UK) c 42 (later HRA), courts have had to act consistently with the ECHR pursuant to s.6. They attempted to “absorb” or “shoehorn” the values contained in ECHR Articles 8 and 10 within the existing action for breach of confidence, see for example: *A v B & C plc* [2002] EWCA Civ. 337 [4] (Lord Woolf); *Douglas v Hello (No. 8)* [2005] EWCA Civ. 595 [53] (Lord Phillips MR). This was unsatisfactory according to Lord Nicholls in *Campbell* [2004] UKHL 22, [14]: “This cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship. In so doing it has changed its nature...The continuing use of the phrase “duty of confidence” and the description of the information as “confidential” is not altogether comfortable. Information about the individual’s private life would not, in ordinary usage, be called “confidential”. The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information.”

<sup>17</sup>[2007] UKHL 21.

<sup>18</sup>[255] (Lord Nicholls); *Tugendhat and Christie*, above n 2, 152. In *Campbell* [2004] UKHL 22, Lady Hale said at [132] – [134] that no new cause of action had been created. The Court of Appeal took a similar approach until *Vidal – Hall* [2015] EWCA Civ. 311 when it accepted that the misuse of private information action was a separate cause of action. Lord McFarlane MR held at [21] that although the action had been absorbed originally by the action for breach of confidence which should be distinguished from misuse of private information. They protected different interests: secret / confidential information as opposed to private information. They are now two distinct causes of action.

<sup>19</sup>171, where they suggest that breach of confidence might be more appropriate in claims of a more commercial nature.

<sup>20</sup>*McKennitt v Ash* [2006] EWCA Civ. 1714 [15] (Buxton LJ) where he held a duty of confidence would usually stem from a transaction between the parties or their pre-existing relationship. In *HRH The Prince of Wales v Associated Newspapers (No. 3)* [2006] EWCA Civ. 1776, the court held that this was not a privacy case but a more traditional breach of confidence case, namely a breach of a contractual duty by a former employee. It would not be appropriate to consider *Campbell* [2004] UKHL 22 as the information was confidential as it should be in a breach of confidence case. Weight was added by the public interest in observing a duty of confidence in *HRH The Prince of Wales*. The publisher knew that information had been revealed in contravention of that duty. In *Browne v Associated Newspapers* [2007] EWCA Civ. 295 it was held that whether the parties had enjoyed a relationship of confidence could be important in assessing whether there was a reasonable expectation of privacy.

<sup>21</sup>[2007] ECHR 935, [35]; *Application by The Guardian Newspaper and Media Ltd* [2010] UKSC1 (Lord Rodger) [42].

person's right to protect their reputation as part of the right to respect for their private life.<sup>22</sup> Once Art 8 is engaged, then the court should balance ECHR Arts 8 and 10 bearing in mind that both carry equal weight.<sup>23</sup> The balancing exercise should consider if the requisite elements of the tort are made out and whether there has been an infringement. This covers both actions.<sup>24</sup>

The next question goes to the heart of the distinction: whether both actions protect damage to reputation. In *Hannon v News Group Newspapers*,<sup>25</sup> Mann J refused to rule out the possibility that damage to reputation might form the basis of both actions<sup>26</sup>. He suggested that disclosure of medical records of a: "socially embarrassing but historic sexual medical condition affecting a prominent person" might cause not only embarrassment but also harm to reputation. Would the main action relate to the consequences of infringing privacy and would any damage to reputation be reflected in the award of damages? If so, then it should be pleaded as a privacy case. As Mann J suggested, the choice between the two might depend on whether the defence of truth<sup>27</sup> would defeat a defamation claim.<sup>28</sup> It would be an abuse to avoid the defence of truth or the one-year limitation period in defamation cases<sup>29</sup> by arguing privacy wrongly.<sup>30</sup> Mann J also raises the possibility of parallel proceedings<sup>31</sup> but the issue was not determined conclusively. As we will see later however, the courts might not allow a defamation case to be framed as a privacy case either to avoid the stricter rules on interim injunctions.<sup>32</sup>

Whilst defamation protects reputation rather than hurt feelings, privacy protects the right to keep certain information private, even this crucial distinction is questionable. The focus in the action for misuse of private information is not on protecting reputation against the publication of untrue facts as in defamation but on preventing the invasion of privacy by revelations of

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<sup>22</sup> The Strasbourg Court takes a broad view of the concept of private life – *Von Hannover v Germany (No 1)* [2004] ECHR 294 where it held that photographs taken in both public and semi-public places could be protected by the right to privacy even in the absence of harassment. The Court also found that the photos of Princess Caroline going about her daily business did not contribute to a debate on a matter of general public interest.

<sup>23</sup> *White v Sweden* [2006] ECHR 793, [19] and [30]; *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47 [17] (Lord Steyn).

<sup>24</sup> Striking the right balance between ECHR Arts 8 and 10 was one of the aims of the 2013 Act, see also the 1998 Act ss 2, 6 and 12 which provide that English courts must consider the ECHR and Strasbourg case law.

<sup>25</sup> [2014] EWHC 1580 (Ch) [29].

<sup>26</sup> *Tugendhat and Christie*, above n 2, 350, however say that even though the law of privacy might protect reputation, this might be either an "incidental benefit (or disbenefit) of the introduction of a privacy law, or as an additional justification for a privacy law". It is in their view a moot point.

<sup>27</sup> The 2013 Act s.2.

<sup>28</sup> *Browne* [2007] EWCA Civ. 295 [56]; [2007] EWHC 202 (QB) [52] (Eady J).

<sup>29</sup> Limitation Act 1980 (UK), c 58, s.4A.

<sup>30</sup> *Hannon* [2014] EWHC 1580 (Ch) [26].

<sup>31</sup> [49].

<sup>32</sup> *Hannon* [2014] EWHC 1580 (Ch), [53].

true facts or images of you and / or your family.<sup>33</sup> Both actions do cover to some extent autonomy, integrity and dignity.<sup>34</sup>

The Strasbourg Court has also held that even though the main purpose of Art 8 is to protect individuals from unlawful state interference with those rights, there might also be an obligation on the state to uphold the right to private or family life.<sup>35</sup>

Both ECHR Arts 8 and 10 are vertically and horizontally effective which is important<sup>36</sup> as the media are often defendants in these proceedings. Questions do however arise over the scope of those articles and whether a corporation might argue a breach of ECHR Art 8 and this will be considered next.

### **Defamation and ECHR Article 8**

It was clear even before the 2013 Act that corporations could bring defamation proceedings to protect their trading reputation and commercial viability.<sup>37</sup> Companies must show that the defamatory material has caused or is likely to cause serious economic loss.<sup>38</sup> The law is based upon the premise that a company's reputation is a thing of value. Damage to corporate standing might lower the body's reputation in the eyes of the public, its shareholders and employees. People might therefore be less willing to deal with it, invest in it or work there. Decline in revenue or share value might not be actionable as causation is difficult to prove without detailed expert testimony or documentary evidence as in *Khalid Undre v the London Borough of Harrow*.<sup>39</sup>

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<sup>33</sup> *A v B & C plc* [2002] EWCA Civ. 337 [11 (vii)] citing dicta of Gleeson CJ in *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1 [42]: "There is no bright line which can be drawn about what is private and what is not...Certain types of information about a person such as information relating to health, personal relationships, or finances may be easy to identify as private; as may certain kinds of activity which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private."

<sup>34</sup> *Avram v Moldova* [2011] ECHR 1076, [36]; *Von Hannover No 1* [2004] ECHR 294, [50]; *Bogomolova v Russia* [2017] ECHR 571; *Reynolds v Times Newspapers* [1999] UKHL 45, 54 (Lord Nicholls); *Mosley* [7].

<sup>35</sup> *Stjerna v Finland* [1994] ECHR 43, [38].

<sup>36</sup> Privacy cases such as *Campbell* [2004] UKHL 22; *Mosley* [2008] EWHC 17777 (QB) and *Khuja* [2017] UKSC 49 (who lost as the majority held that there was no reasonable expectation of privacy) and defamation cases such as *Reynolds* [1999] UKHL 45; Thomas Bennett *Horizontality's New Horizons – Re-examining Horizontal Effect, Privacy, Defamation and the Human Rights Act: Parts 1 and 2* (2010) 21(3) Ent LR 96; (2010) 21(4) Ent L R 145. <sup>37</sup>*Steel and Morris v UK* [2005] ECHR 103; *Jameel v Wall Street Journal* [2006] UKHL 44; *Magyar Tartalomszolgaltatok Egyesulete and Index Hu ZRT v Hungary* [2016] ECHR 135; *Collins Stewart v The Financial Times Ltd* [2004] EWHC 2337 (QB) where Tugendhat J struck out a claim based on a fall in share price because it was not an appropriate measure of loss; *The Bussey Law Firm v Page* [2015] EWHC 563 (QB) [14].

<sup>38</sup> The 2013 Act s 1(2).

<sup>39</sup> [2016] EWHC 931(QB), where Tugendhat J found that: (1) serious financial loss had not been proved (2) customers had probably turned away from a struggling business and (3) there was no causal link between any financial impact on the business and the allegedly defamatory publication.

## Misuse of Private Information and ECHR Article 8 and Legal Persons

Cases on ECHR Art 8 and corporations and the misuse of private information are more nuanced. For instance, in *Niemietz v Germany*<sup>40</sup> the Strasbourg Court held that respect for private life might include protecting the sanctity of business premises.<sup>41</sup> The Court held that:

“...to interpret the words “private life” and “home” as including certain professional or business premises would be consonant with the essential object and purpose of Article 8..., namely to protect the individual against arbitrary interference by public authorities”.<sup>42</sup>

This principle has been applied in the context of competition law proceedings. In *Societe Colas Est v France*,<sup>43</sup> the body under investigation had been obliged to comply with information requests from the French authorities, the Strasbourg Court held that the company’s ECHR Art 8 rights had been infringed and that the limitation in Art 8 in subparagraph (2) should be narrowly construed. The infringement was therefore disproportionate.<sup>44</sup>

In *Firma EDV v Germany*<sup>45</sup> the Court balanced ECHR Arts 8 and 10 holding that protecting a company’s reputation might be a legitimate aim of ECHR Art 10(2). It specifically left open the question of whether a company has a right to reputation for the purposes of ECHR Art 8(1) but proceeded on the basis that it did.<sup>46</sup> ECHR Art 8 does therefore apply to companies at least by implication.<sup>47</sup> Claiming that companies have a right to reputation is controversial as it is difficult to say that companies have the same rights to identity and integrity as natural persons.<sup>48</sup> Could or should the concept of privacy be said to apply to humans alone?<sup>49</sup> The Court should have answered this important question more directly.

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<sup>40</sup>[1992] ECHR 80.

<sup>41</sup> The German authorities had a warrant to search its business premises in criminal proceedings and so the cases are not factually similar.

<sup>42</sup> *Niemietz* [31], *Lindstrand Partners Advokatbyra AB v Sweden* [2016] ECHR 1139, [83] where the Court held that the concept of “home” would include a company’s registered office where that company was run by a private individual and the registered office of a legal person, plus any branches or other business premises.

<sup>43</sup>App no 37971/97 (ECHR 16 April 2002) [47], [49]. Article 8 does mention the right to have correspondence kept private.

<sup>44</sup> Any interference by a public authority with an Article 8 right must be prescribed by law and necessary in a democratic society.

<sup>45</sup> App no 32782/08 (ECHR 2 September 2014).

<sup>46</sup> [23]. Eileen Weinert however argues in *Firma EDV v Germany – do companies have feelings too?* (2015) 26(2) Ent LR 50 that whilst companies have a right to protect the sanctity of their offices and to keep correspondence confidential, privacy is a uniquely human concept agreeing with Lord Justice Mustill in *Regina v Broadcasting Standards Commission ex parte British Broadcasting Corporation* [2000] EWCA Civ. 116. She interprets *Firma EDV* as leaving open the question of whether legal persons have rights under the privacy limb of ECHR Article 8.

<sup>47</sup> See also *Aerzteammer fuer Wien and Dorner v Austria* (2016) ECHR 179 where harm to the reputation of a company seems to be assumed at [62] and [69]; *Heinisch v Germany* [2011] ECHR 1175; *Steel and Morris* [2005] ECHR 103, [94] in relation to ECHR Art. 10: “The State therefore enjoys a margin of appreciation as to the means it provides under domestic law to enable a company to challenge the truth, and limit the damage, of allegations which risk harming its reputation.”

<sup>48</sup> *Case Law, Strasbourg: Firma EDV fuer Sie v Germany. Article 8, Companies and the right to Reputation* <<https://inform.wordpress.com/2014/10/09/case-law-strasbourg-firma-edv-fur-sie-v-germany-article-8-companies-and-the-right-to-reputation-hugh-tomlinson-qc/>>

<sup>49</sup> Weinert, above n 46.

The approach of the Court of Justice in Luxembourg<sup>50</sup> has to some extent drawn on Strasbourg case law to ascertain whether ECHR Art 8 can apply to companies. This has also proved contentious.

### Comparison with Luxembourg and English Jurisprudence

Both actions are seemingly outside the scope of EU Law but the case law does contain some useful analysis on ECHR Art 8 and its application to corporations. The Luxembourg Court considered the issue in cases such as *Hoechst v Commission*<sup>51</sup> which involved competition proceedings.<sup>52</sup> Advocate General Mischco found no agreement between the then EU Member States on whether the concept of the sanctity of the home extended to business premises in their domestic law. The Court was clearly influenced by this and concluded that the principle of the inviolability of the home did not therefore extend to business premises. More recently however, in cases such as *Deutsche Bahn AG v The Commission*<sup>53</sup>, the Luxembourg Court acknowledged that ECHR Art 8 might cover business premises.<sup>54</sup>

This controversial issue has also been analysed in the UK in the *BBC* case<sup>55</sup> where the Court of Appeal decided that both individuals and corporate bodies could argue an infringement of privacy in a judicial review application in relation to ss 110 and 11 of the Broadcasting 1996 (UK) c 55.<sup>56</sup> As Lord Woolf MR put it: “There is no dispute that a company can make a complaint”<sup>57</sup> about the “unjust or unfair treatment or unwarranted infringement of privacy”.<sup>58</sup> The Act extended to the unwarranted interference in the private affairs of a company. Lord Woolf argued that even though intrusion into the private lives of individuals might be more objectionable, companies still needed protection from unwarranted intrusions into confidential affairs.

Lady Hale agreed in principle but felt it was hard to find synonyms for “privacy” although “avoidance of publicity” (and presumably unwanted publicity) might apply to companies. This is a subtle distinction. Companies might wish to keep certain property, meetings and correspondence private and to avoid publicity legitimately or illegitimately.<sup>59</sup> Lord Mustill however took a different view and felt that privacy, could not apply to a corporation: “which has no sensitivities to wound and no selfhood to protect”.<sup>60</sup> A company might be able to

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<sup>50</sup> Later the Luxembourg Court.

<sup>51</sup> (46/87 and 227/88) [1989] ECR 2859. In *Secretary of State for the Home Department v Watson* (C-698/15) judgment of 21 December 2016, the Luxembourg Court ruled that it was a breach of the Charter of Fundamental Rights of the EU for domestic law to allow for the general and indiscriminate retention of traffic and location data relating to electronic communications for all subscribers and registered users even in the fight against crime and terrorism in a different context.

<sup>52</sup> Regulation (EEC) 17/62 of the Council [1959] – [1962] OJ L 13 / 87 (the first Regulation Implementing Articles 85 and 86 of the European Economic Community Treaty), Art 14(3) now Regulation 1/2003 (EC) of the Council [2003] OJ L 1/1.

<sup>53</sup> C-583/13P (COJ 18 June 2015).

<sup>54</sup> [20]; *Roquette Freres v Commission* (C-94/00) (COJ 22 October 2002) [29].

<sup>55</sup> 2000] EWCA Civ. 116.

<sup>56</sup> Programme makers had filmed secretly purchases in Dixons’ stores as part of an investigation into the selling of second-hand goods as new.

<sup>57</sup> [29].

<sup>58</sup> [30].

<sup>59</sup> [42].

<sup>60</sup> [48].

protect confidential information which was different to: “the essentially human and personal concept of privacy”.<sup>61</sup> Companies would need to show that they had a reasonable expectation of privacy in business secrets or price-sensitive information.

The difference in emphasis and approach between the judges in all three jurisdictions is evidence of the controversial nature of the proposition. Companies can rely on ECHR Art 8 to prevent unwarranted intrusions particularly when asked to reveal sensitive information or give access to business premises. However as legal persons do not have the same sensibilities as natural persons; this difference cannot be ignored in interpreting ECHR Art 8(1). Companies can protect information such as trade secrets in an action for breach of confidence<sup>62</sup> and cases such as *Axel Springer*<sup>63</sup> would support a broad interpretation of “reputation” for ECHR Art 8 purposes.

The scope of ECHR Art 10 to both natural persons and corporate bodies will be considered very briefly as it is uncontroversial.

### **Case Law on the application of ECHR Article 10 to Corporations**

Media defendants tend to argue Art 10 and freedom of expression when sued for defamation or for misuse of private information:

“Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for each individual’s self-fulfilment.”<sup>64</sup>

ECHR Art 10 encompasses the right to hold opinions, to receive and share them without interference from a public authority. Even though the media is given a wide degree of latitude, they do have both responsibilities and obligations and should not exceed certain boundaries.<sup>65</sup> The right to freedom of expression is not absolute. The individual’s right to “self-fulfilment” needs to be balanced against the rights of the other party, including the right not to be defamed or to be protected against the misuse of private information. ECHR Art 10(2) contains limitations on the right to freedom of expression including: “the protection of the reputation or rights of others.” In *Lingens v Austria*,<sup>66</sup> the applicant had described the Austrian Chancellor as a Nazi sympathiser. He argued that his conviction for criminal defamation breached ECHR Art 10(2) and the Strasbourg Court agreed, holding that political criticism is an important function of the media.<sup>67</sup>

The press plays the role of a public watchdog in cases such as *Axel Springer* particularly where criminal proceedings involved<sup>68</sup> as they are more likely to have the requisite element of public interest. It is also clear from *Autotronic AG v Switzerland*,<sup>69</sup> that claimants can rely

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<sup>61</sup> [49].

<sup>62</sup> *Vestergaard Frandsen A/P v Bestnet Europe* [2013] UKSC 31.

<sup>63</sup> [2012] ECHR 227.

<sup>64</sup> *Lingens v. Austria* [1986] ECHR 7[41]; *Sener v. Turkey* [2000] ECHR 377; *Thoma v. Luxembourg* [2001] ECHR 295; *Maronek v. Slovakia* [2002] ECHR 154; *Dichand v. Austria* [2002] ECHR 154

<sup>65</sup> ECHR Article 10(2).

<sup>66</sup> *Lingens v Austria* [1986] ECHR 7.

<sup>67</sup> *Lingens* [1986] ECHR 7, [42]. See *Bowman v United Kingdom* (1998) 26 EHRR 1; [1998] ECHR 4, where the Strasbourg Court held that free elections, freedom of expression and free political debate were the essence of democracy. See also *Aquilina v Malta* [2011] ECHR 928, [43].

<sup>68</sup> [2012] ECHR 227, [57].

<sup>69</sup> [1990] ECHR 12, [47].

on ECHR Art 10 regardless of whether they are a natural, legal person or a commercial entity.

ECHR Arts 8 (in some contexts) and 10 therefore apply to corporations. This leads us to consider the balancing exercise between ECHR Arts 8 and 10 which is central to most cases and is essential in analysing whether the issue is in the public interest and whether the material should therefore be published.

### **The ECHR Article 8 / 10 Balance**

The Strasbourg Court starts from the premise that freedom of expression is one of the essential foundations of any democracy subject to the limitations in ECHR Art 10(2) which are to be construed narrowly. Cases such as *Lingens*<sup>70</sup> show that the need for any such restriction must be established by the signatory state.

The word “necessary” in ECHR Art 10(2) implies the existence of a “pressing social need”. However, the signatory states have a “margin of appreciation” in judging whether the restriction can be justified. The Court gives the final ruling on whether any national restriction complies with ECHR Art 10.<sup>71</sup> It must consider whether any restriction on freedom of expression is proportionate, is the reasoning given by the national authorities sufficient and do any national standards comply with those set by Strasbourg case law?<sup>72</sup> This approach applies to both actions.

The Court in *Axel Springer AG v Germany*<sup>73</sup> laid down criteria for judging whether the national authorities have struck the correct balance between ECHR Arts 10 and 8. Both have equal weight<sup>74</sup>. In *Axel Springer*<sup>75</sup>, it found that an allegation of criminal activity contributed to a debate on a matter of general interest: the arrest and conviction of an actor for serious drugs offences. The Court distinguished between a private figure protecting their private life and a public figure. The applicant was a well-known actor and therefore a public figure. He had given press interviews and had courted publicity curtailing any expectation of privacy. The allegations were also true. It therefore found that preventing publication would infringe ECHR Art 10.

In *Von Hannover No 2*<sup>76</sup>, the Court found that press coverage of the illness of the late Prince Rainier III and the conduct of his family (how they reconciled their family obligations with their vacation plans) during his illness contributed to a debate on a matter of general interest. There was no evidence that the press photos had been taken surreptitiously or unlawfully. There was therefore no breach of ECHR Art 8 as there was no reasonable expectation of privacy.

These Strasbourg cases broaden the concept of a “public figure” covering anyone well-known to the public or regarded as a celebrity. The protection afforded to them is lower than for relatively unknown individuals as it is harder to establish that public figures have a reasonable expectation of privacy. It might seem harsh on Princess Caroline as she had succeeded elsewhere in persuading the Court that there was no public interest in knowing

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<sup>70</sup> [1986] ECHR 7

<sup>71</sup> *Amarson v Iceland* [2017] ECHR 530.

<sup>72</sup> *Janowski v Poland* [1999] ECHR 3.

<sup>73</sup> [2012] ECHR 227, [89] – [95] heard on the same day as *Von Hannover No 2 v Germany* [2012] ECHR 228.

<sup>74</sup> *Faludy-Kovacs v Hungary* judgment of 23<sup>rd</sup> January 2018, where the Strasbourg Court also held at [29] that it would be loath to interfere with the national court’s assessment of the Art 8 /10 balance where its case law had been followed.

<sup>75</sup> [2012] ECHR 227.

<sup>76</sup> [2012] ECHR 228.

her whereabouts and how she behaved in her private life even in public places.<sup>77</sup> These two *Von Hannover* cases are however distinguishable on their facts because there was more of a link between the story and her official role in *Von Hannover No 2*.<sup>78</sup> The Court veers towards freedom of expression at the expense of privacy in its broad formulation of the concept of a public figure<sup>79</sup>.

Subsequent cases apply the criteria in interesting ways. Although both *Axel Springer*<sup>80</sup> and *Von Hannover No 2*<sup>81</sup> are privacy cases where the criteria seem to work quite well, the principles derived from those cases have been applied to defamation cases regardless of whether the domestic action arose in civil or criminal defamation proceedings.<sup>82</sup> This development draws the two causes of action closer together than almost any other. It also begs the question as to whether the same criteria should be used for both. As Hugh Tomlinson Q.C. has argued,<sup>83</sup> the Strasbourg Court no longer focusses on the truth of the material and whether it has been verified in defamation cases.<sup>84</sup> The *Axel Springer* criteria<sup>85</sup> leave little room for a consideration of truth even though it is a defence to an English defamation action<sup>86</sup> as is publication on an issue of public interest.<sup>87</sup> How that information was obtained and whether the claimant had already put similar information into the public domain would be irrelevant in English defamation proceedings but not in an action for misuse of private information. Mr Tomlinson is right when he concludes that although it is not easy to distinguish between the two actions, the Court ought to have taken more care in applying the same criteria to both types of action.

For instance, in *Print Zeitungsverlag GmbH v Austria*,<sup>88</sup> it failed to acknowledge that it was applying the *Axel Springer* criteria<sup>89</sup> to a defamation case. Nor did it refer to the fact that Austrian law provided for criminal sanctions although it did consider whether the material was true. Both *Axel Springer*<sup>90</sup> and *Von Hannover No 2* involved celebrities claiming that their privacy had been infringed and *Print Zeitungsverlag*<sup>91</sup> involved the defamation of two politicians where the media are afforded more latitude.<sup>92</sup> The Court never explained why the

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<sup>77</sup> *Von Hannover v Germany* [2004] ECHR 294; 5 RB, *Axel Springer v Germany* <<http://www.5rb.com/case/axel-springer-eg-v-germany/>>; One Brick Court, *Axel Springer v Germany*"

<<http://www.onebrickcourt.co/cases.aspx?menu=main&pageid=42&caseid=460>>; *Von Hannover No.1* [2004] ECHR 294; Princess Caroline's brother lost in Strasbourg in *Couderc v France* [2011] ECHR 66 where the Court ruled that the public had a right to know about his illegitimate child conceived before he married.

<sup>78</sup> [2012] ECHR 228.

<sup>79</sup> But see *Standard Verlags GmbH v Austria* [2009] ECHR 853 [52] where the court felt that "idle gossip" about the state of a politician's marriage and alleged extra - marital relationships was not a matter of public interest.

<sup>80</sup> [2012] ECHR 227.

<sup>81</sup> [2012] ECHR 228.

<sup>82</sup> *Ristamaki and Korvola v Finland* [2013] ECHR 1052; *Caragea v Romania* [2015] ECHR 1069 are cases where the *Axel Springer* criteria ([2012] ECHR 227) were applied to criminal defamation proceedings; *Ungvary and Irodalom Kft v Hungary* [2013] ECHR 1229; *Print Zeitungsverlag* [2013] ECHR 943.

<sup>83</sup> <<https://inform.wordpress.com/2014/01/23/privacy-and-defamation-strasbourg-blurs-the-boundaries-hugh-tomlinson-qc/>>.

<sup>84</sup> *White* [2006] ECHR 793.

<sup>85</sup> [2012] ECHR 227.

<sup>86</sup> The defence is codified in the 2013 Act s 2. *Tugendhat and Christie*, above n 2, argue at 360 that truth is the main way in which English private law protects freedom of expression.

<sup>87</sup> The 2013 Act s 4.

<sup>88</sup> [2013] ECHR 943.

<sup>89</sup> [2012] ECHR 227.

<sup>90</sup> [2012] ECHR 227

<sup>91</sup> [2013] ECHR 943

<sup>92</sup> *Lingens* [1986] ECHR 7.

*Axel Springer* criteria<sup>93</sup> should be applied to a defamation case when holding that there was no breach of ECHR Art10.

Indeed, as Mr Tomlinson has pointed out,<sup>94</sup> the *Axel Springer* criteria<sup>95</sup> are very different to those traditionally used by the Strasbourg Court in defamation cases. It has tended to focus more on whether the journalist had acted responsibly.<sup>96</sup> It is arguable therefore, as Mr Tomlinson contends, that the conclusion in *Print Zeitungsverlag*<sup>97</sup> would have been different had the traditional criteria been applied. The letter in that case did not make any serious factual allegations and the context was political discussion. The allegations were reported rather than adopted which might have fallen within the English defence of reportage.<sup>98</sup>

*Ungvary*<sup>99</sup> is a civil defamation case where a judgment against a historian and a literary weekly breached ECHR Art 10. The story involved statements alleging that a judge in the Hungarian Constitutional Court had been involved in communist activities. The Strasbourg Court relied on the *Axel Springer* criteria<sup>100</sup> focussing on the fact that the judge was a public figure and should therefore be subject to greater public scrutiny. Seeking out historical truth was an integral part of freedom of expression not considered by the Hungarian Court. The Strasbourg Court found that level of damages and legal costs awarded limited the historian's freedom of expression. The national court had not struck the correct balance between ECHR Arts 8 and 10. This case can be contrasted with the earlier case of *Prager and Oberschlick v Austria*<sup>101</sup> also dealing with the defamation of a judge. Here the Court found no violation of ECHR Art 10. The author in *Ungvary*<sup>102</sup> was considered a respectable author, a historian using specialist knowledge to interpret archives published in a literary journal. The dissenting judge in *Ungvary*<sup>103</sup> felt that it was a borderline case. Distinctions are fine here and precedent is weak which undesirable for legal certainty.

The Strasbourg case law is not consistent. After *Axel Springer*<sup>104</sup>, the Court decides first, that the same approach should be taken on the question of public interest and second, that a liberal interpretation of who is a public figure warranting closer scrutiny. The *Axel Springer* criteria<sup>105</sup> were designed to be applied to cases about private life rather than reputation where they worked reasonably well. The Court takes no account of whether the cases arise from civil or criminal defamation proceedings. Powerful criticisms are made in the joint

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<sup>93</sup> [2012] ECHR 227.

<sup>94</sup> Hugh Tomlinson QC and Sara Mansoori, *Libel and Privacy: How are the Courts approaching privacy in recent cases, including the confluence of Libel and Privacy and how does this impact on advice to clients* <[www.whitepaperdocuments.co.uk/index.php?option=com\\_docman&task=doc\\_download&gid=2496](http://www.whitepaperdocuments.co.uk/index.php?option=com_docman&task=doc_download&gid=2496)>.

<sup>95</sup> [2012] ECHR 227.

<sup>96</sup> *Roberts v United Kingdom* App no (ECHR 5 July 2011) [45]; [2010] ECHR 1341 *Polanco Torres & Movilla Polanco v Spain* which influenced Lord Nichols in drafting his criteria in *Reynolds* [1999] UKHL 45, 57.

<sup>97</sup> [2013] ECHR 943.

<sup>98</sup> Reportage is a sub-species of qualified privilege which now appears in the 2013 Act s 4(3) although it does not codify the common law. Detailed consideration is beyond the scope of the article but is analysed in Sarah Gale *Qualified Privilege in Defamation and the Evolution of the Doctrine of Reportage* (2015) 23 TLR 16.

<sup>99</sup> [2013] ECHR 1229.

<sup>100</sup> [2012] ECHR 227.

<sup>101</sup>[1995] ECHR 12.

<sup>102</sup> [2013] ECHR 1229.

<sup>103</sup> [2013] ECHR 1229.

<sup>104</sup> [2012] ECHR 227.

<sup>105</sup> [2012] ECHR 227.

dissenting opinion in *Fuerst-Pfeifer v Austria*<sup>106</sup> attacking the Court's approach accusing it of amongst other things inconsistency and of favouring Art 10 over Art 8. The applicant's Art 8 rights should have prevailed because the revelations concerned her mental health. Publication did not contribute to an ongoing public discussion about the integrity of the applicant as the story had initiated that debate. The article had not contributed to a serious public debate on a matter of general public interest. Judge Motoc was more measured in her dissent concluding that Art 8 should apply where there is a serious and direct attack on personal integrity where private medical records are revealed. This must be correct.

We will focus next on remedies. The approach taken by the English courts on exemplary damages for both actions was different historically. There is still however a distinction when it comes to interim injunctions.

## Damages

The aim of damages is obviously redress although there are fundamental theoretical differences between the two actions here. Defamation actions are aimed at compensation for harm to reputation whereas actions for the misuse of private information provide compensation for distress or injury to feelings and loss of dignity<sup>107</sup>. In *Gulati*,<sup>108</sup> it was held that damages should also reflect the claimant's loss of control over the use of private information. Both actions are about the infringement of ECHR Art 8 although the emphasis in privacy actions is rather different as Eady J pointed out in *Mosley*<sup>109</sup>: damages are about vindicating the infringement of a right not about the vindication of reputation.<sup>110</sup> Whilst damages can to some extent repair injury to reputation, once private information is public, then no amount of compensation is sufficient.<sup>111</sup> Eady J argued in *Mosley*<sup>112</sup> that if your dignity is taken away, that goes to the core of your personality.<sup>113</sup> Could the same be said of a defamation action? If both actions are about loss of personal dignity, autonomy and dignity, then the rules on damages should be similar. Levels of compensation were modest in privacy cases when compared to defamation cases until *Mosley*<sup>114</sup>. The higher awards in *Gulati*<sup>115</sup> might not be repeated.

The principle that juries and presumably now judges<sup>116</sup> in defamation cases should refer to levels of general damages awarded in personal injury cases was clear from *Elton John v Mirror Group Newspapers Limited*<sup>117</sup> even though there was no precise correlation between

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<sup>106</sup> Judgment of 17 May 2016.

<sup>107</sup> *Cooper v Turrell* [2011] EWHC 3629 (QB), [102] (Tugendhat J): "Damages for defamation are a remedy to vindicate a claimant's reputation for the damage done by the publication of false statements. Damages for misuse of private information are to compensate for the damage, and injury to feelings and distress, caused by the publication of information which may be either true or false."

<sup>108</sup> [2015] EWCA Civ. 1291.

<sup>109</sup> [2008] EWHC 1777 (QB).

<sup>110</sup> [2008] EWHC 1777 (QB), [216].

<sup>111</sup> *Mosley* [2008] EWHC 1777 (QB), [231].

<sup>112</sup> [2008] EWHC 1777 (QB).

<sup>113</sup> [2008] EWHC 1777 (QB), [216].

<sup>114</sup> [2008] EWHC 1777 (QB).

<sup>115</sup> [2015] EWCA Civ. 1291.

<sup>116</sup> The 2013 Act s. 11 was interpreted narrowly in *Yeo v Times Newspapers* [2014] EWHC 2853 (QB) to exclude jury trial in most cases.

<sup>117</sup> [1995] EWCA Civ. 23. This controversial principle was not followed in *Gleaner v Abrahams* [2002] UKPC 55 [63].

damage to reputation and personal injury. Eady J suggests<sup>118</sup> that the same principle should apply to privacy cases.

Exemplary damages<sup>119</sup> were seen as punishing defendants for outrageous, deliberate or reckless disregard of the claimant's rights, but not available misuse of private information actions. In *Mosley*,<sup>120</sup> Eady J argues that exemplary damages should not be used in privacy cases. Lord Mance in *PJS*<sup>121</sup> (with whom the majority agreed) did not however rule out that possibility. Lord Toulson (dissenting) said that exemplary damages in actions for misuse of private information were necessary to: "deter flagrant breaches of privacy and to provide adequate protection".<sup>122</sup> Presumably he had in mind the possibility that very high awards of damages might breach ECHR Art 10<sup>123</sup> but proportionate exemplary damages would not.<sup>124</sup>

The Crime and Courts Act 2013 (UK) c 22 ss 34 - 42 (which came into force on 3<sup>rd</sup> November 2015, a year after the establishment of the Press Recognition Panel<sup>125</sup>) might have changed things by introducing a self-regulatory scheme for claims against the press.<sup>126</sup> It applies to both actions<sup>127</sup>. Although Lord Justice Leveson did not hear evidence on exemplary damages, he recommended that membership of a regulatory body be regarded as complying with industry standards. However, IMPRESS, the Independent Monitor for the Press, was the first regulator to be recognised by the PRP<sup>128</sup> but most regional and national press have opted to join the Independent Press Standards Organisation instead which has not applied for recognition and is therefore not covered by the CCA. The scope of the CCA seems therefore likely to be limited. Section 34(2) provides that exemplary damages cannot normally be awarded against members.<sup>129</sup> Failure to sign up could be viewed by the judge an excuse for awarding exemplary damages as could lack of or inadequate internal governance<sup>130</sup> on the sourcing of stories.<sup>131</sup> Exemplary damages will not be awarded

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<sup>118</sup> *Mosley* [2008] EWHC 1777 (QB), [218].

<sup>119</sup> See *Rookes v Barnard* [1964] AC 1129 where the court held that they are intended primarily to punish and deter defendants; *Cassell v Broome* [1972] AC 1027; *Kuddus v Chief Constable of Leicester* [2002] 2 AC 122 and *Elton John* [1995] EWCA Civ. 23, where the Court suggested that the claimant had to show that the defendant either knew or was reckless as to whether the material was false, or had published it after calculating that the potential profit outweighed any possible penalty.

<sup>120</sup> [2008] EWHC 1777 (QB), [172] - [173]; [197].

<sup>121</sup> *PJS v Newsgroup Newspapers* [2016] UKSC 26, [42].

<sup>122</sup> [92].

<sup>123</sup> *Tolstoy Miloslavsky v UK* [1995] ECHR 25.

<sup>124</sup> Normann Witzleb, *Exemplary Damages for Invasions of Privacy* (2014) 6(1) *Journal of Media Law* 69, 83.

<sup>125</sup> Later PRP.

<sup>126</sup> Broadcasters are dealt with by other regulators such as OFCOM or the BBC Trust – Schedule 15. The defendants or "relevant publishers" (s. 41) would include most major newspapers and magazine publishers.

<sup>127</sup> Sections 42(4)(a) & (d).

<sup>128</sup> On 25<sup>th</sup> October 2016.

<sup>129</sup> Section 34(3) provides that s34(2) will not apply where the regulator had already imposed a fine on the defendant or decided not to do so, where the regulator's conduct was "manifestly irrational" or the court is satisfied that it would otherwise have made an award of exemplary damages. Section 34(6) states that exemplary damages can only be awarded where the defendant's conduct shows a "deliberate or reckless disregard of an outrageous nature" or if it is necessary to punish him.

<sup>130</sup> Section 35(3)(3)(a) and (4).

<sup>131</sup> Leveson Report into the Culture, Practices and Ethics of the Press Volume IV paragraphs 511 and 512 pages 1511 - 1512 <[https://www.gov.uk/government/uploads/attachment\\_data/file/151111/0780\\_ivpdf](https://www.gov.uk/government/uploads/attachment_data/file/151111/0780_ivpdf)>.

automatically<sup>132</sup> as the judge must consider all the circumstances of the case and how the defendant's conduct is viewed. The Government plans to repeal s 40 which provides that the defendant would have to pay the claimant's costs even if it wins, unless it is registered.<sup>133</sup>

We will conclude this section on remedies by looking at interlocutory injunctions.

## Injunctions

Interim injunctions are arguably the most important tool for protecting the claimant's ECHR Art 8 rights but the HRA s 12 provides that freedom of expression must be considered in any application for prior restraint. Once the information is public, the harm has been done and damages seem a rather inadequate remedy.<sup>134</sup> Unfortunately, the courts take a rather different view depending on how the action is framed. In *Bonnard v Perryman*<sup>135</sup>, the court was reluctant to grant an interim injunction in libel proceedings unless it could be shown that the claim was bound to succeed and only a perverse jury (presumably now the judge) would reject it,<sup>136</sup> or if the apparently defamatory material is untrue.<sup>137</sup> That conclusion would be hard to draw at an interim stage without full disclosure and detailed consideration of the evidence and examination of the witnesses.<sup>138</sup> This is important where truth is argued.<sup>139</sup> References to the constitutional importance of jury trial as a reason for this rule cannot be argued now as jury trial is no longer the norm<sup>140</sup> although the argument that there is a public interest in the truth coming out is more persuasive.<sup>141</sup> In *Greene*,<sup>142</sup> the Court of Appeal said that the ruling in *Bonnard* had survived the 1998 Act s. 12(3). To rule otherwise would be a significant restriction on freedom of speech.<sup>143</sup> In *Cream Holdings Limited v Banerjee*,<sup>144</sup> Lord Nicholls held that the main purpose of s.12(3):

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<sup>132</sup> Hugh Tomlinson QC "The Leveson Report and Exemplary Damages: No "Violation of Free Speech" <<http://hackinginquiry.or/comment/the-leveson-reoprt-and-exemplary-damages-no-violation-of-free-speech>> where Mr Tomlinson explains how the Act might breach ECHR Article 14 at page 7, see also Witzleb, above n 121, 88.

<sup>133</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/684678/GOVERNMENT\\_RESPONSE\\_TO\\_THE\\_CONSULTATION\\_ON\\_THE\\_LEVESON\\_INQUIRY\\_AND\\_ITS\\_IMPLEMENTATION\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684678/GOVERNMENT_RESPONSE_TO_THE_CONSULTATION_ON_THE_LEVESON_INQUIRY_AND_ITS_IMPLEMENTATION_.pdf)

<sup>134</sup> *Mosley* [2008] EWHC 1777 (QB).

<sup>135</sup> [1891] 2 Ch 269.

<sup>136</sup> Courts will not grant an interim injunction if the defendant can show that he intends to plead justification (now truth, 2013 Act s.2) as in *Bonnard* [1891 2 Ch 269, honest opinion (2013 Act s 3) as in *Fraser v Evans* [1969] QB 349 or common law privilege (*Harakas v Baltic Mercantile & Shipping Exchange Ltd*) [1982] 1 WLR 958 or if the court believes that the defence will not succeed. This favours freedom of expression. Defences are considered in the penultimate section of this piece.

<sup>137</sup> *Holley v Smyth* [1997] EWCA Civ. 2914, 2932 (Slade LJ).

<sup>138</sup> The credibility of witnesses is key to determining justification.

<sup>139</sup> *Greene v Associated Newspapers Ltd* [2004] EWCA Civ. 1462 [30], [77], where the defence of justification was pleaded.

<sup>140</sup> The 2013 Act s.11.

<sup>141</sup> *Fraser* [1969] 1 QB 349.

<sup>142</sup> [2003] EWCA Civ. 103, (a case on the protection of confidential information)

<sup>143</sup> The 1998 Act s.12(1); *Observer and the Guardian v UK* App No. 13585/88 (ECHR 26 November 1991) [60]: "...the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press are concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest."

<sup>144</sup> [2004] UKSC 44, [15].

“Was to buttress the protection afforded to freedom of speech at the interlocutory stage. It sought to do so by setting a higher threshold for the grant of interlocutory injunctions...”

Judges should consider whether the case should have been pleaded in defamation and then apply the more restrictive test for defamation cases to avoid abuse of process allegations.<sup>145</sup>

However, in *RST v UVW*<sup>146</sup>, Tugendhat J granted the injunction on the basis that it was a privacy case. He faced the same dilemma in *Terry* where he said that the court’s first concern is whether ECHR Art 10 prevails over Art 8. The claimant’s choice of cause of action is not therefore the sole consideration.<sup>147</sup> He decided that it was a defamation case and therefore applied the rule in *Bonnard*.<sup>148</sup> Judges are sensitive to this and will not allow the rules to be abused to avoid the ruling in *Bonnard*.<sup>149</sup> However, the outcome of these cases is still hard to predict and legal certainty is not served well by the current state of the law.

In *ZAM v CFW and TFW*,<sup>150</sup> Tugendhat J granted an interim injunction in libel proceedings holding that the material was clearly defamatory and the defence of truth was not available. He was influenced by the fact that the Claimant had a case under the Protection from Harassment Act (UK), c 40 1997,<sup>151</sup> and case law provides that the exercise of free speech might fall within the scope of harassment.<sup>152</sup> Indeed, cases are emerging that indicate that the tort of harassment might provide a way around the strict rule in *Bonnard*.<sup>153</sup> The 1997 Act does not however mention either ECHR Art 10 or defamation<sup>154</sup> but in *Merlin v Cave*, Laing J held that the 1998 Act s. 12(3) should nevertheless apply in harassment cases.<sup>155</sup> In *Brand v Berki*<sup>156</sup> however, Carr J granted an interim injunction under the 1997 Act even though defamation had been pleaded in the claim form. It had been argued as a harassment case and there was no privacy claim.

The threshold for misuse of private information actions seems lower than in defamation actions. The traditional view is stated in *Carter-Ruck*.<sup>157</sup> the claimant would usually need to prove on the balance of probabilities that he would win at trial. However, he might succeed exceptionally where: “the potential adverse consequences of publication could be particularly grave, or where a short-lived injunction allows time for the proper consideration of the application.” Two recent cases demonstrate this: first, in *PJS*<sup>158</sup>, Lord Mance found that

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<sup>145</sup> *Carter-Ruck*, n 135, 699. Specialist judges are well-equipped to decide these issues.

<sup>146</sup> [2009] EWHC 2448 (QB) 2448.

<sup>147</sup> [2010] EWHC 110 (QB) [88].

<sup>148</sup> The claim had been argued as both a breach of confidence and misuse of private information case but the judge said that it was about damage to reputation and therefore a defamation claim.

<sup>149</sup> In *Browne* [2007] EWHC 202 (QB) [30], Eady J pointed out *obiter* (upholding Buxton LJ in *McKennitt* [2006] EWCA Civ. 1714, [79]) that arguing a claim as breach of confidence when it was a series of false allegations to avoid the rule in *Bonnard* [1891] 2 Ch 269 might be an abuse of process.

<sup>150</sup> [2011] EWHC 476 (QB).

<sup>151</sup> The 1997 Act.

<sup>152</sup> *Howlett v Holding* [2006] EWHC 41 [4].

<sup>153</sup> [1891] 2 Ch 269.

<sup>154</sup> Jennifer Agate, *From Defamation to Harassment – Merlin, Brand and circumventing Bonnard* (2015) 26(1) Ent LR 29.

<sup>155</sup> [2014] EWHC 3036 QB [43] – [48]. No interim injunction was granted.

<sup>156</sup> [2014] EWHC 2979 (QB).

<sup>157</sup> Cameron Doley and Alistair Mullis, *Carter-Ruck on Libel and Privacy* (Lexis Nexis, 6<sup>th</sup> ed, 2009), 268.

<sup>158</sup> [2016] UKSC 26.

exemplary damages would be inadequate<sup>159</sup> and that an injunction limiting publication should be granted. The interest in the story and in those involved plus details of their sexual activities would cause terrible distress to them and to their children. Second, in *Weller v Associated Newspapers Ltd*,<sup>160</sup> the Court of Appeal felt that an injunction should be granted where further publication was feared. Although the defendant did not intend to republish the photos, it refused to undertake not to do so. Both cases involved potential harm to children where the court leans towards ECHR Art 8.

Traditionally the threshold for the granting of interim injunctions is much higher in defamation than in privacy cases even though they are both based around ECHR Art 8. Privacy is lost forever after publication apparently whereas harm to reputation can be vindicated at trial.<sup>161</sup> Surely no amount of damages can repair damage to reputation especially if the trial attracts a lot of media interest.

The rule in *Bonnard*<sup>162</sup> is however being eroded by claimants framing their cases under the 1997 Act. A “pure” defamation case would still be caught by *Bonnard*. That is seen in *Terry*<sup>163</sup> and *McKennitt*<sup>164</sup> where the judge suggested that it might be an abuse of process to argue privacy unless the 1997 Act is pleaded instead.

Busutill and McCafferty<sup>165</sup> argue that this puts a heavy premium on specialist advice and costly expert drafting creating uncertainty which is not in the interests of justice because the result depends on whether the judge will take the claim at face value and grant the injunction or conclude that the claimant is manipulating the system and refuse it.<sup>166</sup>

We will now move onto defences where there is more of a dividing line between the two.

## Defences

Some of the main defences will be considered and compared. There are several special defences in defamation such as innocent dissemination,<sup>167</sup> honest opinion,<sup>168</sup> publication on a matter of public interest,<sup>169</sup> peer-reviewed statements in scientific or academic journals,<sup>170</sup> qualified privilege at common law<sup>171</sup> and under the 2013 Act<sup>172</sup> and truth.<sup>173</sup>

The dividing line between the two actions can turn on whether the material is true as truth is not a defence in misuse of private information actions whereas material is presumed to be

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<sup>159</sup> [42] - [43].

<sup>160</sup> [2015] EWCA Civ. 1176.

<sup>161</sup> Carter-Ruck, above n 154, 698.

<sup>162</sup> [1891] 2 Ch 269.

<sup>163</sup> [2010] EWHC 11 (QB), [149].

<sup>164</sup> [2006] EWCA Civ. 1714, [79].

<sup>165</sup> *Interim Injunctions and the Overlap between Privacy and Libel Part 2* <<https://inform.wordpress.com>>.

<sup>166</sup> For further criticism see Carter-Ruck, above n 154, 701.

<sup>167</sup> Defamation Act 1996 (UK) c 31, s 1.

<sup>168</sup> The 2013 Act 2013 s 3.

<sup>169</sup> The 2013 Act s 4; Gale, n 97.

<sup>170</sup> The 2013 Act s 6.

<sup>171</sup> *Clift v Slough Borough Council* [2010] EWCA Civ. 1484.

<sup>172</sup> The 2013 Acts ss 7(2) – (10).

<sup>173</sup> The 2013 Act s 2.

untrue in defamation cases unless the defence proves otherwise.<sup>174</sup> It should be an abuse of process to plead misuse of private information to avoid losing defamation proceedings because the material is true.<sup>175</sup> Malice defeats defences such as qualified privilege at common law.<sup>176</sup> There is no equivalent for misuse of private information.

How the balance is struck between ECHR Arts 8 and 10 is at the heart of both actions as is the issue of public interest e.g. in *Campbell*<sup>177</sup>, Naomi Campbell, had denied taking drugs and so there was a public interest in correcting that false impression and Art 10 prevailed. Even if the claimant did have a reasonable expectation of privacy, the defendant's right to publish and the public's right to receive that information outweighed the claimant's right to privacy.<sup>178</sup> Does the publication contribute to a debate on a matter of public interest?<sup>179</sup> This is not a defence to the action for misuse of private information but should be a factor which precludes the existence of the cause of action.

Public interest is a defence to defamation in 2013 Act s 4. Judges have discretion in deciding whether the threshold has been met although the starting point for both actions is a different one. In privacy cases, the court decides whether there is a reasonable expectation of privacy and in defamation cases, the judge decides whether the claimant has satisfied the court that all the necessary elements have been proved<sup>180</sup> and the issue of public interest is a defence. As we have seen, public figures and especially politicians in privacy cases can expect far greater scrutiny from the media as political debate is the lifeblood of a democracy.<sup>181</sup> The public interest "threshold" is arguably lower here. The same cannot necessarily be said for defamation cases although public figures are more likely to sue to protect their reputation. A similar interpretation of public interest could apply to both if it is sufficiently flexible.

There are few cases on the 2013 Act s 4 and so it remains to be seen how the *Reynolds* criteria<sup>182</sup> will still be considered under s 4(2). Warby J in *Yeo v Times*<sup>183</sup> held that *Reynolds*<sup>184</sup> covered all matters of clear public interest and that the *Reynolds*' approach would still apply despite s 4(6). The law should take a more flexible approach to the criteria as they were not codified in s 4.

That view is supported by Warby J in *Economou v de Freitas*<sup>185</sup> in relation to whether the defendant: "reasonably believed that publishing the statement complained of was in the public interest" in s 4(1)(b) (a novel feature of the Act). Warby J rejected the proposition that this referred to the judgment of the defendant from a purely subjective viewpoint.<sup>186</sup> The claimant

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<sup>174</sup> Edwin Peel and James Goudkamp, *Winfield and Jolowicz on Tort* (19<sup>th</sup> edition Sweet and Maxwell, 2014), 378, analyses defamation defences.

<sup>175</sup> *Hannon* [2014] EWHC 1580 (Ch), [26].

<sup>176</sup> *Horrocks v Lowe* [1975] AC 135.

<sup>177</sup> [2004] UKHL 22.

<sup>178</sup> *Carter Ruck*, n 154, 1047.

<sup>179</sup> Lady Hale in *Jameel* [2006] UKHL 44 [147].

<sup>180</sup> Is the allegation serious, is it defamatory, does it refer to the claimant and has it been published to a third party?

<sup>181</sup> *Lingens* [1986] ECHR 7.

<sup>182</sup> Lord Nicholls ([1999] UKHL 45) was influenced by *Polanco Torres* above n. 96, see also Gale, above n 97.

<sup>183</sup> [2015] EWHC 3375 (QB), decided before the 2013 Act.

<sup>184</sup> [1999] UKHL 45.

<sup>185</sup> [2016] EWHC 1853 (QB) [240].

<sup>186</sup> Defamation Act 2013 – Explanatory Notes [29] <<http://www.legislation.gov.uk/ukpga/2013/226/notes>>.

must prove that he believed that publishing the material was in the public interest and that his belief was reasonable. The court should only consider a belief to be reasonable if the defendant has carried out the “enquiries and checks” that could be reasonably expected of that defendant in those circumstances.<sup>187</sup> The court should look at the subject matter of the material, the words used and any possible meanings the defendant ought to have envisaged that they might convey. The role played by the defendant was also relevant.<sup>188</sup> A lay defendant who provides material to be used in a broadcast or article should not be judged by the same investigative standards expected of a journalist.<sup>189</sup> Warby J is advocating a flexible use of the *Reynolds* criteria making the outcome of cases unpredictable. *Serafin v Malkiewicz*<sup>190</sup> makes it clear amongst other things that where there are multiple allegations, there is no need to find that publication of each one is in the public interest.

Express or implied consent is a defence to both actions. If the claimant has consented to publication, then he cannot be said to have a reasonable expectation of privacy.<sup>191</sup> Consent is rarely used in defamation cases.<sup>192</sup>

The defendant might argue that he was not responsible for the communication or did not publish it. That would be a defence in a misuse of private information action and the claim would not succeed if the material had not been published by the defendant in defamation proceedings.

There would be no expectation of privacy where the material is not private, is “trivial or anodyne” or if the claimant has invited the media into this area of his private life or to another linked area.<sup>193</sup> The same cannot be said for defamation which turns on whether the elements of the tort are made out. Each privacy case will depend on its own facts<sup>194</sup> and so precedent might be tricky.

## Conclusions

This author has argued that the relationship between the two actions is still evolving and many fundamental issues remain unresolved, in particular whether claimants should be allowed to bring parallel proceedings. Arguing the two in the alternative is preferable in cases where the dividing line is blurred. The abuse of process argument must prevail, preventing parallel actions, otherwise claimants will be allowed to avoid the one-year limitation period and the defence of truth in defamation cases by arguing privacy. The choice between the two might also be influenced by whether the court is likely to grant an interim injunction. Framing a defamation case as a harassment case should not be allowed to circumvent the strict rule in *Bonnard*. It makes little sense not to allow interim injunctions in defamation actions but to allow the rule in *Bonnard* to be circumvented by arguing

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<sup>187</sup> The *Reynolds*’ criteria ([1999] UKHL 45) applied to investigative journalism: see Gale, above n 97.

<sup>188</sup> [241].

<sup>189</sup> [246].

<sup>190</sup> [2017] EWHC 2992

<sup>191</sup> *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ. 446 [36].

<sup>192</sup> Winfield, n 171, 406.

<sup>193</sup> *McKennitt* [2006] EWCA Civ. 1714, [12]; *Browne* [2007] EWCA Civ. 295 [33], where Sir Anthony Clarke MR suggested that even a trivial piece of information could be private although the nature of the relationship in which the information had been revealed was likely to be significant; Carter-Ruck, above n 154, 1044; *Tugendhat and Christie*, above n 2, 182.

<sup>194</sup> *Browne* [2007] EWCA Civ. 295 [31].

harassment instead. This argument is even harder to justify in cases such as *Brand*<sup>195</sup> where defamation had been pleaded earlier in the proceedings. This “loophole” creates legal uncertainty and does not stand up to logical analysis. Genuine defamation cases should be argued as defamation cases. The choice between defamation and privacy actions might also be influenced by the argument that damage to reputation can be vindicated by an award of damages but that the leaking of private information cannot which is unconvincing in the author’s opinion. Exemplary damages should be available in both actions.

As we have seen, the two actions are linked partly because of the ECHR Arts 8 and 10 balancing exercise and the role played by the concept of public interest albeit slightly differently in both actions. The influence of the Strasbourg Court in the development of English law should not be underestimated although it tends to take a broader attitude to the concepts of what is in the public interest and respect for private life. The Court veers towards ECHR Art 10 at the expense Art 8 in its broad formulation of the concept of a public figure affording them less protection than unknown individuals. The cogent criticisms of the dissenting judges in *Fuerst-Pfeifer v Austria*<sup>196</sup> should not be ignored however.

Strasbourg case law brings the two actions are drawn closer together with the *Axel Springer*<sup>197</sup> criteria on the ECHR Art 8 / 10 balance but they are not equipped to deal properly with the subtleties of English defamation law. After all, those criteria were designed originally to apply to privacy cases. Whilst there is a distinction in principle between the two actions as defamation is about protecting reputation and the action for misuse of private information focusses more on keeping private certain information and images, they can still overlap. Each action should and does retain its distinctive features even though Strasbourg jurisprudence is bringing them closer together.

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<sup>195</sup> [2014] EWHC 2979 (QB).

<sup>196</sup> Judgment of 17 May 2016

<sup>197</sup> [2012] ECHR 227.

