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PJS v News Group Newspapers Ltd (2016)

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I. INTRODUCTION

There is a scene in the 1997 comedy film, *Bean*, where Peter MacNicol's exasperated American, David, finally orders the hapless Mr Bean simply to stay put and 'do nothing', because 'if you do nothing, nothing can go wrong'. If the UK Supreme Court could ever be said to have pulled a lesson straight from the movies, then perhaps this is one that inspired its approach – to one particular issue, at least – in the 2016 case of *PJS v News Group Newspapers Ltd*.[1]

PJS is a case that achieves 'landmark' status – and thus its place in this collection – not by the substance of its judgment, but rather by the position that it occupies on the timeline along which the doctrine of 'misuse of private information' (MPI) has, since 2004, been developing. Its place on that timeline is indisputably significant; it is only the third MPI case to reach the UK's highest court. Having reached the Supreme Court, however, the case becomes far more noteworthy for what it did not say than for what it did.

The broader doctrinal context here is important. Put simply, the doctrine of MPI has developed in a rather haphazard and undeniably murky fashion. There are a number of reasons for this, to which we shall turn (briefly) in section II. But the upshot is that the doctrine contains a number of loose threads – matters upon which it fails to provide either clear guidance for litigants or clear rationalisations for the turns it has taken. I have identified some of these loose threads in earlier work.[2] One of these – the one that forms the focus of this chapter's

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[1] *PJS News Group Newspapers Ltd* [2016] UKSC 26, [2016] 1 AC 1081.

[2] TDC Bennett, 'Judicial Activism and the Nature of "Misuse of Private Information"' (2018) 23(2) *Communications Law* 74.

analysis – is in respect of something I have previously termed the 'third party interests' (TPI) doctrine.[3] In short, the TPI doctrine is the emergent rule that the interests of third parties, who are neither claimant nor defendant, nor routinely represented, are relevant to (and may play a decisive role in determining) the courts' decision-making process within an MPI claim. The oddity of the TPI doctrine comes from the challenge it poses for the traditionally bilateral structure of tort claims – something that contributed to its rather unexpected emergence at the start of the last decade. It may be possible to rationalise the TPI doctrine in a coherent fashion – indeed it would be helpful if the courts would do so. But the lower courts have not (having offered two entirely unrelated justifications for the doctrine in apparent ignorance of each other). Thus, when it became apparent not only that a third MPI case was heading for the Supreme Court, but one in which the interests of third parties had been found relevant by the lower courts, a tantalising prospect appeared; perhaps – finally – the Court would rationalise the TPI doctrine and bring an end to the uncertainty surrounding it.

Alas, faced with the opportunity to do this, the Supreme Court instead did … nothing. Or rather it did nothing of any great significance. Obviously, it resolved the case to the satisfaction of one party (the claimant) and the dissatisfaction of the other. And it affirmed the notion that privacy injunctions may be issued even where the information is no longer confidential, so long as the injunction could still do some good.[4] And it gave the tabloid press a good slapping for having advanced a spurious public interest argument in its defence, seemingly in a bid to discourage future defendants from trying the same thing.[5] This was all very entertaining, if not particularly novel. But the bigger matter of serious conceptual significance – explaining the basis for the TPI doctrine – went unaddressed. The *real* question that this leaves us with, and which needs now to be answered, is *why* the Court so assiduously avoided dealing with these matters when the opportunity to do so was presented so clearly to it. For if we can get to grips with that, we will understand better that which makes *PJS* a landmark

[3] See TDC Bennett, 'Privacy, Third Parties and Judicial Method: *Wainwright*'s Legacy of Uncertainty' (2015) 7(2) *Journal of Media Law* 251, and 'The Relevance and Importance of Third Party Interests in Privacy Cases' (2011) 127 *LQR* 531.

[4] P Wragg, 'Privacy and the Emergent Intrusion Doctrine' (2017) 9(1) *Journal of Media Law* 14.

[5] *PJS* does make useful contributions to the development of MPI doctrine in some areas. It lays down a clear marker in its rejection of the argument that there is any public interest in the information (that the claimant engaged in a three-way sexual encounter) – an argument that is regularly raised by media outlets as a defence in privacy claims (at [24]–[25]). It also makes clear that different considerations apply in a privacy case than in a case based on confidentiality. Whilst in a confidentiality case, injunctive relief would be denied once the information no longer had the 'necessary quality of confidence' about it (*Coco v AN Clark (Engineers) Ltd* [1968] FSR 415, *PJS* (n 1) [32]–[35]) in a privacy (MPI) case, injunctive relief may still be granted where it can make some positive impact for the claimant and (perhaps or relevant third parties (such as their family). It is not, however, clear whether the Supreme Court envisages that injunctive relief could be granted in a situation where the claimant themselves would see no particular benefit from it, but where third parties – such as the claimant's children – might.

case – this absence of a voice in circumstances where we might have expected something of substance to have been said.

That is what I set out to do in this chapter. And I shall say at the outset that I have a theory. My theory is that the Court found itself faced with a situation in which the various ways in which it could have resolved the conceptual conundrum of the TPI doctrine each presented unpalatable options.[6] None of these were appealing. Faced with this situation, the Court preferred to do nothing – perhaps in the belief that, if it said nothing on the matter, it would at least not make a bad situation worse; 'if you do nothing, nothing can go wrong'. I cannot prove this theory conclusively. We may never know for certain what motivated these judges to sidestep this particular issue in this particular case, just as we may never know for certain why *any* judge rules as they do in *any* case – least of all when they are silent on the matter. But I can present the evidence and advance the theory as a plausible explanation of it. The evidence includes the uncertainty within the TPI doctrine in the lower courts, and sketches of various unappealing ways in which the doctrine might be rationalised. In this way, I can demonstrate that my theory is at least a plausible explanation for what might otherwise, and far less charitably, be considered the Supreme Court's abject failure to clear the murk surrounding the TPI doctrine.

II. TORT LAW AND MPI

Tort law is generally considered to have a fundamentally bilateral structure. That is, claims in tort feature a claimant and a defendant, and that is it; nobody else is normally a party to the proceedings.[7] For some, this bilateralism is a necessary condition of tort's primary focus on achieving corrective justice.[8] But even those who dispute the claim of corrective justice to hold primacy in tort law would generally accept that, as a matter of empirical reality, tort claims have historically adopted a bilateral structure. Observation is not, of course, a guarantee of permanency. There may be good reasons why tort law should adopt a different structure, either generally or in specific types of case. What is clear, however, is that this structure persists as a general rule, and that any departure from it is currently exceptional.

[6] I am going to assume – perhaps charitably – that the Court did not simply fail to appreciate the importance of resolving the issues surrounding the TPI doctrine and let it go without giving it a second thought.

[7] Of course, there may be multiple defendants. The key is the relationship between the parties – it is always one of claimant/defendant, wronged/wrongdoer.

[8] The best-known exponent of the notion that tort law is – and, in his view, can only be – structured bilaterally is the formalist scholar EJ Weinrib. For Weinrib, this is a necessary correlative of tort law being informed by a commitment to securing corrective justice. See *The Idea of Private Law* (Oxford, OUP, 1995).

The bilateral structure gives courts a framework within which, in the course of determining a dispute, they can consider and take seriously the interests of both parties. The flip-side of this structure is that the interests of other parties – those beyond claimant and defendant – are excluded. Whilst broad policy considerations that go beyond the interests of the parties do feature in tort judgments (particularly in negligence cases), they are interests of a fundamentally different order from those of particular individuals who might be affected by the outcome of a particular case. Consider, for example, a simple negligence case arising from a traffic accident. The injured claimant seeks compensation from the defendant negligent driver. No doubt the claimant's family would benefit from the award of compensation, whilst the defendant's family might well suffer. But these interests are not considered relevant by the courts to the determination of the claim – and with good reason. For it would shift tort's focus away from the relationship between claimant and defendant that arose as a result of their interaction (and, in corrective justice terms, from the defendant's wrongful infliction of harm upon the claimant) and towards a potentially wide-ranging series of inquiries into the impact that finding the defendant liable might have upon third parties. Ultimately, this might well result in a party with a family having stronger grounds either to insist upon or to avoid liability than a party who has no dependents. Perhaps some would say this would be a preferable way to go about attributing liability and awarding compensation.[9] But it is not the way that English tort law has traditionally gone about its business.

When the cause of action that has come to be known as 'misuse of private information' first emerged in the case of *Campbell*, it adopted a bilateral structure. In this way, it found itself in alignment with other torts and also with the equitable doctrine of confidence – a doctrine that exercised a profound influence over MPI's development.[10] This laid the groundwork for the doctrine to be treated as a tort, even when it was unclear that it was properly regarded as being of the tort *genus*.[11]

However, the development of a discrete doctrine within MPI that I call the 'third party interests' doctrine has introduced a significant methodological challenge to this bilateral normalcy. The TPI doctrine enables (and perhaps requires) courts to have regard to the significant interests of individuals who are

[9] See arguments made by some of the fictive judges in AC Hutchinson and D Morgan, 'The Canengusian Connection' (1984) 22(1) *Osgoode Hall Law Journal* 69.

[10] There is a general consensus amongst scholars and practitioners in the privacy field that the action for MPI is related to the older equitable doctrine of confidence. (See, eg, R Moosavian, 'Charting the Journey from Confidence to the New Methodology' (2012) 34(5) *European Intellectual Property Review* 324. However, there has been no detailed explanation of the nature of that relationship. This has given rise to some significant ambiguities, including on the most basic question of whether MPI can persuasively and/or coherently be said to be tortious rather than equitable (or something else entirely). I examine this thorny problem in Bennett (n 2).

[11] *Vidal-Hall v Google Inc* [2014] EWHC 13 (QB), [2014] WLR 4155, and *Vidal-Hall v Google Inc* [2015] EWCA Civ 311, [2016] QB 1003. For an argument that *Vidal-Hall* does not resolve the issue adequately, see Bennett (n 2).

not themselves parties to the proceedings (that is, they are neither claimant nor defendant) when adjudicating an MPI claim (whether at trial or at an interlocutory stage). The interests of these third parties, moreover, can prove determinative of the claim (for instance, where the interests of claimant and defendant roughly cancel each other out, the interests of third parties can become dispositive). When the High Court (in 2014) and Court of Appeal (in 2015) finally confirmed that MPI *is* a tort (albeit those rulings have significant analytical deficiencies), the shape of MPI – its no longer strictly bilateral structure – was conspicuous by its absence from those courts' analyses.[12]

Thus, from MPI's first appearance in English law, the situation was that we had no clear idea whether this emergent cause of action was tortious, equitable or – quite possibly – something else entirely. Its apparently bilateral structure gave it the appearance of a private law doctrine. But that structure was then undermined by the emergence of the TPI doctrine within MPI. So far, so confusing. And the picture quickly became even murkier. For the TPI doctrine emerges in the case law not from a single line of authority, but from two *differently reasoned* lines of authority, each decided apparently in ignorance of the other.[13]

PJS was unlikely ever to solve the Really Big Questions about MPI, such as whether the cause of action can persuasively be said to be tortious, equitable, or something else. But it did represent an opportunity to resolve the lasting murkiness of the TPI doctrine. Quite simply, the Supreme Court had an opportunity to tidy up the mess that had been created by the lower courts' use of these two competing lines of authority to explain and justify the doctrine's existence. Taking that opportunity would have entailed doing one of three things: deciding either that one line of authority was correct and stating clearly that the other was no longer good law, deciding that neither was correct and elaborating a third rationale for the doctrine, or simply abolishing the TPI doctrine altogether. As we shall see, however, in the end the Supreme Court did none of these things. It merely affirmed the relevance of third party interests in MPI without even acknowledging the mangled heap of doctrinal justifications that lay beneath it, let alone trying to sort it out.

At this point, it is necessary to delve in a little more detail into the messiness of the doctrine as elaborated by the lower courts, by examining these two competing lines of authority.

III. THIRD PARTY INTERESTS: THE COMPETING LINES OF AUTHORITY

There are two lines of authority in which the interests of third parties have been accorded relevance and importance in MPI cases by the courts. These lines of authority give rise to what I have termed the 'third party interests' doctrine,

[12] *Vidal-Hall*, ibid.
[13] I have detailed this in Bennett, 'Privacy' (n 3).

although it might be more accurate currently to speak of two distinct doctrines, such are the differences in reasoning between these two lines. Before we can critique the Supreme Court's failure in *PJS* to address the problems arising from these authorities, we must first bring them into focus.

The first line begins in the case of *Ambrosiadou v Coward*,[14] though its reasoning does not emerge until the subsequent decision (by the same judge) in *CDE v Mirror Group Newspapers Ltd*.[15] The second line, meanwhile, originates in *K v News Group Newspapers Ltd*.[16] At no point, prior to the *PJS* litigation, do these two lines meet one another; they have, it seems clear, developed entirely in ignorance of one another. It will be helpful at this point to outline the two lines of authority and the reasoning that features in each of them.

A. Ambrosiadou/CDE

The core feature of the *Ambrosiadou/CDE* line of authority is its bald reliance on Article 8 ECHR as justification for the relevance and importance of the third party's interests. In *Ambrosiadou v Coward*,[17] Eady J held that the privacy interests of the claimant's son were relevant to his decision to grant injunctive relief prohibiting the publication of the claimant's private information, despite the son not being a party to the proceedings. (The information did, in part, relate to the son, though he was not a named claimant.) The only basis that Eady J identified for taking the son's interests into account was the son's Article 8 ECHR right to private life. No other authority was identified. The formal difficulty with this approach is simple; the ECHR is not directly effective in 'horizontal' cases (those between private parties and not involving the state) in English law. Rather it is *indirectly* effective – it operates *through* existing domestic legal mechanisms (often common law doctrines).[18] Thus, in order to provide formal authority for

[14] *Ambrosiadou v Coward* [2010] EWHC 1794, [2010] 2 FLR 1775.

[15] *CDE v Mirror Group Newspapers Ltd* [2010] EWHC 3308 (QB), [2011] 1 FLR 1524. The judgment in *CDE* (which follows the approach in *Ambrosiadou*) was itself followed in *TSE v News Group Newspapers Ltd* [2011] EWHC 1308 (QB) and the interests of the claimant's children (as third parties) were taken into account.

[16] *K v News Group Newspapers Ltd* [2011] EWCA Civ 439, [2011] 1 WLR 1827.

[17] *Ambrosiadou* (n 14).

[18] The debate on which model of horizontal effect would apply to the HRA mainly took place in academic circles from the late 1990s to the mid-2000s, and revolved around notions of 'direct' and 'indirect' horizontal effect (both terms borrowed from European Union law). Later, the debate morphed into one considering which *type* of indirect horizontality would dominate. Key contributions to this debate include: M Hunt, 'The "horizontal effect" of the Human Rights Act' [1998] *PL* 423; R Buxton, 'The Human Rights Act and Private Law' (2000) 116 *LQR* 48; HRW Wade, 'Horizons of Horizontality' (2000) 116 *LQR* 217; A Lester and D Pannick, 'The Impact of the Human Rights Act on Private Law: The Knight's Move' (2000) 116 *LQR* 380; N Bamforth, 'The True "Horizontal Effect" of the Human Rights Act 1998' (2001) 117 *LQR* 34; D Beyleveld and S Pattinson, 'Horizontal Applicability and Horizontal Effect' (2002) 118 *LQR* 623; J Morgan, 'Privacy, Confidence and Horizontal Effect: "Hello" Trouble' [2003] *CLJ* 444; M Du Plessis and

Article 8's influence in this area, domestic authority ought to be cited. As an isolated incident, this case would probably not have caused much consternation. But it turned out not to be isolated.

Five months later, Eady J was again at the centre of matters in *CDE v Mirror Group Newspapers Ltd*.[19] In *CDE*, he again issued injunctive relief (in respect of private information about the claimant) and again identified the interests of third parties as relevant to his decision to do so. In this instance, the third parties were the claimants' child and also the family of the second defendant (the woman with whom the first claimant had, allegedly, had an extra-marital affair). These third party interests militated in favour of granting the injunction.

Once more, Article 8 takes centre-stage. This time, however, Eady J cites two decisions of the UK Supreme Court as authority for the proposition that third party interests should be taken into account, calling – rather uncomfortably, given the very limited amount of authority he cites in support of it – this principle (that they should be taken into account) 'well established'. These two cases are *AP v Secretary of State for the Home Department*[20] and *Donald v Ntuli*.[21] Neither, however, convince as authority for the proposition for which Eady J cites them. *AP* was a case involving 'control orders' – orders that placed restrictions on the freedoms of suspected terrorists. It was a public law case – a judicial review – in which a decision in respect of such an order, made by the Secretary of State, was challenged on human rights grounds. Eady J cites (in *CDE*) a passage from Lord Rodgers' judgment in *AP* which is itself a verbatim quote from an earlier judgment of the same Lord Rodgers in *In re Guardian*.[22] *In re Guardian* was also a public law case involving the judicial review of the decision of a public official on the ground that the decision was incompatible with the claimant's Convention rights and therefore in breach of the statutory prohibition, under section 6 Human Rights Act 1998, on public officials acting incompatibly with Convention rights.

There is a crucial difference between these sorts of cases (involving judicial review of decisions made in breach of section 6) and private law claims. The difference is that in a section 6 case, the defendant public official or public body is under a statutory duty – the section 6 duty – to take into account, when making decisions in their capacity as a public official/body, the Convention rights of *anyone who might be affected by those decisions*. Public officials are

J Ford, 'Developing the Common Law Progressively – Horizontality, the Human Rights Act and the South African Experience' [2004] *European Human Rights Law Report* 286. Later contributions of note include N Moreham, 'Privacy and Horizontality: Relegating the Common Law' (2007) 123 *LQR* 373; G Phillipson, 'Clarity Postponed: Horizontal Effect after Campbell' in H Fenwick, G Phillipson and R Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (Cambridge, CUP, 2007); G Phillipson and A Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) 74(6) *MLR* 878.

[19] *CDE* (n 15).

[20] [2010] UKSC 24, [2011] 2 AC 1.

[21] *Donald v Ntuli* [2010] EWCA Civ 1276, [2011] 1 WLR 294.

[22] *In re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 AC 697.

under a statutory duty to conduct a trawl for potentially affected Convention rights in order to ensure that the decisions they make are not incompatible with *anybody's* fundamental rights. By contrast, defendants in private law claims are not required, in the ordinary course of things, to conduct a trawl for potentially affected rights. The obligations placed on defendants by private law are generally quite tightly limited to a narrow class of potential claimants (for example, by concepts such as duty and remoteness in negligence and contract law, or by the fiduciary relationship in equity), and these obligations do not generally extend beyond those potential claimants. Keeping this state of affairs firmly in place is one of the effects of the indirect horizontal effect of the Human Rights Act.[23] If, instead, the Act had created obligations on all private law defendants to consider the potential impact of their actions on the Convention rights of *any and all* persons, this would be a hallmark of *direct*, rather than indirect, horizontality. The point here is that *AP cannot* provide convincing authority for the proposition that the Convention rights of third parties are relevant in private law because it was not a private law case, and because there is a very specific, statutory-based rationale for the principle that *AP* references *in its own context* that is fundamentally inapplicable in private law.

The other case cited by Eady J in *CDE* as authority for the TPI doctrine is *Donald v Ntuli*. This was a Court of Appeal decision upholding a decision to award a so-called 'super-injunction' in an MPI claim. The judge who had imposed the injunction at first instance had done so after taking into account the interests of the claimants' children. The Court of Appeal labelled the judge's decision in this respect 'proper', though it itself cites no authority explaining the basis of that propriety. Nor does any authority appear in the original first instance decision in *Donald v Ntuli*. Eady J cites, in *CDE*, the line in the Court of Appeal's *Donald* judgment where it says that the first instance judge had 'proper' regard to the interests of the third parties. And who was this first instance judge? With almost comical circularity, it was Eady J.

Eady J's reasoning in *CDE* for saying that the TPI doctrine is 'well established' is thus wholly unconvincing. It amounts simply to this: 1) in public law cases, public officials are statutorily obliged to consider the Convention rights of potentially affected persons and private law defendants ought to be too, even though this would cut entirely against the principle of indirect horizontality and the basic bilateral structure of private law; and 2) there is a case where the Court of Appeal said without explanation that it was 'proper' to do something that Eady J had himself done at first instance without explanation. Nothing about any of this convinces.

[23] There was a time, in the early years of the HRA era, when this direct mode of horizontality was considered a possible interpretation of the Act's effect. In the years since, however, consensus has firmly built up around indirect horizontality. It is now well-established that the HRA has indirect, rather than direct, horizontal effect. See n 18, above.

B. *K v NGN*

In an entirely separate development, in which no mention whatsoever is made of *Ambrosiadou* or *Donald* or *CDE*, nor of *AP* or *In re Guardian*, the Court of Appeal in *K v News Group Newspapers Ltd* recognised that the interests of third parties were relevant and significant to a claim for injunctive relief in MPI.[24] It did so on a more detailed, entirely different and yet still formally unconvincing basis. Since it was handed down, *K* has proven to be the instigator of a longer line of authority than *Ambrosiadou*/*CDE*.[25]

The core feature of the *K* case's basis for its version of the TPI doctrine is its focus on the 'best interests of the child' – a test in substance lifted from the Children Act 1989 and applied here for the first time in a private law privacy case. The claimant in *K* is a married man well-known in the entertainment industry. K had engaged in an adulterous affair with a work colleague, X. X had subsequently lost her job. The defendant newspaper planned to expose the affair, under the guise of a public interest story about a woman losing her job because of her relationship with a male co-worker. Neither K, nor his wife, nor X wanted the story published. The claim comes before the Court of Appeal a matter of hours after the initial claim for injunctive relief had been rejected in an *ex tempore* judgment given by the first instance judge in the middle of the night. Lord Justice Ward gives the only judgment, with which Laws and Moore-Bick LJJ agree. The Court of Appeal grants the injunction, after taking into account the interests of the claimant's children which militate against allowing publication of the information.[26]

A striking feature of the judgment is the significance placed by Ward LJ on the fact that the third parties in this case are children. He is concerned by the 'ordeal of playground ridicule … that would inevitably follow publicity'.[27] He asserts that 'the playground is a cruel place where the bullies feed on personal discomfort and embarrassment'.[28] He accords this sort of harm 'particular weight', despite it being assumed rather than actually evidenced in the proceedings.

In terms of authority, Ward LJ relies upon three cases (and two subtly different legal justifications) to support his assertion that the children's interests are relevant. The first is *Beoku-Betts v Secretary of State for the Home Department*.[29]

[24] *K* (n 16).

[25] The judgment in *K* has been followed on several occasions, although not all are MPI cases. Those which are MPI cases are: *Rocknroll v News Group Newspapers Ltd* [2013] EWHC 24 (Ch), *EF v AB* [2015] IRLR 619 (in which the third party was an adult), and *Bull v Desporte* [2019] EWHC 1650 (QB) (in which 'great weight' [113] was given to the interests of the claimant's children as third parties).

[26] This is despite the fact that the claimant did not pray in aid his children's interests at any point during the proceedings. I am indebted to Hugh Tomlinson QC, who acted for the claimant, for this insight.

[27] *K* (n 16) [17].

[28] ibid.

[29] *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39, [2009] AC 115.

He cites the passage in *Beoku-Betts* where Baroness Hale commented, in a short judgment, that

> [t]he right to respect for family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed.[30]

Despite paying lip-service to the fact that *Beoku-Betts* took place in 'another context',[31] Ward LJ has nonetheless fallen into the same difficulty as Eady J by citing it as authority for the TPI doctrine. For *Beoku-Betts* is another public law case – a judicial review – revolving around a decision by a public official (the Home Secretary) and its compatibility with section 6 HRA. For the same reasons discussed in the context of the *CDE* case, this sort of authority is of a fundamentally different nature to a private law case.

Ward LJ also presents a subtly different, secondary line of justification for his decision to consider the interests of third parties. This is the argument that the court must consider 'the best interests of the child', and as such it calls to mind that well-established statutory principle of family law.[32] He cites ECtHR authority for the broad proposition that, as a matter of consensus in international law, 'in all decisions concerning children, their best interests must be paramount'.[33] He also cites, from domestic precedent, the House of Lords' decision in *ZH (Tanzania) v Secretary of State for the Home Department*.[34] In that case, the Supreme Court held that the adverse effect upon the child of a non-citizen parent against whom deportation proceedings were being brought, when that child would inevitably have to leave with the parent if she were deported, must be taken into account.

Ward LJ states that the 'universal' principle that the court should act in the child's best interests 'cannot be ignored' in such a matter as the instant case (*K*).[35] He takes inspiration from Lord Kerr, who, in *ZH*, stated that

> in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interests. This … is a factor … that must rank higher than any other. … Where the best interests of the child clearly favour a certain course, that course should be followed, unless countervailing reasons of considerable force displace them.[36]

[30] ibid, [4].

[31] *K* (n 16) [17].

[32] One issue relating to this 'best interests of the child' approach which remains unresolved is one we encountered earlier, namely how it is that the court came to determine that the children's interests were even relevant. However, we need not repeat our analysis of that issue here.

[33] *Neulinger v Switzerland* (2010) 28 BHRC 706 [135]. *Neulinger* concerned the potential return of a child to Israel, wherefrom he had been removed unlawfully by his mother in breach of an Israeli court order. Ward LJ (*K* at [18]) refers to the second principle of the United Nations Declaration of the Rights of the Child 1959, Art 3(1) of the Convention of the Rights of the Child 1989 (UNCRC) and Art 24 of the European Union's Charter of Fundamental Rights.

[34] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166.

[35] *K* (n 16) [19].

[36] *ZH* (n 34) [46].

However, Ward LJ is not prepared simply to adopt this guidance without qualifying it. For

> … the interests of children do not automatically take precedence over the Convention rights of others. … The force of the public interest will be highly material, and the interests of affected children cannot be treated as a trump card.[37]

To a private lawyer, the appearance of the 'best interests of the child' principle is as unexpected as it is perplexing. Many thousands of private law cases – in negligence, nuisance, contract, breach of fiduciary duty and many other doctrines – will inevitably have some impact upon a child who is not a party to the proceedings. But there has been hitherto no suggestion that the court may, ought to or must engage in a 'best interests' analysis in those cases. All of a sudden, however, the Court of Appeal in *K* is declaring this to be not only appropriate but necessary. Our perplexed private lawyer's immediate concern is one of breadth. How widely applicable is this test? What are the limits of the relationship between the parties and the affected child within which the test is triggered? The judgment in *K* not only fails to answer these questions, it fails even to recognise their importance. Ward LJ simply proceeds on the basis that the need to conduct this test, as well as its ambit, is obvious and uncontroversial. In so doing, *K* contributes significantly to a confusing emergent picture of the TPI doctrine.

Neither *CDE* nor *K* adequately explain *why* third party interests warrant (let alone require) consideration in MPI cases as a matter of formal law. Moreover, since there is no cross-referencing between the two formulations of this doctrine, and since the core foundations of each are significantly different, we are left with a thoroughly confusing conundrum. We are left to wonder which of these rationales, if either, is the formally 'correct' rationale for the TPI doctrine. This is a conundrum that the Supreme Court could have resolved in *PJS*. It is a matter of lasting frustration that, presented with this opportunity, it did not take it. In the next section, we turn – at last – to *PJS* itself, to examine the extent of the Court's silence in respect of the TPI doctrine.

IV. *PJS*

PJS was a claim in MPI brought by a well-known, married individual in the entertainment industry.[38] The claimant, who had an open marriage with his spouse, engaged in a three-way sexual encounter with two other individuals. These individuals subsequently sought to sell their story to media outlets in the UK and the US. Some details of the encounter, including the claimant's identity, were published in outlets in the US. However, the High Court awarded the

[37] *K* (n 16) [19].
[38] *PJS* (n 1).

claimant injunctive relief to prohibit their publication in England and Wales. After the information became widely accessible online, the Court of Appeal discharged the injunction on the basis that the information it sought to protect was no longer confidential. The claimant appealed to the Supreme Court which reinstated the injunction on the basis that it could still do some good by limiting the extent of the intrusion that would occur into the claimant and his family's private life in the UK. In coming to that conclusion, the Supreme Court took into account the likely impact of publication, and the benefits of injunctive relief, on the claimant's children – third parties to the litigation.

The Supreme Court's treatment of the TPI issue is threadbare. Of the 93 paragraphs produced by the Court, spread across four judgments, only eight even mentioned the claimant's children. Of these eight paragraphs, only two contained any reference to authority that might support the TPI doctrine. And these two paragraphs (one in Lord Mance's judgment, the other in Lady Hale's) hint at different doctrinal justifications. Lord Mance, at paragraph 36, hints at a *K*-style analysis, drawing on the 'best interests of the child' test and citing four domestic authorities in which the courts have applied that test, all four of which are public law cases concerning either deportation or extradition.[39]

Lady Hale's judgment is just seven paragraphs long, of which three are redacted entirely in order to protect the claimant's identity. In those which remain, Lady Hale focuses not on the 'best interests' approach but instead on a more direct application of the children's Article 8 ECHR rights, in a manner reminiscent of Eady J's *CDE* approach. She gives two reasons for her conclusion that the children's interests 'deserve closer attention that they have so far received in this case'.[40] The first is a bare and unexplained assertion that the children have significant Article 8 interests of their own, separate from those of their parents. This reason is reminiscent of Eady J's approach in *Ambrosiadou*. It is entirely correct, as a matter of formal law, to point out that the children have such interests and that they are separately enforceable from those of their parents – plenty of authority could have been cited in support of such an assertion.[41] What is problematic about this assertion is the lack of justification for the court considering the children's interests in an ostensibly bilateral dispute between their parents and a publisher. Put simply, the *importance* of the children's interests is not in dispute, but their *relevance* in these proceedings is.

Lady Hale's second reason for taking into account the interests of the children is taken from section 12(4)(b) of the Human Rights Act, which requires a

[39] The authorities cited are: *ZH* (n 34, also cited in *K*), *BH v Lord Advocate* [2012] UKSC 24, 2012 SC (UKSC) 308 (cited in *PJS* as *H v Lord Advocate*), *H (H) v Deputy Prosecutor of the Italian Republic (Genoa)* [2012] UKSC 25, [2013] 1 AC 338, and *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74, [2013] 1 WLR 3690. All four involve challenges to orders either for deportation or extradition.

[40] *PJS* (n 1) [72].

[41] See, eg, *Murray v Express Newspapers Ltd* [2008] EWCA Civ 446, [2009] Ch 481, *Reklos v Greece* [2009] ECHR 200, [2009] EMLR 16, *AAA v Associated Newspapers Ltd* [2012] EWHC 2103 (QB), [2013] EMLR 2.

court considering imposing injunctive relief in circumstances where freedom of expression might, as a result, be curtailed, must 'have regard' to 'any relevant privacy code'. She, like Lord Mance, identifies the Independent Press Standards Organisation (IPSO) code as such a code. This code provides that 'editors must demonstrate an exceptional public interest to over-ride the normally paramount interests of [children under 16]'.[42] Lady Hale then goes on to say, without further reference to legal authority, that for a court to discharge this statutory obligation satisfactorily, it will need to consider evidence pertaining to the actual or likely impact of publication on the children, and that this will need to take place at trial.[43] Only then will it be possible to determine whether the children's interests (added to the claimant's) outweigh the defendant's interest in freedom of expression. This is a rather baffling conclusion to reach in this particular case, given that Lady Hale is adamant (as are her fellow Supreme Court justices) that there is 'no public interest in the legal sense in the publication of this information'.[44] If there is no arguable public interest in the publication of the information, it is unclear why evidence of the impact on the children would be needed, since presumably the claimant's own privacy interests – even if they were only minimal (which they are not in this case) – would suffice to defeat the defendant's public interest argument.

In the course of giving her second reason for considering the interests of the children, Lady Hale has essentially elevated the code of the press regulator (to which the defendant publisher had *voluntarily* signed up) to the level of law. In an area of doctrine that is marked by its freewheeling uncertainty, it is quite remarkable for a judge in our highest court to treat the IPSO code not only as a de facto legal standard, but as *the only* applicable de facto legal standard relating to third party interests. For only those defendants who have signed up to a 'relevant privacy code' will be bound by its provisions. This creates a potential imbalance between cases featuring commercial media bodies as defendants and cases featuring other sorts of defendants; whilst third parties will have emphasis placed on their interests in the former, this particular basis for doing so will be entirely absent in the latter. This is enormously problematic, because (quite apart from the IPSO code's internal deficiencies and the fact it was not the product of any form of either democratic (ie parliamentary) or considered judicial decision-making) the IPSO code quite obviously cannot form a *generally applicable* basis for legal doctrine in this field. Section 12(4)(b), therefore, cannot provide a *complete* rationale for the existence of the TPI doctrine; at best, it bolsters the case for considering third party interests in those cases where the defendant is a commercial entity that is signed up to a relevant code.

[42] *Editors' Code of Practice* (IPSO 2016), available at www.ipso.co.uk/media/1058/a4-editors-code-2016.pdf (accessed 1 January 2021).
[43] *PJS* (n 1) [73].
[44] ibid, [78].

This, then, is the sum total of the Supreme Court's input on the TPI doctrine in *PJS*. The Court has vaguely affirmed the doctrine, gently hinting at three different rationales for it (one of which is, as we have seen, incomplete) without indicating which (if any) of them is preferable or why. Its analysis of the matter is so lacking in development that the picture remains wholly unclear. Indeed, Lady Hale's introduction of a new, possible (but incomplete) rationale – section 12(4)(b) coupled with the IPSO code – muddies the already murky waters in this area still further.

Having explored what little the Supreme Court had to say on the TPI doctrine in *PJS*, it is now time to introduce my theory as to why it said so little. It seems obvious that a coherent rationalisation of the TPI doctrine would be desirable. For the more-or-less automatic assumption of most lawyers is that coherent rationalisation of doctrine is usually, if not always, desirable.[45] But when we pause to consider the ways in which the Court might actually have rationalised the TPI doctrine, we uncover a whole new set of problems. Put simply, there seems to be no obvious, coherent way to rationalise the doctrine that does not either create new problems, or exacerbate existing ones, for the law. In other words, whilst the Supreme Court may attract criticism for failing to clarify the TPI doctrine, perhaps this failure is forgivable (or at least understandable) because it found itself faced with a situation in which there were no good options. In order to explain and evidence the plausibility of this theory, in the next section I sketch out some of the ways in which the TPI doctrine could have been rationalised (or, in the case of the last option, abolished). As we shall see, none of these options are particularly appealing.

V. RATIONALISING THE TPI DOCTRINE: THE CHOICES

A. The 'Best Interests of the Child' Approach

Two approaches have already gathered some judicial support in the cases we have canvassed. We will deal with these before discussing others. The first is the 'best interests of the child' approach adopted by Ward LJ in *K* and mentioned briefly by Lady Justice Hale in *PJS*. The roots of this approach lie in Article 3 of the UN Convention on the Rights of the Child (UNCRC), which obliges courts to regard as a 'primary consideration' the best interests of the child in any legal case 'concerning children'.

There are three issues which make adopting this approach difficult, which may explain why the Supreme Court did not endorse it. The first is that, as an

[45] See, eg, W Lucy, 'Access to Justice and the Rule of Law' (2020) 40 *OJLS* 377, 384–389, arguing that coherence, amongst other desiderata associated with Lon Fuller, constitute the basis of the rule of law. (See further Lon L Fuller, *The Morality of Law*, revised edn (New haven, Yale University Press, 1969) ch 2.)

instrument of international law, Article 3 of the UNCRC is not directly effective in domestic law. Like any instrument of international law, unless statutorily incorporated into domestic law, it provides only persuasive rather than formally binding authority. Whereas there are areas in which the 'best interests' test has been incorporated by statute into English and Welsh law (most famously in the Children Act 1989), it has not been incorporated broadly into every domestic legal field. Indeed, Parliament may be thought to have taken the deliberate view that its incorporation should be limited to those fields for which it has incorporated the provision in legislation. The problem here is not so much with the courts choosing to deploy the 'best interests' test in MPI cases involving third party children, but with the courts choosing not to deploy it in other areas. We have seen children's interests litigated without the courts recognising the primary importance of acting in those children's 'best interests' in a range of tort cases, including in nuisance,[46] negligence,[47] the *Wilkinson* tort,[48] and also in MPI cases where the child is themselves the claimant, rather than a third party.[49] The 'best interests' test might seem like an easy justification for considering third party interests in MPI, but logically it must not only justify but compel their consideration in all other types of legal claim where the interests of third party children would be affected by the outcome. For some, this would quickly lead to an unpalatable level of judicial activism, as the range of relevant interests that would need to be considered in private law claims would expand. This would also inevitably bring increased cost to the proceedings, which would require more evidence of the impact on third party children to be taken, increasing the length of hearings and trials and generally increasing the administrative burden on an already overburdened legal system.

The second issue re-engages some of the concerns mentioned immediately above. For the courts would need to determine which legal actions 'concern children' for the purposes of triggering the 'best interests' test. It is unclear where the line should be drawn in terms of cases that 'concern children' and cases that do not. Intuitively, it seems entirely plain that if a litigant has responsibility for the care of children, those children are likely to be affected – at least to some degree – by the outcome, and indeed quite probably by the very process of the litigant being involved in, the litigation. But, to the best of my knowledge, nobody has ever seriously suggested in court that a claimant in a negligence case should be able to boost their chances of having the defendant found liable

[46] *Dobson v Thames Water Utilities Ltd* [2009] EWCA Civ 28, [2009] 3 All ER 319.

[47] *Perry & Anor v Harris (A Minor)* [2008] EWCA Civ 907, [2009] 1 WLR 19, also *O v A* [2014] EWCA Civ 1277, [2015] EMLR 4.

[48] *Wilkinson v Downton* [1897] 2 QB 57. The *Wilkinson* tort was revived by the Supreme Court in *O v A* [2015] UKSC 32, [2016] AC 219, wherein it was relabelled the tort of wilful infringement of personal safety.

[49] For example: *Murray* (n 41), *AAA v Associated Newspapers Ltd* [2013] EWCA Civ 554, [2013] WLR (D) 189, *O v A* (n 47), *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB), [2014] EMLR 24 and [2015] EWCA Civ 1176, [2016] 1 WLR 1541.

simply because such a finding would benefit their child. Yet the presence of the TPI doctrine in MPI effectively achieves just this, by the courts' admission that the child's interests could tip (and have tipped) the balance in favour of the claimant when all other matters are equal.[50] Thus, in the interests of coherence, the courts would need to find a way to determine and rationalise the outer limits of the phrase 'concerning children', which could prove tricky.

Third, the other glaring problem with the 'best interests' approach is that Article 3 of the UNCRC *only* applies to children. If the third parties to the litigation whose interests would be adversely affected by publication of the private information are aged 18 or over, then this approach would not justify taking their interests into account at all. In *K*, whilst the children's interests militated against publication, so did the interests of the claimant's wife and the woman with whom he had had his extra-marital affair. Likewise in *CDE*, Eady J considered the interests of an adult third party as well as those of children,[51] as did Slade J (following the *K* line of authority) in *EF*.[52] So the courts, if they relied solely on the 'best interests of the child' approach, would need to acknowledge that this would not justify considering the interests of adult third parties.[53] This would not rationalise the entirety of the TPI doctrine as it currently stands; it would limit its applicability and thus significantly alter it. It would create a situation in which the interests of a stoical seventeen-year-old would automatically be considered in an MPI case brought by the parent, but the interests of a suicidal nineteen-year-old would not. It would not give the courts the formal flexibility to consider the interests of adult third parties which, though they might ordinarily not be thought to be so severely affected as children, might in some circumstances be so.

B. The Article 8 ECHR Approach – (More) Direct Horizontality

The second approach the courts could take would be the other that features in the cases to date. This is the approach whereby Article 8 of the ECHR provides direct justification for considering the rights of third parties, much as it does in judicial reviews of deportation decisions (which, as we have seen, provide the bulk of the authorities relied on by those courts that have deployed this approach in MPI cases).

The problem with this approach is that which we identified in *CDE* and *K* – namely that it fails to recognise the difference between vertical and horizontal

[50] See *K* (n 16) [19]–[23].
[51] See *CDE* (n 15) [6].
[52] *EF* (n 25).
[53] It may be, of course, that the courts would prefer to limit the TPI doctrine to children. In *Terry v Persons Unknown* [2010] EWHC 119 (QB), [2010] EMLR 16, for example, Tugendhat J opined that adult third parties should normally attend court and give evidence if their interests are to be considered. This would, however, constitute a departure from the key cases (*K* and *CDE*) in this field.

human rights cases and thus undermines the basic premise, which is today widely accepted, that the Human Rights Act 1998 gives direct vertical effect, but *indirect* horizontal effect, to the ECHR. There simply is no formal justification for doing this, unless the courts are prepared to overturn nearly two decades of broad consensus on the nature of the HRA's horizontal effect and re-open the argument made by William Wade that the HRA would and should give *direct* horizontal effect to the ECHR.[54] With Wade's preferred approach having been roundly rejected by both the courts and much of the academy, this would be remarkable to say the least.[55] Moreover, it would seriously challenge the shape of MPI doctrine which has been labelled a tort but which, if it was the result of direct rather than indirect horizontality, would not need to be a tort at all.[56]

Re-opening the debate on horizontal effect would, of course, have a profound impact on private law in the UK. As Gavin Phillipson once dramatically put it, direct horizontality would 'threaten whole swathes of the common law with replacement by private HRA actions'.[57] This might not necessarily be a bad thing in itself, but it would be unpalatable to many. This is because it would involve a radical reshaping of the domestic legal landscape, and also because it would render that re-moulded landscape vulnerable to a rather chaotic situation in the event of the HRA being repealed and/or the UK withdrawing from the ECHR (both of which have been mooted by the UK's governing Conservative party in recent years). Put simply, neither those who see the ECHR as a malign influence on British sovereignty nor those who see it as an underused instrument of salvation would find this approach comfortable.

C. The Equitable Approach

The remaining approaches to rationalising the TPI doctrine in MPI have not made any overt appearance in any MPI cases. They are sketched out here for, to the best of my knowledge, the first time. This third approach would justify considering third party interests on straightforwardly equitable principles governing injunctive relief.

Injunctive relief is the most common remedy in MPI cases. This is because most MPI cases have their main hearing at the interlocutory stage, with very few thereafter proceeding to trial. The reason for this is simple. If the claimant succeeds in obtaining interim injunctive relief, the information usually quickly loses its newsworthiness and the defendant (who is oftentimes a media

[54] Wade (n 18).

[55] See n 18.

[56] A cause of action arising directly out of the HRA would be sui generis, and would not need to fit into any existing category of legal action.

[57] G Phillipson, 'Clarity postponed: Horizontal Effect after *Campbell* and *Re. S*', in H Fenwick, R Masterman and G Phillipson (eds), *Judicial Reasoning under the UK Human Rights Act* (Cambridge, CUP, 2007) 152.

organisation) is likely to abandon its defence of the claim. This is boosted by the test in section 12 HRA, which effectively prevents the court from granting interim relief unless it is satisfied that the claimant is more likely than not to obtain permanent injunctive relief at trial. If, on the other hand, the attempt to obtain interim injunctive relief fails, then the information will swiftly be published, leaving the claimant with no privacy left to protect. Whilst a claim could still proceed to trial seeking damages only, such cases are rare – probably at least in part because the trial would revitalise public interest[58] in the information several months down the line, which the claimant may wish to avoid.

The availability of injunctive relief in MPI cases is one of the remaining links between that doctrine and its predecessor,[59] the equitable doctrine of confidentiality. Injunctive relief is a discretionary remedy available in circumstances where damages would not be adequate. Violations of privacy or confidence are classic circumstances where damages are unlikely to be adequate. As an exercise of discretion, the court has broad latitude over the factors it considers when deciding whether or not to grant injunctive relief (whether interim or permanent), and so is at liberty to consider the interests of third parties as part of that exercise. At first glance, this seems like a potentially viable rationalisation of the TPI doctrine. But it, too, is fraught with difficulty.

First, it would not properly reflect what the courts have actually been doing. In the third party cases, the courts have not separated their findings on liability and remedy in the way this approach would suggest. That is, the courts have not first decided that the defendant must be liable to the claimant *without* considering the interests of third parties, and then imposed a particular remedy (injunctive relief) *after* considering the interests of third parties. Rather, consideration of third party interests has demonstrably been undertaken *as part of* the 'new methodology' – the two-stage test for *liability* in MPI cases.[60] The third party interests come into play at stage 2 (the multi-factorial balancing exercise known as the 'ultimate balancing test'[61]), which is a necessary component of establishing liability. Put simply, if the claimant's interests, which may be bolstered by

[58] In the non-legal sense of being interesting to the public.

[59] I have argued elsewhere that the conclusions reached by the High Court and Court of Appeal in *Vidal-Hall* that MPI is tortious (and not equitable) are unconvincing (see Bennett (n 2)). Since neither the courts nor mainstream scholarship has managed to convincingly explain the interrelationship between MPI and the older doctrine of confidence, it is uncomfortable – and quite possibly inaccurate – to describe equitable confidence as MPI's 'predecessor'. I do so here only in the interests of simplifying the analysis, not as an endorsement of the description.

[60] For clarity: at stage one, the court determines whether the claimant has a 'reasonable expectation of privacy' in respect of the information that is the subject of the complaint. If such a reasonable expectation is established, the court proceeds to stage two, at which point it conducts a multi-factorial balancing exercise to determine whether the claimant's privacy rights outweigh the defendant's rights to freedom of expression and/or any public interest in receiving (via publication) the information. See *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 AC 457, *Murray* (n 41), *Re S (A Child)* [2004] UKHL 47, [2005] 1 AC 593 and *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), [2008] EMLR 20.

[61] *Re S* (ibid) [17].

the interests of third parties, do not outweigh the defendant's interests (which may be bolstered by, or indeed entirely superseded by public interest in publication of the information) at this stage, the claim simply fails on its merits. So the approach described in this subsection – regarding third party interests as relevant because of the injunctive nature of the relief sought – simply does not reflect the process that the courts are following in these cases.

This is not the only problem with this approach. Let us postulate that the first objection could be overcome, and equitable considerations built simultaneously into the tests for liability and the award of a particular remedy. If this were to happen, the doctrine of MPI would have *at its core* an equitable exercise of discretion. This would put the doctrine in significant tension with recent judicial pronouncements that MPI is tortious and not equitable.[62] It might be argued that these recent judicial pronouncements are incorrect, and that MPI is best categorised as neither tortious nor equitable but as some (hitherto poorly-explained) hybrid tortious-cum-equitable action with a methodology rooted in European-style human rights jurisprudence (the 'ultimate balancing test'). But thus far no serious effort has been devoted to conceptualising MPI in that fashion, either in academic scholarship or courts' judgments. So it seems clear that, at this point at least, English and Welsh courts would be unlikely to find this option attractive.

D. The 'Family Unit' Approach

At this point, we reach options that represent more radical departures from the courts' established practices. The mere fact of this makes their adoption less likely, for they would require a departure from the close adherence to precedent that is characteristic of the 'narrow incrementalism' that is more instinctively appealing to British judges than its less doctrine-bound (but still principle-based) 'wide' variant.[63] Departing significantly from established practices is something that judges who incline to modes of judging that bear the hallmarks of legal formalism – which is most obviously on display in those places where judges openly appeal to the importance of 'legal certainty'[64] – are likely to eschew.

[62] See *Vidal-Hall v Google Inc* (HC and CA). See also Bennett (n 2).

[63] The terms 'narrow incrementalism' and 'wide incrementalism' were coined by L Dolding and R Mullender in 'Tort Law, Incrementalism, and the House of Lords' (1996) 47(1) *Northern Ireland Legal Quarterly* 12. I have examined their relevance to analysis of the development of MPI in Bennett (n 2) and 'Privacy' (n 3).

[64] See, eg, Lord Hoffmann's judgment in *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406, and Baroness Hale's judgment in *Campbell* (n60), in which both judges appeal to the importance of legal certainty as justification for refusing to introduce significant doctrinal development (in the form of the recognition of a novel cause of action). More recently, the Court of Appeal made a similar appeal to legal certainty as its justification for refusing to countenance the imposition of a duty of care in negligence on a parent planning to publish autobiographical material that could have an adverse impact on their autistic child in *O v A* (n 47) [57].

Nonetheless, since it may be possible to pursue these approaches by adopting a 'wide' incrementalist mode of judging (which would be just as constitutionally legitimate as its narrow variant, in terms of being a legitimate exercise of judicial power), it is worth considering these more 'activist' possibilities.[65]

One of these is to reframe the privacy claim at the heart of MPI as a claim brought not by an individual simply on behalf of themselves, but as one instead brought on behalf of the claimant's entire family unit. This would involve significantly reconceptualising not only the nature of the privacy interest at the heart of the claim, but also the traditionally bilateral nature of private law claims in England and Wales. For the scope of the claim's potential reach would be determined (not entirely, but in significant part) by the size of the claimant's family unit.

Under existing MPI methodology (as best we are able to understand it, given the ambiguities we explored in section III), third party interests are not considered at stage one (when the court determines the reasonable expectation of privacy issue) but come into play at stage two (when the court conducts the 'ultimate balancing test'). But if the privacy claim at the heart of MPI is reframed as a claim of and relating to the claimant's family unit, then in the interests of coherence, the interests of the entire family unit must be relevant at *both* stages. Thus, when determining whether the claim discloses a reasonable expectation of privacy, the court would need to consider whether the family unit *as a whole* has a reasonable expectation of privacy in respect of the information.

The impact that this could have on the disposal of claims would be significant. Consider the (entirely hypothetical, obviously) example of a high-profile politician holding high public office who has fathered a number of children with different women, some as the result of extra-marital liaisons. Suppose that a journalist uncovers evidence that, despite recently marrying his current partner, this politician has fathered yet another child with another woman so recently that he must have done so during his current relationship. The journalist may well seek to publish this information, arguing that there is public interest in the character of this political figure.

Under standard MPI methodology at present, the court would first determine whether the politician has a reasonable expectation of privacy in respect of this information. It might well determine that he does not, or that his reasonable expectation is significantly reduced owing to his status as a public figure. If the latter is the case, the court would then proceed to stage two and *only at that point* would it consider the interests of his various children and partners when determining whether the public interest in his extra-curricular activities outweighs the harm that publishing the information would cause to his (and, as an incidental matter, their) private life.

[65] On the potential for 'wide incrementalism' to justify early developments in the TPI doctrine, see Bennett, 'Privacy' (n 3).

However, under the 'family unit' approach we are considering here, the court would consider the claimant's entire family unit together at stage one. Rather than dealing with a single, obviously high-profile individual, the court would be dealing with a family unit that includes one high-profile individual but which also includes a substantial number of people, including young children who are not public figures and who, prima facie, must be regarded as any other private figure.[66] *As a unit*, the family's claim would likely be stronger at stage one. This extra strength will improve the chances of the claim surviving the defendant's public interest-based arguments at stage two and thus may dramatically affect the claim's prospect of success.

The biggest conceptual impact that a reworking of the MPI doctrine in this manner would have would be to shift its focus from being on an *informational* right (to privacy) to a right based more broadly on the integrity and wellbeing of the family unit. Such a move would, however, be deeply controversial, for a number of reasons. First, there is no obvious precedent for such a claim in English and Welsh law. Second, it would not deal with the challenge that the TPI doctrine has posed for the traditionally bilateral structure of private law so much as simply abandon that structure *for this particular type of claim*. Third, it would cohere poorly with at least one significant decision in MPI in recent years – the conclusion (of both the High Court and the Court of Appeal) in *O v A* that an individual who is not themselves the subject of the information, but whose psychological integrity would be harmed by its publication, simply has no standing to bring a claim in MPI.[67] If this approach were to be adopted, *O v A* would surely have to be regarded as wrongly decided on this point. This would lead to a fourth objection – that the upending of *O v A*'s prohibition on non-subjects bringing MPI claims could well open the floodgates. In theory, *any* member of the family unit could be the instigator of the claim because the true claimant is not an individual but the family unit itself. This in turn leads to a fifth objection – that it is wholly unclear where the line will be drawn in terms of the relevance of the interests of third parties (who would, of course, at this point no longer be third parties but simply members of the claimant unit). I have used the term 'family unit' simply as a reflection of the fact that in most of the TPI cases, the third parties involved have been members of the claimant's family. But in the twenty-first century, the whole notion of what constitutes a 'family unit' has been significantly expanded. Certainly, it goes beyond the nuclear family, and would surely incorporate foster children, step-children/parents, the children that unmarried adults have had with previous partners, and may include house-mates, carers, and others who live in a relationship of dependency with one another. As a sixth objection, none of this would cohere well with the remainder of tort doctrine, which would remain untouched by such a reconceptualisation in MPI and thus would remain resolutely bilateral and individualistic.

[66] *Murray* (n 41).
[67] *O v A* (n 47) and in the High Court at [2014] EWHC 2468 (QB), [2015] All ER (D) 23 (Jun).

The sheer scale and complexity of the changes that such an approach would entail, and the obviously large number of potential objections – even in a brief sketch such as this – would make this an unpalatable choice. Unless enacted (presumably statutorily) as part of a broader package of similar reforms to private law, it is highly unlikely that such a reworking would be undertaken at common law.

E. The Incidental Family (or the 'It's the Claimant's Family Interest, Really') Approach

A variant on the previous approach should also be briefly mentioned, lest my failure to do so become the basis for an objection to my analysis. This would be an approach that justifies considering the interests of the claimant's family only incidentally, as evidence of the harm done to the claimant's private life. Under this approach, the claim would – as in the previous approach – be a broad one in respect of interference with private and family life, but the claimant would only be bringing the claim in respect of herself (and not her family). Should embarrassing private information about the claimant be published, so the argument would go, her relationship with her family members (the third parties) might be damaged.[68] And so evidence of the impact of publication upon those family members becomes relevant in order to establish the factual basis of the claimant's claim.

In addition to triggering most of the concerns identified by the previous approach, this approach would also be rather convoluted and procedurally would make little sense. For in order to protect the relationship between the claimant and her family members, her family members would have to be kept unaware of the embarrassing information. But they may also have to give evidence in respect of its impact upon them; at the very least, evidence of its impact upon them will need to be presented from *somewhere*.[69] These two things are not easily compatible. In practice, this approach would ensure that third party interests would, in many cases, have to be evidenced without the direct testimony of the third parties themselves, which would likely reduce the impact those interests would have on the court's decision-making.

[68] See *Rocknroll v News Group Newspapers Ltd* (n 25).

[69] It is not clear, from the judgments in *PJS*, whether third parties would ever be expected to give evidence personally. Lady Hale is ambiguous on this point at [73]–[74]. What is clear is that Lady Hale expects the court to rule on the basis of *some* evidence, though from where this might be obtained is a matter open to interpretation. It might be that the courts continue in the vein of *K*, in which Ward LJ effectively (though not describing it as such) inferred the potential for harm to the claimant's children from playground bullies, presumably from a combination of the breadth of the intended publication, the nature of the allegations and the fact that the children were of school age.

F. The 'Assumption of Responsibility' Approach

The final approach that might rationalise the TPI doctrine that I will consider here is of an even more 'left field' variety. It would involve drawing on the notion of 'assumption of responsibility' – a concept which justifies the imposition of liability in other parts of tort law – to justify holding the defendant prima facie liable for harm caused to the third parties.

It is now well-established in negligence law that a person who assumes responsibility for the interests of another may be held liable for a negligent failure to secure those interests, in circumstances where no liability would have accrued if there had been no such assumption of responsibility. For example, if I see a child standing in the middle of the road, I am generally under no legal obligation to rescue the child from on-coming traffic. But if I have assumed responsibility for the child – perhaps by agreeing to 'watch' the child while its parent attends to a parking meter – my failure to act will now attract liability.

The interests of third parties in MPI could perhaps be secured in an analogous way. If a defendant (for example, a print media outlet) seeks to publish private information about a claimant, and that defendant has actual or constructive notice that there are third parties who might be adversely affected by publication, then it might be said – by virtue of 'voluntarily' publishing the piece – to have assumed responsibility for their wellbeing.[70] If publication occurs, this approach morphs into one where the third parties become claimants in their own right: if this publication actually results in harm, then the defendant may be liable in damages not just to the subject of the information but also to the affect third parties. But at the interlocutory stage, where most MPI claims live and die, the publication would merely be intended (rather than actual), and the third parties would simply be third parties. The claimant would argue that, by voluntarily acquiring and intending to publish the information in circumstances where an adverse effect upon known third parties is objectively likely, the defendant has assumed responsibility for their wellbeing, and may therefore be enjoined from publication if there is evidence of this likely adverse effect.

There are, however, significant reasons to think that the courts would find this approach, too, unpalatable. First, it would explicitly, rather than tacitly, make defendants responsible for considering the well-being of parties beyond the subject of the information. This would raise coherence issues – for if defendants are responsible for third parties in MPI cases, it is unclear why they should not also be in other torts such as defamation. Second, there are – as Donal Nolan has pointed out – definitional problems with the assumption of responsibility doctrine.[71] Both the terms 'assumption' and 'responsibility' lack clear

[70] This would, of course, be a highly controversial argument, and one that is unlikely to survive the objections to it – particularly the third one identified below.

[71] D Nolan, 'Assumption of Responsibility: Four Questions' (2019) 72(1) *Current Legal Problems* 123.

definition in the case law. And even though Nolan himself has made a forceful argument as to the best way in which both terms may be coherently understood, it remains impossible to reconcile all of the existing case law on the doctrine with his preferred understandings – indicating that this remains an area of live controversy. Whether judges in MPI cases would be open to drawing this controversy into the field of MPI is doubtful.

The third and perhaps most serious problem posed by this approach is the lack of either explicit or implicit agreement by the defendant to undertake the task of looking out for either the claimant's or the third parties' well-being. Unlike in the example featuring a child in the road whom I have agreed to watch out for, most MPI defendants are media organisations pursuing journalistic activity for their own and their readers' benefit, not for the claimant or affected third parties. So, the courts would have to extend the doctrine of assumption of responsibility into new territory in order that mere *awareness* of the presence of third parties who might adversely be affected by publication would trigger the duty to ensure reasonable care is taken for their wellbeing. This would be a highly significant development in negligent law, with potentially far-reaching consequences. As such, it is something the courts are likely to eschew at present.

Fourth, even if the courts were minded to pursue such a significant extension of the law, this approach would still run into a practical problem. The problem is that the assumption of responsibility approach would not protect third parties of whom the defendant was not and could not reasonably have been aware. This would leave a gap in protection for any such third parties, although it might be thought that, overall, this strikes a defensible balance (since imposing liability on defendants for causing harm to individuals of whom they had no actual or constructive knowledge might produce considerable chilling effects).

Fifth, there is a particularly acute problem of coherence emanating from the *O v A* case. In *O v A*, the Supreme Court held that only the subject of the private information has standing to bring an MPI claim. The assumption of responsibility approach would be in tension with this (at least at trial for damages), since it would ultimately make those who are not the subject of the information the claimants. No lower court could issue a ruling so obviously in tension with *O v A*, and so the matter would require intervention from the Supreme Court – and we have seen, in *PJS*, that Court's reluctance to engage with these issues. There would also be a less problematic tension with the High Court and Court of Appeal judgments in *O v A*, which ruled out claims in negligence against the defendant. Since the assumption of responsibility doctrine emerged from negligence law, it might be thought that the Court of Appeal's firm denial (albeit not supported by any cited authority) that there could be no duty of care imposed upon parents in respect of decisions pertaining to their child's upbringing (including the autobiographical publication of potentially distressing facts about a parent) should also be taken to rule out the imposition of such a duty as a result of the assumption of responsibility doctrine. However, since assumption of responsibility appears not to have been expressly argued

(it is certainly not mentioned in the judgments), this is perhaps less immediately problematic.

G. Abolish the TPI Doctrine

The final option we will consider here is the simple abolition of the TPI doctrine. Rather than attempting to rationalise it – and inevitably encountering the difficulties outlined above – the courts could simply abolish it, and declare that only the interests of the parties are relevant in determining a claim in MPI. The attractiveness of this option lies in its provision of a simple solution to the problems with the competing lines of authority in this area identified in section III. However, there are reasons to conclude that the courts would find this option, too, unpalatable.

These reasons derive from the obvious keenness of the courts to consider the interests of third parties. It is quite clear from the competing lines of authority that, despite obvious doctrinal difficulties with them, the courts have nonetheless been keen that the interests of third parties should form part of their decision-making. This is in all likelihood a reflection of the normative appeal of finding novel ways to protect children from being adversely affected by publicity given to their parents' actions. This has been thematic in MPI cases for several years. Even before the TPI doctrine emerged, claims were creatively pleaded; in some, the children acted as the claimants, since they were more likely to succeed – particularly where the parents were public figures but the children were not.[72]

It is also clear, from the judgments in *PJS*, that whilst the Supreme Court is reluctant to rationalise the doctrine, it is keen to see it remain – and perhaps even flourish – as a component of MPI. The Court's endorsement of the doctrine may be bare and intellectually unhelpful, but it is nonetheless a powerful indicator that the Court regards the TPI doctrine as a normatively desirable part of tort law. It thus seems highly unlikely that the Court would perform the abrupt about-turn necessary to abolish it.

VI. CONCLUSION

The third party interests doctrine in MPI is a mess. It is conceptually incoherent, lacks a clear formal basis, and causes the entire cause of action for MPI to stick out in tort law like a proverbial sore thumb. It is easy to criticise the Supreme Court for failing, in *PJS*, to deal with this situation. But it is more useful to try to understand why it so failed. It is possible, of course, that the Court simply did not apprehend the degree of the challenges that the TPI doctrine poses for English and Welsh law, and that, having failed to appreciate its significance, it saw no

[72] *Murray* and *Weller* (both n 49).

reason to address it. But it may also be the case that the Court realised that it had no good options. For whilst it is possible to rationalise the TPI doctrine, doing so involves making hard choices. Each of the options considered in this chapter – albeit necessarily briefly – appear to have some unappealing features. Whichever path is taken will involve trade-offs between competing interests.

No doubt a compelling normative argument could be made for the adoption of one or more of the approaches outlined in this chapter. And indeed there may well be others that I have not thought of – the list is unlikely to be exhaustive – that might also be the subject of a persuasive argument in favour of adoption. But it is apparent that none will satisfy everyone, and some would cause more consternation than others.

PJS is a landmark case in English and Welsh privacy law. But it is a landmark for a rather ignominious reason. It is the case in which the UK's highest court could have taken a stance on an important issue of live controversy and conceptual confusion, but in which it did not do so. This failure may be forgivable. But the problems associated with the TPI doctrine will not go away. And some day, they will need to be reckoned with.