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# WAS *RICHARD v BBC* CORRECTLY DECIDED?

Thomas DC Bennett

Paul Wragg

## INTRODUCTION

The recent judgment in *Richard v BBC* is already proving to be enormously controversial.<sup>1</sup> Although only a High Court decision, it has generated the sort of debate, both in academic commentary and the popular press, not seen in a long time in privacy law. It even eclipses the reaction to Max Mosley's successful claim back in 2008 (where the negative response came exclusively from the press). In a sense, this controversy is good, because privacy law is an area that deserves rigorous discussion about its nature and its limits. But, at times, the debate can feel frustrating – particularly when scholarship in this field is presented as a question of picking a side: “team privacy” or “team press freedom”. Such polarisation presents press freedom and privacy as a dichotomy. This is not wholly unjustified. But it does bring with it a serious risk that we will lose sight of the fact that both are vital political rights, which have, by common consensus, at least a rough equality of importance. Some cases, of course, raise no real privacy issues; others raise no great press freedom issues. But we must not lose sight of the importance of ensuring our system of privacy law is sufficiently calibrated to be sensitive to the legitimate claims of both rights in finely balanced cases. If the law is to truly take these rights seriously, it must find ways to accommodate both defensibly. For this reason, in our work, both of us have tried to pursue this holistic project through the criticisms of doctrinal failings and the engagement with the deeper, philosophical claims that must animate one's understanding of both rights. We do this not because we think that either privacy or press freedom is seriously imperilled but because we think that English law, at a systemic level, still needs some fine tuning.

For us, *Richard v BBC* is significant because it is yet another case that raises important questions about the mechanics of determining privacy claims. We both recognise that these concerns are real, and that they are not necessarily easily resolved. This recognition manifests in our disagreement about how this sort of case ought to have been decided. There are points we agree on, but there are several others on which we are some distance apart. For instance, whereas we both agree, to a great extent, on the ideal of privacy law, as realised in the misuse of private information tort (MPI), we disagree on how that ideal ought to play out on the facts of the case. Given this, it occurred to us that presenting our disagreement may serve the literature, in some small way, by highlighting some of the choices and issues that UK privacy law has yet to grapple with satisfactorily. To this end, we present these opposing views in this article. In the first section, Wragg argues that the case of *Richard* was wrongly decided. In the second section, Bennett responds to Wragg's argument, and makes the case that the decision in *Richard* was broadly correct. We present our arguments without any joint conclusion, thereby leaving readers to reach their own conclusions about the case, and, more importantly, the choices that ought to be made in developing privacy law.

Many will be familiar with the facts of the case, but they are worth briefly restating at the outset. In 2014, South Yorkshire Police (SYP) raided the home of the famous singer, Sir Cliff Richard, following an allegation of an historic sexual assault. A source at SYP informed the BBC about the raid in advance of it taking place. Believing themselves to have secured a “scoop”, staff at the BBC prepared for live coverage of the raid. On the day of the raid, live video footage of it was broadcast on the BBC's news services. Aerial footage was shot from a helicopter. Police officers could be seen through the windows of Richard's home, going through his belongings, and removing large numbers of items, including computers, from the residence. No charges were ever brought against Richard as a result of the investigation. Richard brought claims in MPI against both SYP and

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<sup>1</sup> *Richard v BBC* [2018] EWHC 1837 (Ch)

the BBC. SYP settled the claim, but the claim against the BBC went to trial. At trial, Mann J found the BBC liable.

## 1. WHY *RICHARD v BBC* IS WRONGLY DECIDED – PAUL WRAGG

### a) *Overview*

#### i) Law

There are three reasons why I think *Richard v BBC* is wrongly decided. One, it seems to me that whilst a wrong has been done to Sir Cliff, this was committed by the police when it, or someone within it, disclosed information to the BBC that Sir Cliff was being investigated as part of Operation Yewtree (it must be stressed that the CPS announced on 16 June 2016 that no charges would be made against Sir Cliff and that, as was said in court, ‘he is an innocent man in the eyes of the law’);<sup>2</sup> Secondly, I think that the High Court made significant errors of law, not fact, that render the decision eminently appealable (ie, it is not simply that I think the judge made findings of fact that I do not agree with); Thirdly, I think the ramifications of the judgment have larger ramifications that ought to have played a greater part in the decision, relating to the findings of law about i) the reasonable expectation of privacy (REOP) that pre-charge suspects have and ii) the public interest in publicising the activities of the police. I do not doubt that others will disagree with me and I welcome their response. There are broader public policy issues raised by the case that require serious attention and considered debate. This is all the more important if the BBC is unable to obtain permission from the Court of Appeal to appeal the decision.

#### ii) Ethics

I must stress that I have great sympathy with Sir Cliff Richard’s position. He does not deserve what he has been through. In defending the BBC, as I will shortly, I do not say anything about the ethics of what they did, only the position in law. I am sympathetic to the argument that a complaint (singular or plural) about compliance with their ethical code ought to be raised, although appreciate that the outcome of that, even if successful, would not generate the same level of vindication as the court case has.

#### iii) The Administration of Privacy Claims

Finally, I must take this opportunity for a personal gripe. MPI is a fascinating area and raises genuinely perplexing issues that deserve great reflection. But I am not convinced that, even though reasonable people may disagree on the outcome, the case necessitated a judgment of some 122 pages and 454 paragraphs (somewhere, Lord Denning is spinning in his grave). I suspect I am not alone in feeling mystified at the level of detail some privacy cases attract and it concerns me that these decisions can read as if MPI is an unusual area of law, or one not often litigated (ie, like Intentional Infliction of Emotional Distress), or one of such esoteric qualities that every principle needs reams of supporting literature and case law analysis.

I do not think the issues in *Richard v BBC* needed the level of volubility on the facts let alone the law. There were three questions to answer here: 1) did Sir Cliff Richard have a REOP as against the BBC in the information that he was being investigated as part of Operation Yewtree? 2) if so, was there a

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<sup>2</sup> This is from the earlier, preliminary decision which settled the case against SYP: *Richard v BBC* [2017] EWHC 1648 (Ch), Statement in Open Court, [4].

public interest in publicising this information? 3) Did the extent of that public interest warrant the damage done to his legitimate interest in privacy?

I will tackle each question in turn.

*b) Decision*

i) Did Sir Cliff Richard have a REOP as against the BBC in the information that he was being investigated as part of Operation Yewtree?

The finding in Sir Cliff's favour on REOP stems chiefly from Mr Justice Mann's conclusion that, when determining the existence of a REOP, the court needs look no further than the quality of the information at stake. That the SYP had conceded in earlier litigation that they had breached Sir Cliff's REOP was taken as proof that he had a REOP against the BBC.

We see this conclusion in two places. Here:

'Sir Cliff's rights in respect of the information in the hands of the police are not based on a reasonable expectation of privacy as long as the information does not fall into the hands of the media; he has a reasonable expectation of privacy full stop.'<sup>3</sup>

And here:

'there is no basis for saying that a reasonable expectation of privacy, which previously existed, is somehow removed, or requires a complete reconsideration, merely because the information has come into the hands of the media... What matters is the substance of what is protected, and the substance of the protection.'<sup>4</sup>

Let us put to one side that the SYP conceded the point on REOP; it was not judicially determined.<sup>5</sup> Let us assume that, had they disputed it, the court would have had good grounds to find against them, for reasons I will make clear shortly.

I disagree with the legal analysis about REOP on two related grounds: one, the context in which information is received also goes to the REOP determination, as the Court of Appeal decision in *Murray v Express Newspapers Ltd*<sup>6</sup> makes clear:

'the question whether there is a reasonable expectation of privacy is a *broad* one, which takes account of *all the circumstances of the case*. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and *the purposes for which the information came into the hands of the publisher*.' (emphasis added)<sup>7</sup>

Now, notice I have cherry-picked here what I take to be most relevant. Clearly, I cannot ignore that the effect on the claimant is also important as is the absence of consent and the inference of such.

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<sup>3</sup> N Error! Bookmark not defined., [258]

<sup>4</sup> Ibid, [259]

<sup>5</sup> N 2.

<sup>6</sup> [2008] EWCA Civ 446.

<sup>7</sup> Ibid, [36].

Neither do I ignore the ethical issues about the circumstances in which the information was received (although I suspect that this is intended to refer to surreptitious recording of information as in *Campbell* and *Murray* itself, rather than that the information was leaked).

But, I do not think these concessions do much violence to my ultimate point: that the difference in identity between the SYP and the BBC is different because their intentions for the information were different (but I'll expand on this in a moment). Let me conclude this first point by highlighting some simple examples: a person will not have the same REOP when in the public toilet and the toilet at home, even though the information received by the stranger in one context and the spouse/partner in the other is identical; similarly, the REOP claim is different when a full body-scanner is used by airport security and by the average employer, even though the information obtained is identical; finally, the REOP as against the private investigator who tracks my movements and the local council whose CCTV cameras essentially do the same is different even though the information may be identical.

My second point on the REOP is the difference in obligation between SYP and the BBC as against Sir Cliff (or anyone else). Put simply, SYP, as a public authority, does have an absolute *obligation* under the Human Rights Act 1998 to act compatibly with human rights (this is not to say that the Art 8 right is absolute; it is not). The disclosures made by SYP to the BBC (inadvertently or not) clearly breached those obligations and could not be excused on operational grounds. There was no claim, for example, that publicity might generate further evidence.

The position against the BBC is more complicated but, ultimately, weaker. There is some merit (and some mileage left) in asking whether the BBC is a public authority under the HRA. To my mind, this question has never been answered satisfactorily but to the extent it has been examined, the answer appears to be no. For example, see the Joint Committee on Human Rights in the 2003/04 session<sup>8</sup> which makes no reference to the BBC on this point. But even if it is, the obligation owed by the BBC must be tempered by its obligations as a broadcaster of news – a function that SYP does not have – and which clearly speaks to the final consideration in the *Murray* test, the purposes for which the information came into their hands.

There are important operational reasons why investigations need to be kept secret, eg, to avoid tipping off either the suspect or his/her accomplices. But, of course, these are matters of confidentiality. The privacy aspect here relates to the sensitivity that the police ought to have toward those suspected of a crime before they have been charged. Whereas I do not say that this consideration is absolute, it is understandable why those considerations ought to arise as part of the police's obligations to the public under the Human Rights Act 1998.

But the BBC is not in the same position. The question of REOP for the police and the BBC is different. As against the SYP, it is: was it reasonable for the claimant to expect that news of the impending search would not be distributed to the press, including the BBC? As against the BBC, it is: was it reasonable for the claimant to expect that the BBC would not broadcast the search of his property by the police as part of their investigation into him about allegations of non-recent criminal behaviour? The distinction may be subtle but it is important.

Why is it important? In short, because the BBC, in monitoring the police, and its activities, serves the public interest. Now, at this point, I do not wish to confuse the public interest in publication with the REOP relating to that activity, albeit it is difficult, certainly here, to maintain a neat distinction. But the question, to my mind, is the reasonableness of the claimant expecting the BBC to respect his

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<sup>8</sup> <https://publications.parliament.uk/pa/jt200304/jtselect/jtrights/39/39.pdf>.

privacy in circumstances where it knows he is being investigated as part of Operation Yewtree – and, although it does not arise on the facts (I do not think), it is not irrelevant that the BBC has received much criticism for its silence in the Savile saga.

Is Sir Cliff’s expectation reasonable? Perhaps so, perhaps not, but I think the question is more finely balanced than Mann J recognises.

In fairness, he recognises something of the difficulty, as when he notes Lady Justice Sharp’s observation in *PNM* (when it was still known as that) that there is ‘a growing recognition that as a matter of public policy, the identity of those arrested or suspected of a crime should not be released to the public save in exceptional and clearly defined circumstances’.<sup>9</sup> Yet his reliance on this principle is weakened by the failure to observe the distinctive obligations that the police and BBC have.

His reasoning also speaks to, I think, an unhappy conflation of privacy harms (such as emotional distress) with reputational concerns, as when he says ‘the consequences of such an accusation [specifically, Operation Yewtree] in that form are something that should be taken into account in considering whether the suspect has a legitimate expectation of privacy in the fact of the investigation’ [246]. This strikes me as relevant only *after* the police investigation is concluded. *Then*, if the claimant’s reputation is impugned, he has a claim in defamation. It is important that privacy law is not used to shortcut the perceived deficiencies of contempt of court laws or defamation. All of this, though, is recognised in *Khuja v Times Newspapers Ltd* – a case that Mann J notes, but largely ignores. Instead, he finds:

‘It seems to me that on the authorities, and as a matter of general principle, a suspect has a reasonable expectation of privacy in relation to a police investigation, and I so rule.’<sup>10</sup>

As against the police, this is undoubtedly correct – but it is rather more doubtful when it is the press that discloses the information. It is also very troubling for the chilling effect that this ruling has on press freedom. I appreciate the term ‘chilling effect’ is used far too often, but here it strikes me as an accurate prediction. Admittedly, *Khuja* was about a person’s identity being revealed in open court and subsequently published by the press. But the reasoning strikes me as applicable to the police process as a whole – but, anyway, the majority of the Supreme Court was adamant that this could not give rise to a reasonable expectation of privacy.

The situation in *Richard* is different. It is about a police investigation – and recently there have been some troubling decisions which suggest there is a reasonable expectation of privacy in being interviewed by the police and these cases are discussed by Mann J. Yet, these cases cannot stand for the proposition that there is always a reasonable expectation of privacy when a person is investigated by the police. That would be against public policy; it would provide space for corruption, particularly where powerful figures are under scrutiny; we do not want the press to decide that they had best not reveal the names of those investigated for fear of being sued. All of this is recognised by Mann J, I think – certainly he sees that legal recognition of a reasonable expectation of privacy in these circumstances is highly fact-sensitive and requires some aggravating factors before it can arise.

But, at the very least, we might say that police interview under caution involves a degree of discretion, at least as far as police respect for privacy goes. It can be done quietly, away from public scrutiny and there are obvious instances where this has advantages for police investigation,

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<sup>9</sup> N Error! Bookmark not defined., [234], referring to *PNM v Times Newspapers Ltd* [2014] EWCA Civ 1132, [37].

<sup>10</sup> *Ibid*, [248].

particularly where there is a fear of tipping off. The execution of a search warrant, though, is materially different. It is unpersuasive to say that this happens in private (even if it happens very early in the morning, and even if no one is about). It happens in plain sight – regardless of whether anyone sees it or not. Obviously, there is a material difference between that which is observed by passers-by and that which is broadcast to the world at large. But, if anything, that goes to the second stage of the *Campbell* test, not the first.

It seems to me there is more reason to doubt the existence of the REOP than Mann J allows; I do not think the law is correctly stated or administered.

ii) Was there a public interest in publicising this information?

Even if I am wrong on that point, though, issues arise on the court's handling of the second stage, especially on the question of whether there was a public interest in publication.

On this, Mann J found that there was not because of a) the BBC's conduct in publishing the information (that it was more interested in beating a competitor than serving the public interest; and b) that whereas Operation Yewtree is a matter of public interest, the names of suspects are not.

We see a) arise here:

‘For what it is worth, I do not believe that this justification [the public interest] was much in the minds of those at the BBC at the time. I think that they, or most of them, were far more impressed by the size of the story and that they had the opportunity to scoop their rivals’.<sup>11</sup>

And later, here:

‘To that extent it can be said that the BBC did not quite comply with what it itself saw as the ethical requirements of its journalism at that stage. The real reason for that was, in my view, because it was giving a lot of weight, in its own deliberations, to preserving the exclusivity of its own scoop.’<sup>12</sup>

And, as if he had not rebuked the BBC enough,

‘That narrative does not really do justice to the quality of the broadcasts. They were, as I have said, presented with a significant degree of breathless sensationalism.’<sup>13</sup>

We see b) here:

‘Knowing that Sir Cliff was under investigation might be of interest to the gossip-mongers, but it does not contribute materially to the genuine public interest in the existence of police investigations in this area. It was known that investigations were made and prosecutions brought. I do not think that knowledge of the identity of the subject of the investigation was a material legitimate addition to the stock of public knowledge for these purposes.’<sup>14</sup>

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<sup>11</sup> Ibid, [280].

<sup>12</sup> Ibid, [295].

<sup>13</sup> Ibid, [300].

<sup>14</sup> Ibid, [282].

In this post-Yewtree age, this sort of cavalier statement is not only remarkable but quite dangerous. Clearly, it has a chilling effect on press freedom. It is here that, I think, Mann makes two further mistakes relating to a) the judicial method of determining if a public interest exists; b) the significance of the speaker's motives and the quality of their journalism when making that assessment.

That this happens is strange because Mann J recognises the context of this sort of arrest:

'The whole thing [Yewtree and Rotherham] was very much a source of legitimate public interest and concern, and the public had a legitimate interest in knowing at a general level that the police were pursuing alleged perpetrators, and particularly those who might have abused their celebrity status. At that level, therefore, information about the inquiry did... contribute to a debate of general public interest.'<sup>15</sup>

But concludes:

'The second part involves the element of identifying the individual concerned. It does not follow that, because an investigation at a general level was a matter of public interest, the identity of the subject of the investigation also attracted that characterisation. I do not think that it did.'<sup>16</sup>

At this point, it seems to me Mann J is again unhelpfully conflating privacy with reputation. Clearly, significant reputational damage can be done by press reports that *imply* a connection with Yewtree. All that is understood. But that analysis is post-investigation, not pre-

But Mann J sees things differently:

'I acknowledge a very significant public interest in the fact of police investigations into historic sex abuse, including the fact that those investigations are pursued against those in public life. The public interest in identifying those persons does not, in my view, exist in this case. If I am wrong about that, it is not very weighty and is heavily outweighed by the seriousness of the invasion.'<sup>17</sup>

This is problematic – as is the view that the journalistic quality of the broadcast was also material. Judges should not act as editors or arbiters of taste. All of this is very well established. It is not for judges to chastise any journalist for failing to reach high ethical standards.

But, most fundamentally, I think Mann J is simply wrong about what this broadcast represents. Two points are important: first, the finding of a public interest is an objective, not subjective, matter. Ultimately, it is irrelevant what the press thinks is the public interest in the story, because this goes to motive. And motive can have no bearing on our understanding of public interest. Of course the BBC sent up the helicopter because Sir Cliff Richard was involved and not Richard Cliff, painter and decorator. And, of course, there is no public interest in knowing what Sir Cliff Richard is up to these days, how he fills his time, what his favourite pastimes are.

But the public interest here is not about Sir Cliff Richard, it is about SYP. It is about the fact that SYP had convinced a judge the investigation was sufficiently serious to issue a search warrant. That, of itself, is in the public interest. Now, Mann J recognises this, sort of, but says there is no public

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<sup>15</sup> Ibid, [281].

<sup>16</sup> Ibid, [282]

<sup>17</sup> Ibid, [317]



interest in knowing of this unless there are operational reasons for disclosure (by which he means that additional or fresh evidence might be disclosed). But this is wrong. There is always a public interest in knowing what the police does in the public's name. There is always a public interest in knowing how the police interact with celebrity – and the upper echelons of society: Are they intimidated? Do they apply the law equally? In other words, the rule of law is firmly in view.

But Mann J dismisses this sort of argument firmly out of hand:

‘In evidence there was an attempt by Mr Smith to justify the use of the helicopter as providing evidence as to what was going on inside, as if some form of verification was necessary or appropriate. I find that that was a spurious justification. The helicopter shots did not verify or evidence anything particularly useful or controversial that needed evidencing. They were moving pictures of the property, of seven or eight people in plain clothes walking to a building, the same people walking back to their cars and fuzzy shots of two or three people in Sir Cliff's flat. It may have made for more entertaining and attention-grabbing journalism. It may be justifiable or explicable on the footing that TV is a visual medium and pictures are part of what it does. It did not, however, add any particularly useful information.’<sup>18</sup>

This misses the point. It is wrong. Even if the images are entirely mundane, the public interest is served.

iii) Did the extent of that public interest warrant the damage done to his legitimate interest in privacy?

Now, there is merit in saying that (as Mann J does) ‘the consequences of a disclosure for a person such as Sir Cliff are capable of being, and were, very serious’<sup>19</sup> and that these outweighed the public interest at stake. This conclusion would be remarkable of itself because, as I have said before,<sup>20</sup> the problem with MPI is that judges do not really balance the respective weights of the two claims (even when they say they do), they instead apply a simple rule: if there is a public interest in publication, the claim fails; if not, the claim succeeds. This would explain Mann J's insistence that there is NO (or *de minimis*) public interest at stake.

Let us consider the two claims. On the one hand, I say that there is a strong public interest here in knowing how the police conduct investigations against the upper echelons of society. This goes directly to the rule of law. On the other hand, there is the damage done to Sir Cliff Richard. But what is that damage? The Campbell decision, and others, tell us that privacy is about dignity and autonomy. What was it about the reporting that caused harm to Sir Cliff's dignity and autonomy? It is tolerably clear that he was most concerned about (and most affected by) the intrusive nature of the coverage (the helicopter recording events as his possessions were taken out of his flat) and the reputational harm. Let us put reputational harm to one side (because that is properly dealt with through defamation – or, if it is not, then we shall need another full-length article to analyse the point). What threat to dignity and autonomy arises from the recording, via helicopter, of his possessions being captured by the police? I do not say there is no damage to these values, but is it at the same level as the damage done in the *Mosley* case,<sup>21</sup> or the *Tulisa* case,<sup>22</sup> or *AMP v Persons*

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<sup>18</sup> Ibid, [300].

<sup>19</sup> Ibid, [316].

<sup>20</sup> See, eg, Paul Wragg, ‘Protecting Private Information of Public Interest: Campbell's Great Promise, Unfulfilled’ (2015) 7(2) *Journal of Media Law* 225 and ‘The Benefits of Privacy-Invasive Expression’ (2013) 64(2) *Northern Ireland Legal Quarterly* 187.

<sup>21</sup> *Mosley v News Group Newspapers Ltd* [2008] EWHC 687 (QB).

<sup>22</sup> *Contostavlos v Mendahun* [2012] EWHC 850 (QB).

*Unknown*,<sup>23</sup> or the *McClaren* case<sup>24</sup> (where the claim failed because the public interest outweighed it) or the *YXB v TNO*<sup>25</sup> case (just read the first section to see my point in action).

I do not think so. Consequently, even if it is accepted that damage is done to Sir Cliff's privacy interests, that damage is less than in other cases – which I say makes it medium rather than high – as against the public interest in publication, which I say is high.

Now, as I say, reasonable people can disagree about the weight attached to the two claims. But what needs serious thought is the consequence, if any, of this case and others like it. Are we certain that we want suspects to have the sort of privacy rights that *Richard v BBC* implies?

## 2. WHY *RICHARD v BBC* IS CORRECTLY DECIDED – THOMAS DC BENNETT

### a) Introduction

Wragg takes the view that the reasoning of Mann J in *Richard* is deficient in a number of respects, and that his disposal of the case is unsatisfactory. In this section, I respond to Wragg's argument and make the case that, notwithstanding some deficiencies in the judgment, the disposal of the case was essentially sound.

Wragg takes issue with Mann J's treatment of both elements of the claim in MPI. The first element is the question of whether the claimant (C) has a reasonable expectation of privacy in respect of the information the publication of which forms the basis of the complaint. The second element is the question of whether, assuming C has a reasonable expectation of privacy, that privacy interest is outweighed in an objective balancing test by the public interest in publishing the information.

In respect of the "reasonable expectation" question, Wragg argues that Mann J incorrectly treated Richard's reasonable expectation claim against the BBC as if it were the same as that which Richard had against SYP. Wragg says this is a misunderstanding of the legal test in question; whilst Richard may have had reasonable expectations of privacy against both the BBC and SYP, they were not the same reasonable expectations (because the BBC and SYP serve different functions). He goes on to argue that Richard ought to have found it more difficult to establish a reasonable expectation *vis-à-vis* the BBC than Mann J seems to have appreciated, though he stops short of arguing that there was no valid basis upon which Mann J could have found such a reasonable expectation.

In respect of the question of balancing in the public interest, Wragg argues that Mann J misunderstood the objective nature of the test. For the true public interest in the BBC's broadcast concerned the police: it was the public interest "in knowing how the police conduct investigations against the upper echelons of society".<sup>26</sup> It matters not, Wragg insists, that the BBC *thought* the public interest in the story centred on Sir Cliff Richard's identity, rather than the police's conduct of its investigation. All that matters is that the broadcast contributed to informing the public about this issue which is of public interest. As such, when Mann J says there was no public interest in the BBC's broadcast, he is mistaken. This error comes from Mann J having been looking for public interest in the wrong place; he thought – as the BBC thought – that the public interest derived exclusively from Sir Cliff Richard's identity. In reality, Wragg says, it was a very different public interest to do with police conduct. Once one realises that, it becomes apparent that there is *some* public interest and thus the learned judge's conclusion – that there was *no* public interest in the BBC's broadcast – is unsound. Moreover, a proper balance between these two competing interests would see the public interest claim succeed and the privacy claim fail, for little – if any – harm was actually done to Sir Cliff Richard's privacy

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<sup>23</sup> [2011] EWHC 3454 (TCC).

<sup>24</sup> *McClaren v News Group Newspapers Ltd* [2012] EWHC 2466 (QB).

<sup>25</sup> [2015] EWHC 826 (QB).

<sup>26</sup> X-REF p 7.

interests by the BBC's broadcasts. The only real harm here was caused by SYP's indiscretion in revealing the impending raid to the BBC.

For the reasons set out below, I find Wragg's arguments on both elements in the judgment problematic, and offer the following critique in the interests of fostering discussion.

*b) Reasonable expectation of privacy*

The BBC and SYP are different types of organisation, serving different public functions. SYP is, undoubtedly, a public body and is thus bound by the s.6 Human Rights Act 1998 obligation to act compatibly with the rights enshrined in the European Convention on Human Rights (ECHR). The BBC's status in this respect is less clear. It has been found to be a "hybrid" body – taking on the responsibilities of a public body – for the purposes of Freedom of Information law, but it may still lie outside the reach of s.6.<sup>27</sup> In Wragg's view, this distinction takes on considerable significance. SYP can readily be said to have breached Richard's Art.8 ECHR right to private life when they revealed the fact that he was under investigation to journalists at the BBC, which amounts to an unlawful act in breach of s.6. As such, SYP's liability was not challenged in court. The BBC, however, is not necessarily bound by s.6 and thus cannot be said automatically to have breached a statutory obligation either by soliciting the information or by broadcasting it and the police raid on Richard's home. Any liability faced by the BBC arises at common law, not under the HRA.

Wragg is absolutely correct in making these observations. But nothing in them necessitates the conclusion that Mann J was wrong to treat the BBC and SYP equivalently when determining the reasonable expectation question. For whilst SYP is bound by s.6, it is also capable of attracting liability at common law under the "tort" of MPI.<sup>28</sup> The fact that SYP is a public body does not alter the test by which its potential liability in tort is decided; the test for SYP and the BBC, in MPI, is one and the same.

The next objection Wragg raises to Mann J's treatment of this question is that the differing functions served by the BBC and SYP necessitate the court phrasing its reasonable expectation question differently in respect of each organisation:

As against the SYP, it is: was it reasonable for the claimant to expect that news of the impending search would not be distributed to the press, including the BBC? As against the BBC, it is: was it reasonable for the claimant to expect that the BBC would not broadcast the search of his property by the police as part of their investigation into him about allegations of non-recent criminal behaviour?<sup>29</sup>

Wragg makes no mention of the BBC's deliberate sourcing of the information from SYP in his reworked reasonable expectation question. However, it must surely be acknowledged that the reasonable expectation against the BBC goes not just to publication of the material, but to its *acquisition*. (In *Tchenguiz v Imerman*, we find Court of Appeal authority that could be mobilised to support this, with a modest amount of analogical argument.<sup>30</sup>) The reworked question thus ought to be, or at the very least to include the following: was it reasonable for the claimant to expect that the BBC

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<sup>27</sup> *Sugar v BBC* [2012] UKSC 4, [2012] 1 WLR 439.

<sup>28</sup> I call MPI a "tort" here for convenience, not as an endorsement of that deeply problematic label which I have critiqued in an earlier essay. See Thomas DC Bennett, 'Judicial Activism and the Nature of "Misuse of Private Information"' (2018) 23(2) Communications Law 74.

<sup>29</sup> X-REFp 10.

<sup>30</sup> [2010] EWCA Civ 908, [2011] 2 WLR 592. *Tchenguiz* was a claim ultimately disposed of under the equitable doctrine of confidence, rather than in MPI. But precedents from both lines of authority were cited and accepted in the case. Moreover, the Court of Appeal opined that "the law should be developed and applied consistently and coherently in both privacy and 'old fashioned confidence' cases, even if they sometimes may have different features" (at [67]).

would not seek out information pertaining to an impending police raid and then film and broadcast the execution of that raid in a highly intrusive manner?

If one separates out the individual parts of the BBC's conduct and subjects each to the question "does this give rise to a reasonable expectation of privacy?", the answer is likely to be "no" on most, if not all, counts. But this is not an appropriate way to look at what happened. Indeed, it cuts across the Court of Appeal's guidance in *Murray*,<sup>31</sup> which explicitly instructs the court to consider *all of the circumstances* in which the alleged privacy violation occurred. It is the totality of the BBC's conduct in this matter – from its first steps into seeking out the information from SYP, to preparing for a large-scale live broadcast operation, to the sensationalist and intrusive nature of the broadcast, informing the public of the nature of the investigation (ie. into an historic sex abuse allegation), and the inclusion of the fact that the person under suspicion was Sir Cliff Richard – that gives rise to the reasonable expectation. These matters must be viewed holistically. It was reasonable for Richard to expect that the BBC would not do *all* these things, *together*, and thereby victimise him.

Wragg objects to analysing the reasonable expectation question in a more holistic fashion (though he does not appear to envisage such a broad contextual analysis as the one I have set out) in part because it conflates "privacy harms (such as emotional distress) with reputational concerns".<sup>32</sup> The consequences of falsely accusing a person of a serious crime (or of suggesting they are under investigation, as happened here) are not relevant to the reasonable expectation question, Wragg says. They may become relevant to a different action, further down the line – such as a claim in defamation. But, he argues, the reputational concern is distinct from the privacy harm and should play no part in establishing a claim in MPI.

Mann J takes a rather different view of the relationship between privacy and reputational interests, and has done for some time. There is clear consistency in the manner in which this judge has approached this particular issue. In *Hannon v News Group Newspapers Ltd*, he refused to strike out a claim in MPI that, the defendant argued, was primarily to do with protecting the claimant's reputation.<sup>33</sup> In an earlier case, *Terry v Persons Unknown*, Tugendhat J had refused an application for interim injunctive relief on the basis that the claim, brought in MPI, was primarily to do with the claimant's reputation, and that granting an interim injunction for breach of privacy would in effect usurp the stricter rules surrounding interim relief in defamation.<sup>34</sup> In refusing to strike out the claim, Mann J distinguished *Hannon* from *Terry*, noting that, whilst *Terry* was solely concerned with the availability of interim relief, *Hannon* concerned the very question of liability under MPI. *Hannon* is of relevance here because much the same legal point was made by defence counsel in that case as is made by Wragg in his essay – that the only route of legal redress for reputational harm should be a defamation claim, and that a privacy claim should not encompass reputational concerns. In *Hannon*, responding to that argument, Mann J said:

I am not satisfied that as a matter of principle it is necessary or appropriate, or even in some cases practically possible, to draw a hard line between the element of privacy or confidence claims which go into what might be called the realms of reputation, and other elements.<sup>35</sup>

As Mann J notes, it is far from clear that harm to privacy and reputation need to be separated in the way Wragg suggests. Eric Descheemaeker has argued that one way in which tortious harms can be legitimately, coherently conceptualised is to conflate the wrongful act with the harmful

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<sup>31</sup> *Murray v Express Newspapers Ltd* [2008] EWCA Civ 446, [2009] Ch 481.

<sup>32</sup> XREF p 5.

<sup>33</sup> [2014] EWHC 1580 (Ch), [2015] EMLR 1.

<sup>34</sup> [2010] EWHC 119 (QB), [2010] EMLR 16. For comment on both *Hannon* and *Terry*, and the state the two cases have left the law in, see Eric Barendt, 'An overlap of defamation and privacy?' (2015) 7(1) *Journal of Media Law* 85.

<sup>35</sup> *Hannon*, n 33, [29].

consequences.<sup>36</sup> He calls this a “uni-polar” model of harm. According to this model, the “harm” suffered by the victim *is* the very diminution in their right (to privacy) inherent in the defendant’s wrongful act. This sets the uni-polar model apart from its counterpart, the bi-polar model, whereby harm is separate from and consequent upon a wrongful act. The uni-polar model is actually the model of harm that appears to prevail in English privacy cases (the phone hacking case of *Gulati v MGN*<sup>37</sup> being a prime example), suggesting it would be appropriate (on coherence grounds) to deal with *Richard* along its lines.<sup>38</sup>

Furthermore, we know as a matter of law that the Art.8 ECHR right to private life *contains* a right to reputation.<sup>39</sup> Viewed through the eyes of the Strasbourg Court, reputation *is* a privacy interest. And if, as Wragg later argues, privacy is conceptualised as an interest in one’s dignity and autonomy, it becomes entirely defensible – as a conceptual matter – to locate reputational interests within a broader privacy right.<sup>40</sup> One’s reputation, after all, contributes to one’s dignity; to traduce one’s reputation (undeservedly) is to act with contempt for one’s dignity. A good reputation, moreover, contributes to our ability to lead autonomous lives; a bad reputation is likely to see avenues for self-advancement and self-development that we might choose to take (perhaps in our choice of employment) curtailed. Thus we might say – invoking the uni-polar model and this conceptual perspective on privacy – that a diminution in one’s reputation *is* a diminution in one’s right to private life.

Three things may therefore be said in defence of Mann J’s treatment of this issue. First, it maintains consistency with his earlier judgment on the point (providing a degree of certainty and predictability). Second, it coheres with the prevailing model of harm in English privacy law (the uni-polar model).<sup>41</sup> Third, it fits within the European Court of Human Rights’ declaration that reputation is an aspect of the Art.8 right to private life. These points, moreover, are mutually supportive.

However, Wragg has a further objection to Mann J’s judgment on this element of the claim. This objection comes from what he (Wragg) sees as its potential to set a precedent to the effect that a person suspected of a criminal offence has a reasonable expectation of privacy, effective against any and all defendants (including media outlets) in respect of the fact he or she is under such suspicion. This also appears to be the major objection to the case currently doing the rounds in news reports and newspaper opinion columns, and is likely to provide the motivation for an appeal. The ruling is, Wragg says, “very troubling for the chilling effect that [it] has on press freedom.”<sup>42</sup>

Wragg’s concern here seems to me to be premature. The finding of a reasonable expectation of privacy is not a conclusive finding of liability. It is just the first stage in a two-stage process. Once established, the court moves on to balance that reasonable expectation against the public interest. To pray in aid the public interest in avoiding chilling effects on the press as a reason to find against a reasonable expectation of privacy jumps the proverbial gun. It is the same in defamation. For example: the Defamation Act 2013 creates the defence of publication on a matter of public interest (s.4). Much of the press was highly supportive of this legislation as a much-needed pro-defendant liberalisation of defamation law. S.4 does not prevent the court from finding that a piece of public interest journalism is *prima facie* libellous, but does give the defendant a strong defence once a *prima facie* case has been

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<sup>36</sup> Eric Descheemaeker, ‘The harms of privacy’ (2015) 7(2) Journal of Media Law 278.

<sup>37</sup> [2015] EWHC 1482 (Ch), [2016] FSR 12.

<sup>38</sup> As Descheemaeker (n 36) points out, this does have the potentially problematic effect of setting privacy at odds with much of the rest of tort law – a matter of broader incoherence with which the common law will at some point need to wrestle.

<sup>39</sup> *Pfeifer v Austria* [2007] ECHR 935, (2007) 48 EHRR 175.

<sup>40</sup> We shall return to the matter of what “privacy” means briefly below, at X REF 16-17.

<sup>41</sup> Mann J’s focus on “consequences”, as distinct from the wrongful act which causes them, does not map neatly onto Descheemaeker’s “uni-polar” model. However, the conclusion Mann J reaches on this element of the claim – that reputational concerns are relevant to establishing a reasonable expectation of privacy – does, at a level of generality and with some allowance made for loose usage of legal terminology, fit with that model.

<sup>42</sup> XREF p 5.

established. As such, a finding in a defamation case that accusing a person of murder is *prima facie* libellous does not set a precedent that accusing a person of murder will always result in liability. It simply enables the claim to move beyond the *prima facie* stage and on to the defence stage.

“We do not want the press to decide that they had best not reveal the names of those investigated for fear of being sued,” says Wragg.<sup>43</sup> But being sued is not the problem. The problem is being sued *and losing* as a result of having no defence. We all face liability for breaches of various legal obligations every day of our lives. If I tweet or re-tweet an allegation of criminal conduct about a person out into cyberspace, I may face liability in defamation – but only if I cannot raise a successful defence. Now, I, with my limited means and minimal public profile, am in a position to do far less damage to another’s reputation than the BBC, and I am also in a far weaker position to defend a claim against me for whatever damage I do cause. With the means to cause damage ought to come a responsibility to use those means carefully and with due regard to the harm we may cause our victims; with great power comes great responsibility.

But Wragg’s argument cuts the other way. In his view, large media outlets should be granted the benefit of claims against them falling at the first hurdle, on the sorts of public interest grounds that ought to be considered at the second stage. He says this is a policy matter and he is right – it is. But the real policy question is not whether this would benefit the media (which it would), nor whether such a benefit to the media secures some public interest (which it may well do). The question is whether granting such a legal procedural benefit to defendants in privacy cases is a proportionate response to the fear of a chilling effect, given that it will seriously curtail opportunities for claimants to succeed in protecting their own privacy interests.

This is not a new policy debate in tort law. The law has sought – and struggled – for many years to strike a balance between individual security and freedom of action.<sup>44</sup> Speaking at a high level of generality, English tort law favours individual security over freedom of action. It prefers to keep open the possibility of recognising novel duties of care in negligence over the certainty that refusing to do so would give to the insurance industry. It prioritises our right to quiet enjoyment of our homes over the public benefit that nuisance-creating activities might provide. It has traditionally prioritised reputational interests over freedom of expression, although that balance shifted somewhat with the passing of the 2013 Act. The two sides of this debate can be characterised in many ways. Some prefer to talk of the competing claims on the loyalty of the law made by the ideals of corrective and distributive justice.<sup>45</sup> (For instance, Lord Browne-Wilkinson said, in *X (Minors) v Bedfordshire County Council*, that corrective justice has the “first claim” on the loyalty of judges.<sup>46</sup>) So it might be said – in favour of keeping the public interest matters away from consideration at the reasonable expectation stage of an MPI claim – that to do so coheres with tort law’s long-standing preference for prioritising individual security (and thereby pursuing corrective justice). Or it might be countered that acceding to the Wragg-type position, and fixating on the potential “chilling effects” in order to support a finding that there is no reasonable expectation in a case like *Richard*, coheres with a contemporary trend in tort law away from individual security and towards freedom of action.<sup>47</sup> The policy question underpinning this aspect of *Richard* is large and has significant implications. It raises rule of law questions, such as whether such policy matters ought even to be addressed by the courts or whether they should be left to legislators. Somewhat paradoxically, we tend to find that the sorts of media

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<sup>43</sup> Ibid.

<sup>44</sup> Richard Mullender, ‘The Reasonable Person, Negligence Law, and the Pursuit of Justice’ (2005) 68 *Modern Law Review* 681.

<sup>45</sup> See, for example, Richard Mullender, ‘Tort, human rights and common law culture’ (2003) 23(2) *OJLS* 301.

<sup>46</sup> [1995] 2 AC 633, 749.

<sup>47</sup> For example, the Supreme Court’s decision in the case of *Coventry v Lawrence* [2014] UKSC 13, [2014] AC 822 moves the common law of nuisance away from its traditional reticence towards public interest-based justifications for private nuisances, making them subject to damages awards rather than injunctive relief in some circumstances. We can also see a move in favour of freedom of action in the development, first at common law and then in statute, of public interest publication defences in defamation.

outlets that continually flag up possible chilling effects on their ability to publish stories of interest are also the very outlets that take up arms against the development of the common law at the hands of judges.<sup>48</sup> At one and the same time, they seek the greater protection that a judge developing the law in order to give effect to policy concerns can provide them with, and also evince a powerful disdain for the very notion that judges, rather than legislators, should be doing this.<sup>49</sup>

Of course, Wragg (and others) might retort that the argument I have presented is hopelessly naïve for thinking that media outlets will routinely run the risk of publishing material that gives rise to a *prima facie* claim, even if it is expected that they would successfully defend the claim at stage two of the court's analysis. Business does not thrive on such uncertainty, so the argument goes. Our media is commercial in nature and if it is not to collapse under the weight of its own insecurities, it needs assurances that public interest journalism will be fulsomely protected – even when it goes wrong.

I may well be naïve in my outlook. But if our press is as risk-averse as this argument would suggest – and given its propensity for publishing and broadcasting stories that cause enormous harm to individuals, both deserving and undeserving, this is highly dubious – then it is not really a free press at all, in any meaningful sense. As ever, what the press and big media outlets really want is special treatment. It may be a good idea to give it to them. But, as Wragg rightly recognises, the decision to do so (or not) is one of policy; policy, moreover, that is intimately enmeshed with the legal doctrine in this field, the contours of which have been set out by appellate courts whose precedents bind the High Court.

The common lawyer's quick (and probably unsatisfactory) answer to this is that the elements of MPI, which were laid down by the House of Lords,<sup>50</sup> can only be significantly altered legitimately – and certainly such a policy shift would be significant – by our highest court (or Parliament), and not by a court of first instance. Mann J's ruling on the reasonable expectation question contains some confusing parts, which Wragg is right to criticise. But it essentially does that which is generally thought to be “right” in precedential terms: following the Court of Appeal's *Murray* guidance (in spirit, if not always in express language), keeping the reasonable expectation question separate from public interest arguments and thereby adhering to the higher court precedents that have sketched out (admittedly incompletely) the contours of the law in this field.

### *c) Balancing individual privacy against the public interest*

Wragg is justified in criticising Mann J for the way in which he went about dealing with the balancing test that forms the second stage of the MPI methodology. The learned judge regrettably falls into error in a manner to which Wragg, by virtue of his recent work, is acutely sensitive. Mann J found that there was no public interest in broadcasting the footage of the raid on Richard's home for two reasons. First, because the BBC appeared not to believe in the public interest nature of the journalism itself; it was more concerned with beating its rivals to a big scoop. Second, because whilst the wide-ranging police investigation into historic sex offences known as Operation Yewtree is a matter of public interest, the names of individual suspects are not.

Those who are familiar with Wragg's work will instantly recognise the error that Mann J has committed here. It is that he has treated the question of public interest as an all-or-nothing matter; either there is public interest or there is none. Wragg has done the study of privacy jurisprudence a

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<sup>48</sup> See Bennett, n 28, 76.

<sup>49</sup> I should clarify that in making this point about certain media outlets I certainly do not extend it to accuse Wragg of having such a tension in his thinking – nothing in his work suggests he takes issue with the nature of judicial elaboration of the common law.

<sup>50</sup> The key contours of MPI were settled in *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 AC 457 (establishing the two-stage “new methodology”); *Re S (A Child)* [2004] UKHL 47, [2005] 1 AC 593 (guidance on the “ultimate balancing test” at stage two of the methodology); *Murray* n 31 (guidance on the holistic nature of the “reasonable expectation” test at stage one).

great service by demonstrating – in forensic detail – that English courts almost always fall into this trap.<sup>51</sup> Where a court finds that there is *any* level of public interest in published information, the claim fails. Conversely, in virtually every case where the claim succeeds, the court finds that there is no public interest at all. The chances of these findings accurately reflecting the true levels of public interest in play in these cases is remote. What is far more plausible is that in many cases there is *some* degree of public interest that might justify the privacy violation. And, of course, the very purpose of the balancing exercise in MPI is to determine whether that degree of public interest is *sufficient* to justify, on a test of proportionality, the infringement of the claimant’s privacy.

Wragg argues that there is clearly a degree of public interest in the BBC’s broadcast in *Richard*. This public interest derives, he says, from the conduct of the police in investigating these sorts of offences, and in the execution of search warrants, being a matter of public importance:

There is always a public interest in knowing what the police does in the public’s name. There is always a public interest in knowing how the police interact with celebrity – and the upper echelons of society: Are they intimidated? Do they apply the law equally? In other words, the rule of law is firmly in view.<sup>52</sup>

Thus, Wragg argues, it is irrelevant that the BBC failed to appreciate the public interest nature of the journalism in which it was engaged; the point of an objective test is that it is open to the court to identify matters of public interest that the parties themselves may have overlooked. The problem with this is that it would not be a great extension of it to suggest that there is public interest in universal surveillance of the interactions between the police and anybody else.<sup>53</sup> Giving the argument the benefit of the doubt, however, and assuming, *arguendo*, that there is such a public interest, it must (a) be fairly minimal in any individual case, and (b) of a sort that could quite straightforwardly be satisfied by far less intrusive means than the BBC deployed in this instance. (This is a matter of proportionality – something to which we will shortly return.)

There is some public interest in the identity of criminal suspects. This has the potential also to be troubling, given that we live in a technologically interconnected age where being linked with a crime one has not committed can create a false impression that lasts indefinitely (particularly online). (It remains to be seen how effective enforcement of the “right to be forgotten” will turn out to be.) However, decisions to charge suspects are made by the Crown Prosecution Service only when there is a realistic prospect of securing a conviction. And since the evidence of a single complainant may not be sufficient to clear this hurdle (especially in historic abuse cases where there is a lack of hard evidence), it can be in the public interest to identify suspects so that further complainants, should there be any, have the opportunity to come forward. They could then potentially provide evidence that would corroborate the original complaint and bolster the chances of a conviction sufficiently to enable a charge to be brought to bear. This is the strongest reasonable argument against granting suspects pre-charge anonymity (a move that is shortly to be the subject of a Private Member’s Bill in Parliament). Moreover, the Supreme Court in *Flood v Times Newspapers Ltd* held that the identity of an individual can add colour to a media report of an investigation, in a way that increases the chances of bringing matters of public interest pertaining to that investigation to the attention of the public.<sup>54</sup> In *Flood*, this led the Supreme Court to hold that identifying the claimant in that case in a newspaper report (even though he turned out to be wholly innocent) was not only in the public interest, but a proportionate infringement of his privacy. The reasoning in *Flood* is deeply troubling for anyone who takes individual privacy rights seriously (it was not a case where unknown complainants might have come

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<sup>51</sup> Paul Wragg, ‘Protecting private information of public interest: *Campbell*’s great promise, unfulfilled’ (2015) 7(2) *Journal of Media Law* 225.

<sup>52</sup> XREF – p7.

<sup>53</sup> Robin Barnes, in her book, *Outrageous Invasions* (OUP 2010), gives some striking examples of US cases in which such a public interest has been asserted – including cases where the interactions of paramedics with dying patients have been broadcast – in the interests of dispelling the argument.

<sup>54</sup> [2012] UKSC 11, [2012] 2 WLR 760.



forward with more evidence). But the simple fact of the matter is that it is a Supreme Court authority with clear relevance to *Richard* that ought either to have been applied by Mann J or explicitly distinguished. Unfortunately, *Flood* was not even mentioned in his judgment.

The notion that the police conduct of raids connected with high-profile (or indeed, presumably, any other level of profile) investigations is an issue of public interest simply as a matter of course is (for the reasons elaborated above) problematic. But it is nonetheless possible, depending on the particular facts, for police conduct to be a matter of public interest in any given case. The objections raised herein to declaring a universal public interest of this sort notwithstanding, Wragg is undoubtedly correct to say that the legal test is an objective one and that this renders the BBC's own lack of appreciation of the public interest in what they were doing irrelevant. Where Wragg's analysis becomes problematic is with the notion that the public interest in the police conduct of raids (assuming that there is some), which was apparently served by broadcasting the execution of such a raid live on national television, justifies the broadcast as a proportionate infringement of Richard's privacy.

Any public interest in identifying Sir Cliff Richard as the subject of the investigation could proportionately have been served with a simple factual statement; the sensational live coverage filmed from a helicopter was far more intrusive than was necessary to satisfy that aspect of public interest. And so we are left with the question of whether the nature of the coverage was proportionate to the public interest in the conduct of the police served by the live filming.

Wragg makes two points that suggest he thinks that the coverage was proportionate, to which a brief response may be offered. First, he queries what "damage" Sir Cliff Richard actually suffered. Once he discounts reputational harm as irrelevant (discussed above), he asks "[w]hat threat to dignity and autonomy arises from the recording, via helicopter, of his possessions being captured by the police?"<sup>55</sup> In his view, the only harmful conduct in this case was that of SYP (by informing the BBC of the impending raid); the BBC's broadcast added nothing. Second, Wragg queries whether the harm Richard might have suffered at the BBC's hands (if indeed there was some), rose to a comparable level to that which has attracted liability in other high-profile privacy cases:

I do not say there is no damage to these values, but is it at the same level as the damage done in the *Mosley* case, or the *Tulisa [Contostavlos]* case, or *AMP v Persons Unknown*, or the *McClaren* case ... or the *YXB v TNO* case...<sup>56</sup>

My response would be thus. First, as a basic matter of causation, the BBC's broadcast *did* add something – it added that which elevated the extent of the distress the claimant suffered to the level it reached. SYP's act of informing the BBC about the impending raid would have caused minimal harm but for the BBC's decision to give the raid on-air prominence. Moreover, Sir Cliff Richard's dignity and autonomy were not merely threatened by the coverage; they were violated. His possessions were hauled out of his home live on national television. (Whilst the BBC's motive is, as Wragg says, irrelevant to the question of public interest, there is still something striking about its own description of this as a "money shot".<sup>57</sup>) There is nothing dignified about having the police go through your possessions, less still in having others watching while that happen, still less in those watchful eyes being those of 3.2 million strangers glued to their TV screens.<sup>58</sup> His autonomy – his capacity to decide for himself who would see him and his possessions that day – was wholly subverted.

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<sup>55</sup> XREF p 8.

<sup>56</sup> XREF, p 8.

<sup>57</sup> *Richard*, n Error! Bookmark not defined., [59].

<sup>58</sup> "The 14th August 1pm BBC broadcast attracted 3.2 million viewers. Viewer figures for later BBC broadcasts on that day, so far as provided, indicated viewers in the many hundreds of thousands." *Richard*, n Error! Bookmark not defined., [143].

Second, each of the cases Wragg cites involves sexual matters – whether publication of the fact of an affair (as in *McClaren*<sup>59</sup>) or of pictures/video footage of sexual acts (*Mosley*,<sup>60</sup> *Contostavlos*,<sup>61</sup> *AMP*,<sup>62</sup> and *YXB*<sup>63</sup>). The cases involving the dissemination of intimate pictures/footage immediately give rise to an intuitive feeling that the victim’s dignity and autonomy have been violated – we do not stop to query this. Even if we did, we would quickly conclude that our intuition was correct; people are rarely at their most dignified during moments of sexual ecstasy and, in any event, disseminating such pictures/footage clearly rides roughshod over the individual’s claim to decide for themselves under what circumstances and to whom sexual acts in which they are engaged are revealed. But we should not fall into the trap of thinking that, just because most privacy cases in English law are about sex, all such cases must be. Or that matters that are not sexual are not as private as those which are.<sup>64</sup>

The distress caused to Sir Cliff Richard is also relevant, as part of the violation of his dignity and autonomy. To knowingly or recklessly cause distress to a person – and there can have been no doubt that the BBC knew that its behaviour would cause Richard distress – is to treat that person without regard for their dignity. Distress does not manifest itself in humans voluntarily; to cause a person distress is to violate their autonomy, for they cannot control this emotional reaction. And what did we learn about the police raid that might justify these various violations of Richard’s privacy? We learned that the police go in in numbers. That they take everything of interest from a property. That they wear translucent plastic gloves when handling evidence. Most of this we knew already, of course, from watching police dramas on TV or in the movies. We learned far more about wrongdoing committed by SYP from the broadcasts of the Hillsborough disaster, but we do not repeat the footage of individuals being crushed in the crowd because to do so would be disproportionately distressing; we can learn what we need to know by *ex post facto* verbal or written reports. And so it is difficult to accept that there could be sufficient public interest in this to justify what the claimant in this case suffered.

#### d) Conclusion

There has already been, and will continue to be, much wringing of hands and public protestation about the dangerous precedent this case purportedly sets for public interest journalism. This is to be expected; it has happened every single time (which still adds up to fewer than ten) that a high-profile MPI claim has proceeded to trial and resulted in a claimant succeeding against a big media company. *Campbell* supposedly heralded the end of public interest journalism in 2004.<sup>65</sup> *Mosley* did so again in 2008.<sup>66</sup> *PJS* did in 2016.<sup>67</sup> By their own accounts, the news media – both print and broadcast – ought by now to have been utterly eviscerated by these dangerous precedents, but there they stand, as strong as ever. In other words, the boys in the British media continue to cry wolf, but there is no sign whatsoever of anyone being eaten.

To stand accused – falsely – of a serious crime is undoubtedly one of the most distressing things that can happen to a person. Miscarriages of justice may be mercifully rarer than they once were, but as the recent scandal involving the CPS’s failure to disclose vital evidence in rape cases shows, they continue

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<sup>59</sup> N 24.

<sup>60</sup> N 21.

<sup>61</sup> N 22.

<sup>62</sup> N 23.

<sup>63</sup> N 25.

<sup>64</sup> For clarity: I do not regard privacy as consisting solely of the preservation of one’s dignity and autonomy. There are many ways in which privacy may be conceptualised; an understanding of it based on dignity and autonomy is but one way. It is, however, the manner in which contemporary domestic and European human rights law conceptualises privacy and so it is appropriate to work within that framework for the purposes of this essay.

<sup>65</sup> *Campbell*, n 50.

<sup>66</sup> *Mosley*, n 60.

<sup>67</sup> *PJS v News Group Newspapers* [2016] UKSC 26, [2016] AC 1081.

to occur and with some regularity.<sup>68</sup> To be under intense suspicion for a crime that one has not committed – even if one has yet to be “accused” of it – is not far removed from the trauma of a false accusation. In an era where journalists proclaim loudly the merits of “responsible journalism” in order to avoid liability for mishaps, and declare themselves proudly to be members of a largely responsible and trustworthy profession that is sensitive to the interests of individuals caught up in scoops, it is surely reasonable to expect these responsible journalists to behave ... *responsibly*.

No doubt, there may be times when exposing wrong-doing by the police (or other public servants) necessitates a proportionate violation of individual privacy. When such a time arises, I have no doubt that the committed and responsible people who make up the vast majority of journalists in this country will fearlessly report the truth. When that happens, the courts would do well to heed Wragg’s warnings about the dangers of treating public interest matters as all-or-nothing issues, and instead start engaging actively in a detailed, subtle and – above all else – *genuine* balancing exercise. But this was not such a case. The police told the Beeb they were going to raid Cliff Richard’s home and good ol’ Auntie thought this would make for a fabulous scoop – especially from a helicopter from which the “money shots” could most dramatically be filmed. As such, whilst Mann J’s judgment is far from perfect in the way that it understands and applies MPI doctrine, his disposal of the case – ruling that Sir Cliff Richard’s privacy was unlawfully violated – is, in my view, entirely correct.

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<sup>68</sup> See the Justice Select Committee’s report, *Disclosure of evidence in criminal cases*, published 20 July 2018. (Available at <https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/859/85902.htm>, accessed 26 July 2018.)